

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

Nodak Electric Cooperative. Inc.,

Appellant,

v.

North Dakota Public Service Commission,  
and City of Drayton,

Appellees,

and

Otter Tail Power Company,

Appellee and Cross-  
Appellant.

Supreme Court No. 20220122

District Court File No. 08-2021-CV-  
01508

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Appeal from:

Findings of Fact, Conclusions of Law and Order of the North Dakota Public Service  
Commission dated July 14, 2021

Order Affirming Public Service Commission Order dated March 2, 2022

Judgement dated March 3, 2022

District Court, South Central Judicial District  
Burleigh, North Dakota

The Honorable Judge Douglas Bahr, Presiding

**BRIEF OF AMICUS CURIAE NORTH DAKOTA LEAGUE OF CITIES  
IN SUPPORT OF CITY OF DRAYTON AND OTTER TAIL POWER COMPANY  
IN OTTER TAIL POWER COMPANY'S CROSS-APPEAL SEEKING  
REVERSAL OF THE NORTH DAKOTA PUBLIC SERVICE COMMISSION'S  
DECISION**

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## **INTEREST OF AMICUS CURIAE**

[¶1] The North Dakota League of Cities has an interest in this appeal as an amicus curiae. The North Dakota League of Cities is a voluntary membership organization with over ninety percent of North Dakota’s 356 incorporated cities as members. Our member cities make up ninety-nine percent of the population of incorporated cities in North Dakota. The North Dakota Constitution restricts the legislature from interfering with a city’s ability to enter franchise agreements because cities have an important interest of protecting the health and safety of city residents through its franchise authority. The North Dakota Public Service Commission’s (“Commission”) decision in this case that failed to dismiss Nodak Electric Cooperative. Inc.’s (“Nodak”) complaint, in spite of the existence of a city franchise agreement, infringes on the city’s franchising authority. As such, an adverse decision in this case could impact the ability of cities to exercise their authority to enter franchise agreements.

## **STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS**

[¶2] No party’s counsel authored this brief in whole or in part, neither a party nor party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

## ARGUMENT

### NODAK'S COMPLAINT TO THE COMMISSION SHOULD HAVE BEEN DISMISSED BECAUSE THE COMMISSION DID NOT HAVE JURISDICTION TO HEAR THE COMPLAINT.

[¶3] A strong legal foundation exists for protecting North Dakota cities, that have exercised their franchise authority, from that authority being infringed on by the Commission. That foundation is two-fold. First, the North Dakota Constitution prevents the North Dakota Legislature from impairing a city's power to enter franchise agreements, and second, the North Dakota Century Code grants cities the ability to enter into franchise agreements to only allow companies with franchise agreements to operate in the city. See N.D. Const. Art. VII, § 11 and N.D.C.C. § 40-05-01(57). In addition, nothing in the North Dakota Century Code gives the Commission the authority to issue a franchise agreement within a city. As such, the Commission failing to dismiss Nodak's complaint in this case impairs a city's ability to enter franchise agreements.

A. A city has power to enter franchise and it is protected from legislative interference by the constitution.

[¶4] Article VII, § 11 of the North Dakota Constitution provides:

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.

This Court has stated that the North Dakota Constitution provides restrictions on state power. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197, 205 (N.D. 1957).

This section prohibits the North Dakota Legislature from interfering with a city's right to

enter franchise agreements in the city.

[¶5] Further, N.D.C.C. § 40-05-01(57) gives cities the authority to enter franchise agreements for up to 20 years. As such, cities have the authority to enter franchise agreements without interference for the legislature.

[¶6] The ability of a city to enter franchise agreements is important for many reasons; however, the following reasons are clearly outlined in the city of Drayton's franchise agreement with Otter Tail Power Company (Otter Tail):

1. It gives the cities control over their streets and right of ways where infrastructure to serve the franchise is placed.
2. It allows the city to make sure proper safety procedures are used when the franchise infrastructure is being installed and maintained.
3. It allows the city to assess a franchise fee.
4. It provides instructions for what happens to the franchise infrastructure if the agreement is terminated.

See, e.g. R35:3-4.

[¶7] Although not specifically an allegation made in this case, the ability of cities to attract new projects to the city could be impacted by a city not being able to exercise its authority to enter franchise agreements with the company or companies that it chooses. See R91:14-17 (Testimony of Drayton Mayor Charles Olson); R91:42-48 (Testimony of Loves Truck Stops Real Estate Project Manager Steve Walters); R92:12 (Testimony of Otter Tail Employee Chris Walz). Drayton Mayor Chuck Olson, Loves Truck Stops Real Estate Project Manager and Otter Tail Employee Chris Walz all

discussed at the Commission Hearing on April 16, 2021, how the electrical service provider is an important business consideration. See Id. Attracting and retaining businesses is vital to the health of a city.

[¶8] Cities need to maintain the ability to control franchise agreements for all areas of the city because it enables cities to protect city property and to safeguard the health, safety and welfare of city residents. These are precisely the reason why cities were created.

1. There is no difference between an area annexed to the city and the rest of the city.

[¶9] In this case, the city of Drayton annexed McFarland's Addition into the city. See R35:7. The process for a city to annex land to the city is found in N.D.C.C. ch. 40-51.2 and the chapter is entitled the Municipal Annexation Act of 1969. N.D.C.C. § 40-51.2-01. This Court has stated:

When territory is annexed to a city the annexed territory becomes a part of the city and all ordinances are immediately in effect governing the annexed territory. Likewise, the powers of the city, which are provided by the statutes, are extended to the annexed territory. The annexed territory is as much a part of the city as the original townsite, when it becomes 'a part thereof.'

Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 726, 729 (N.D. 1971) (citing NDCC § 40-51.1-01, which is now repealed and replaced by N.D.C.C. ch. 40-51.2). Once McFarland's Addition was annexed, it was just like the rest of the city. In other words, the city of Drayton had the authority to require a franchise agreement to serve McFarland's Addition and McFarland's Addition was protected from legislative interference of the city's franchising authority.

[¶10] Further, the purpose of the Municipal Annexation Action of 1969 is:

1. To encourage natural and well-ordered development of municipalities of the state;
2. To extend municipal government to areas which form a part of the whole community;
3. To simplify government structure in urban areas; and
4. To recognize the inter-relationship and interdependence between a municipal corporation and areas contiguous or adjacent thereto, and to these ends this chapter shall be liberally construed. For the purposes of this chapter, contiguity will not be affected by the existence of a platted street or alley, a public or private right of way, or a public or private transportation right of way or area, or a lake, reservoir, stream, or other natural or artificial waterway between the annexing municipality and the land to be annexed.

N.D.C.C. § 40-51.2-02. The North Dakota Legislature has explicitly recognized that it is in the best interest of North Dakota to treat land annexed to cities just like the rest of the city. A crucial item to being able to carry out the Legislative intent of the Annexation Act of 1969 is applying a city's franchising authority to the newly annexed land. As such, McFarland's Addition in the city of Drayton needed to be served by an electrical service that has a franchise agreement with the city, just like the rest of the city.

2. A franchise agreement is required to provide service in the city.

[¶11] The city of Drayton exercised its authority to require franchises in the city by entering a franchise agreement with Ottertail Power Company and enacting the agreement as an ordinance. Determining whether a city's action was a proper exercise of its authority is a three-step process. See Haugland v. City of Bismarck, 429 N.W.2d 449, 453-454 (N.D. 1988). First, a determination needs to be made about whether the city had the municipal authority. Id. Second, if authority exists, the court must determine whether the legislature has dictated how the authority is to be exercised. Id. Finally, the court must

determine whether the city's exercise of that authority was reasonable. Id.

[¶12] Strict construction applies to the Court's initial determination about whether a city has a municipal power. See Id. at 453. N.D.C.C. § 40-05-01(57) provides the governing body of the city has authority:

[t]o grant franchises or privileges to persons, associations, corporations, or limited liability companies, any such franchise, except when given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provision of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.

Clearly, N.D.C.C. § 40-05-01(57) gives cities the authority to enter franchise agreements.

[¶13] Next, the court must determine whether the manner for using those powers were prescribed by the legislature. See Haugland, 429 N.W.2d at 453-454. There are not further statutes in the North Dakota Century Code defining the manner in which a city uses the authority to franchise.

[¶14] Finally, the Court must determine whether the authority was exercised in a reasonable way. See Id. Once it is established that a city had the authority to do something, there is a lot of latitude in the way the city exercises its authority. See Id. This case involves the exercise of the city's power through executing a franchise agreement. A franchise means a "special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right." Williams Bros. Pipe Line Co. v. City of Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968) (quoting Black's Law Dictionary (4<sup>th</sup> ed. 1957)).

[¶15] Here, the city of Drayton and Otter Tail entered a franchise agreement for

providing electricity in the city. The franchise agreement was adopted by ordinance. The franchise agreement gives Otter Tail the special privilege of providing electric service in the city. This necessarily provides that other companies cannot provide service in the city without also obtaining a franchise agreement. If the franchise agreement is interpreted any other way, it would not be a special privilege. As such, the franchise agreement was a reasonable way for the city to exercise its authority to require companies to have franchise agreements to provide electricity within the city.

B. The Commission did not have jurisdiction to hear the complaint.

[¶16] As explained above, city authority to enter franchise agreements is protected by the North Dakota Constitution. See N.D. Const. Art. VII, § 11. In this case Nodak filed a complaint with the Commission under the N.D.C.C. ch. 49-03, also known as the Territory Integrity Act.

[¶17] The city of Drayton requires a company to have a franchise agreement with the city to provide electrical service within the city. The Commission only has the jurisdiction granted to it by the legislature. See In re Application of Neb. Pub. Power Dist., 330 N.W.2d 143,149 (N.D. 1983). There's nothing in the Territory Integrity Act that gives the Commission the authority to grant a franchise to an entity to provide electricity within city limits. Further, as an entity of the State, the Commission is prohibited from interfering with a city's right to enter franchise agreements. See N.D. Const. Art. VII, § 11. In other words, the Commission does not have jurisdiction to hear a case involving a complaint regarding land in a city when the city has exercised its franchise authority. Further, the Commission does not have the authority to provide the

remedy requested because it cannot issue the franchise that would be required to provide service within a city.

[¶18] In this case, the City of Drayton exercised its authority to enter a franchise agreement which covers all parts of the city, including any newly annexed territory, with Otter Tail. Nodak did not enter a franchise agreement with the city. As such, since the city exercised its franchise authority and Nodak does not have a franchise agreement with the city, the Commission lacked jurisdiction to regulate franchise agreements in the city of Drayton and Nodak's complaint should have been dismissed.

### **CONCLUSION**

[¶19] A city's franchise authority is an important tool for cities to protect the health and welfare of the city residents. When a city has exercised its legislatively granted authority to exercise franchise authority, the North Dakota Constitution prevents the legislature from interfering with the city's franchise authority within the city. In this case, the Commission interfered with the city of Drayton's franchise authority by failing to dismiss Nodak's case. This Court should protect a city's constitutionally protected authority to control franchise agreements within city boundaries and hold that the Commission's decision is not in accordance with the law because it failed to dismiss Nodak's case for lack of jurisdiction.

### **CERTIFICATE OF COMPLIANCE**

[¶20] The undersigned, as attorney for Amicus Curiae North Dakota League of Cities, certifies this brief is in compliance with the page limitations in Rules 29 and 32(a) of the North Dakota Rules of Appellate Procedure. The brief was prepared in 12-point

font and is 12 pages in length.

[¶21] Respectfully submitted this 26<sup>th</sup> day of August, 2022.

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