
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.,	Appellant and Cross Appellee
v.	
NORTH DAKOTA PUBLIC SERVICE COMMISSION AND THE CITY OF DRAYTON,	Appellees
and	
OTTER TAIL POWER COMPANY,	Appellee and Cross-Appellant

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

BRIEF FOR APPELLEE, NORTH DAKOTA PUBLIC SERVICE COMMISSION

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STATEMENT OF THE ISSUES

- [¶1] The Commission’s finding that there would not be interference by Otter Tail with Nodak’s existing services is supported by a preponderance of the evidence.
- [¶2] The Commission’s finding that there was not unreasonable duplication of services is supported by a preponderance of the evidence.
- [¶3] The Commission did not err in concluding that the 1968 service area agreement between Nodak and Otter Tail was subject to the provisions of N.D.C.C. § 49-03-06.
- [¶4] The Commission did not err in its decision in denying Otter Tail’s Motion to Dismiss.

STATEMENT OF THE CASE

[¶5] Nodak Electric Cooperative, Inc. appeals 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”) 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. (R8, R9). Nodak states by extending its plant and system, Otter Tail threatens to interfere with Nodak service and system and result in an unreasonable and wasteful duplication of facilities. *Id.*

[¶7] 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. (R32-34). On December 28, 2020, Nodak responded that the Commission does have authority to address the issues raised in Nodak Complaint by virtue of the provisions found in Chapter 49-03 of the North Dakota Century Code. (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 filed closing arguments and briefs. (R75, 76). On May 7, 2021, Otter Tail and Nodak filed reply briefs. (R77, 79). On May 28, 2021, the Commission held its first work session relative to Nodak's Complaint. After that work session, both Otter Tail and the City of Drayton filed requests for oral argument. On June 15, 2021, Nodak filed a response to the requests for Oral Argument opposing the requests on the grounds that a full hearing was already held, 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's Complaint and denying the relief being requested by Nodak. The Commission also denied Otter Tail's Motion to Dismiss. *See* (R82). On August 13, 2021, Nodak filed a Notice of Appeal and Specifications of Error in District Court for the County of Burleigh, State of North Dakota. (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. (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.

STATEMENT OF THE FACTS

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

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

[¶14] The area at issue in this case is the McFarland's Addition. On August 12, 2019, the City Council of Drayton approved annexation of the McFarland's Addition into the corporate city limits of Drayton. (R61). On August 19, 2019, Drayton filed the Plat of McFarland's Addition and annexation with the Pembina County Recorder. As a result, McFarland's Addition is located within the municipal limits of Drayton. Id.

[¶15] On November 4, 2019, the McFarland's Addition was purchased by a company with the intent to construct a Love's Travel Stop ("Love's") on the property. (R62).

[¶16] The existing electric infrastructure located within the McFarland's Addition includes: (1) Otter Tail's high voltage electric transmission line following the south side of 80th St. NE, crossing 160th Ave NE into McFarland's Addition, and continuing south along the east side of 160th Ave NE until it exits McFarland's Addition and (2) Nodak's single-phase underground distribution line passing through the McFarland's Addition, passing

under Interstate 29, through areas served by Otter Tail in Drayton, to serve a Cenex Station and customers north of Drayton. (R51).

[¶17] Love's requested three-phase service for its operations. (R91:266:8). Both utilities would need to extend nearby three-phase service into McFarland's Addition to serve Love's.

[¶18] Otter Tail proposes to extend existing three-phase service approximately 1000 feet by boring under Interstate 29 to the Love's site. (R89:48:20-24). Otter Tail's existing high voltage transmission line in the annexed area would need to be stepped down. This design is not preferred or cost-effective. (R89:39:1-9).

[¶19] Nodak proposes to extend three-phase service by approximately 350 feet from a grain bin location existing outside of the annexed area by trenching across 160th Ave NE to Love's. (R89:34:19). Nodak's single-phase line in the annexed area will not meet Love's request for three-phase service. (R91:266:8).

[¶20] Otter Tail has been providing electric service to residents, businesses, and industrial customers in Drayton since 1931 via franchise granted by Drayton to construct, install, and maintain an electric light and power system within the city. (R66,67). The current 20-year franchise agreement was approved by Drayton, Ordinance 51, on May 3, 2011. (R60).

[¶21] In April of 2020, Drayton resolved that Otter Tail's franchise extends without ambiguity to the McFarland's Addition. (R62). The resolution cited the desire for efficient and unified operation of electrical services in the city, Love's desire to utilize the existing franchise Drayton has with Otter Tail to provide electric service, and Otter Tail's obligation under its existing franchise agreement to provide electrical service to the McFarland's

Addition. (R91:242:20-25) and (R91:243:1-14).

[¶22] Nodak does not possess a franchise agreement with Drayton permitting it to provide electric service to customers within the city. (R89:129:10-11) (R90:151:2-6) (R91:243:3-25).

[¶23] Nodak attended a city council meeting and corresponded with the city attorney about the process to acquire a franchise. Despite Nodak attempting to engage with Drayton to obtain a franchise, no application for franchise was filed with Drayton. (R91:243:15-22).

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

[¶25] Nodak witness Einarson (R89:126:15-20), and Otter Tail witness Mayor Olson (R91:242:5-25) testified that the city informed Nodak of its plan to annex the McFarland's Addition with the intention that Otter Tail would provide service to the annexed area.

[¶26] Love's is not currently a coop member with Nodak and has not applied for cooperative membership with Nodak. (R89:69:12-14).

[¶27] There are no current Nodak customers (R89:67-68:24-25,1-3) or Otter Tail customers in McFarland's Addition. (R89,122,18-22).

[¶28] Nodak and Otter Tail have an executed 1968 service area agreement. (R53). The service area agreement specifies that Otter Tail shall serve all territory located within and adjacent to urban areas served by the Company as outlined on attached maps. (R53:2:¶2).

[¶29] The service area agreement provides that to avoid any transfer of customers when annexed by municipalities, areas are designated between Otter Tail and Nodak consistent with an attached map. (R53:2:¶2-3). The map appears to provide that the

McFarland Addition is outside of the service area specified for Otter Tail. (R53:5).

[¶130] The service area agreement was not filed with the Commission, no notice of the filing was issued, and no approval of the service area agreement has occurred. Furthermore, it does not provide that it is subject to the continued jurisdiction of the Commission to settle disputes under the agreement. (R90:177-178:24-25,1-13).

[¶131] Drayton did not sign or participate in the service area agreement and did not approve the agreement. (R90:178-179:14-25,1-4).

[¶132] Nodak witness Steve Breidenbach testified that the parallel electrical lines on the same property during construction can cause confusion for contractors in the event of one-call markings and construction within the area. Mr. Breidenbach also testified that the crossing of the lines is a concern for Nodak's operations and safety. (R89:42-43:14-25,1-5).

[¶133] Otter Tail's design proposal crosses under a single overhead Nodak line that is co-located on Otter Tail's existing overhead transmission poles. Otter Tail has secured the necessary permits to bore under Interstate 29 and boring is a common construction practice for extending utility infrastructure. (R91:289-290:19-25,1-17).

[¶134] Nodak's design proposal crosses under an existing Otter Tail transmission line to serve the location. Nodak's existing distribution line crossing the McFarland's Addition also currently crosses under Otter Tail's transmission line. (R51).

[¶135] Nodak witness Breidenbach (R89:66:8-13) and Otter Tail witness Jacobson (R91:293-294:23-25,1-2) both testified that there are no statutory or regulatory prohibitions for Otter Tail's design proposal and that it does not violate National Electric Safety Code. Mr. Breidenbach also testified that underground lines crossing under

overhead lines frequently occurs. (R89:58-59:22-25,1-6).

[¶136] Nodak Witness Einarson testified that the annexation by Drayton and implementation of its franchise with Otter Tail creates “economic interference” that will foreclose future revenue opportunities from incremental investments made in 2009 or earlier. (R89:147-148:21-25,1-7). Mr. Breidenbach stated that it will interfere with Nodak from the standpoint that Nodak may miss out on an additional load. (R89:98-99:22-25,1-2). Mr. Breidenbach corroborated that technical interference is not as much of an issue as is interference with plans and ability to provide service to the area based on existing investments. (R89:99-100:25,1-4).

[¶137] Otter Tail’s proposed design and construction will not take away any existing Nodak customers. There will be no service interruptions or impacts to Nodak’s existing customers. (R:89:98:10-17).

[¶138] No Nodak infrastructure will be taken or impacted by Otter Tail’s extension into McFarland’s Addition. (R:89:100:5-10).

[¶139] Otter Tail’s service to McFarland’s Addition will not prevent Nodak from running three-phase service to other locations. (R89:99-100:21-25,1-4).

[¶140] There is no existing three-phase service within McFarland’s Addition to serve Love’s.

[¶141] Nodak’s proposed extension of three-phase service to the Love’s location by approximately 350 feet will cost a total of \$19,037.50. (R89:37:3). Otter Tail’s extension of approximately 1000 feet will cost an estimated \$52,000. (R91:301:12-16).

[¶142] Nodak’s proposed three-phase service line serves 3 customers within the 2-mile radius with neither of the other two three-phase customers within close proximity

to the McFarland's Addition. (R52). Nodak testified that it will continue to provide three-phase service to its existing customers regardless of whether Otter Tail provides service to McFarland's Addition. (R89:99-100:25,1-4).

[¶43] Nodak testified that it made investments planning to serve the area's customer growth and development. (R89:30:6-15). Nodak witness Einarson also agreed that Otter Tail has made investments in its system to serve customers located in Drayton and likely made investments for possible expansion. (R89:123-124:21-25,1-5).

[¶44] Nodak's single-phase distribution line crosses the McFarland's Addition and continues through areas in Drayton with joint occupancy on Otter Tail's infrastructure. The distribution line crosses ND Highway 66 to serve a Cenex station which is located within the city limits of Drayton, as well as additional customers outside of city limits. (R89:30-31:16-25,1-20).

[¶45] The Commission held a hearing on April 16, 2021. Nodak called two witnesses, Steve Breidenbach and Mylo Einarson. See generally (R89). 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's Complaint and denied the relief being requested by Nodak. (R82). The Commission held that Nodak did not meet the burden necessary to demonstrate that Otter Tail's extension into McFarland's Addition will cause interference with Nodak's service. (R82:7:¶9). The Commission also held Nodak did not meet the burden necessary to demonstrate that Otter Tail's extension into McFarland's Addition will cause unreasonable duplication. (R82:8:¶10-14). The Commission also denied Otter Tail's Motion to Dismiss. (R82:7:¶3).

[¶46] 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.*

[¶47] 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. (R117). On March 3, 2022, Judgment was entered and on March 11, 2022, Notice of Entry of Judgment was filed. (R119-120). On May 3, 2022, Nodak 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. (R124, 128).

STANDARD OF REVIEW

[¶48] An appeal from a decision of the North Dakota 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."

[¶49] "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).

[¶50] 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

1. The Commission’s finding that there would not be interference by Otter Tail with Nodak’s existing services is supported by a preponderance of the evidence.

[¶51] Nodak claims that if Otter Tail extends its facilities, it will interfere with their existing services. The Commission is governed by N.D.C.C. § 49-03-01.3 which states:

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity. Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission. Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof whose places receiving service are located outside the corporate limits of a municipality on July 1, 1965; provided, however, that within ninety days after July 1, 1965, any electric public utility furnishing service to customers whose places receiving service are located outside the corporate limits of a municipality shall file with the commission a complete map or maps of its electric distribution system showing all places in Page No. 1 North Dakota which are located outside the corporate limits of a municipality and which are receiving its service as of July 1, 1965. After ninety days from July 1, 1965, unless a customer whose place being served is located outside the corporate limits of a municipality is shown on said map or maps, it shall be conclusively presumed that such customer was not being served on July 1, 1965, and cannot be served until after compliance with the provisions of section 49-03-01.1.

[¶52] Otter Tail lawfully commenced operations in the municipality of Drayton prior to this complaint and has held a franchise since 1931. (R66 and R67). The latest 20-year franchise was granted on May 3, 2011. (R60). There is no dispute that Otter tail does not

need to seek a certificate of public convenience and necessity to serve Drayton or the annexed are known as the McFarland's Addition. N.D.C.C. § 49-03-01.3 also states that the public utility can extend its lines provided such extension does not interfere with existing services provided by a rural electric cooperative or another electric public utility within the municipality and provided that duplication of services is not deemed unreasonable by the Commission.

[¶53] Nodak contends that Otter Tail's extension of service to Love's site would interfere with Nodak existing services. The Commission looked 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).

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.

[¶54] There is no dispute that neither Nodak nor Otter Tail had any customers in the McFarland Addition at the time of annexation. (R89:68:2-3) see also: (R89:122:18-22). The Commission also looked at the existing facilities of both Otter Tail and Nodak. (R51). Otter Tail has a transmission line that would be crossed by Nodak's trenching of three-phase service to the Love's location. *Id.* Similarly Otter Tail's extension would cross a distribution

line of Nodak's when three-phase service is extended by underground boring. Id.

[¶55] Since there are no customers, both extensions would cross under the facilities of another the Commission looked to see if there would be any physical interference by either extension. Testimony showed either extension would be within the National Electric Safety Code. (R89:61:6-9) and (R89:66:8-13). The Commission also heard testimony that lines crossing other lines is common industry practice and must occur for people to get power. (R89:58:11-14). Nodak contends that its single-phase service line would become a stranded asset if Otter Tail were allowed to serve the area. There was no testimony or evidence to show the line could not be continued to be used as it currently is, or that it would have to be moved. Nodak currently has an under-share agreement with Otter Tail to utilize Otter Tail power poles which run through city limits of Drayton. (R89:66:14-25). An under-share agreement is an agreement to allow Nodak to place its distribution lines on Otter Tail's utility poles for a fee to reduce the amount of infrastructure.

[¶56] Nodak alleges Otter Tail's extension would cause future economic interference of investments of infrastructure already in the area. Nodak through the testimony of Steve Breidenbach states that the 3-phase service from which they would extend to Love's was put in with future development in mind. (R89:30:9-15). No other evidence was entered into the record to show how much was invested, or if there were any discussions as to future economic development in this area. Nodak relies only on a statement they do not build infrastructure to serve one customer, but to serve an area. (R89:83:7-15).

[¶57] Nodak contends that the record here is like that in Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181, 186-88 (N.D. 1988). After Cass, Id.

was remanded and the Commission's decision was appealed by NSP in Northern States Power Co. v. North Dakota Public Service Com'n, 452 N.W.2d 340 (1990) the Commission found and this Court found that Cass had included the area in controversy in its long-term plans, had made investments of \$2,235,593 in facilities and other electrical systems to serve the territory. . . Id. 343 ¶2.

[¶58] In the case at hand, we have a generic statement that future development was part of Nodak's long term plans, but this is not supported by any other evidence. (R89:83:7-15). Otter Tail also made investments in infrastructure which is where they would extend service to Loves. (R90:159:18-21). A reasoning mind could look at the facts and determine that Nodak's three-phase infrastructure was installed to serve the grain site and two other farmsteads that are on the same line, as service infrastructure and not long-term development of the area for future service. (R89:83:7-15).

[¶59] There is substantial evidence in the record to support the decision of the Commission. There is nothing in the record or in Nodak's brief that shows the findings of fact made by the Commission are not supported by a preponderance of the evidence; or the conclusions of law and order of the Commission are not supported by its findings of fact. The Commission found and the District Court confirmed that there would not be interference with Nodak's existing services.

2. The Commission's finding that there was not unreasonable duplication of services is supported by a preponderance of the evidence.

[¶60] Nodak contends that Otter Tail's extension is an unreasonable duplication because they have three-phase power in the area that is closer than Otter Tail's 3-phase power which is also in the area.

[¶61] "The Territorial Integrity Act was enacted by the Legislature in 1965. It

amended N.D.C.C. Sections 49-03-01 and 49-03-05, 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.*

[¶162] 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.

[¶163] The Commission looked at what facilities each entity had in the area to determine if duplication exists, if it would be unreasonable. (R51) see also (R48). 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 and adjacent to Drayton City limits. Nodak Electric had been serving the area west of I-29 before the annexation. The existing electric infrastructure located within the McFarland's Addition includes: (1) Otter Tail's high voltage electric transmission line following the south side of 80th St. NE, crossing 160th Ave NE into McFarland's Addition, and continuing south along the east side of 160th Ave NE until it exits McFarland's Addition (R51) and (2) Nodak's single-phase underground distribution line passing through the McFarland's Addition, passing under Interstate 29, through areas served by Otter Tail in Drayton, to serve a Cenex Station and customers north of Drayton. (R51). Nodak Electric has 3-phase service adjacent to the site. Similarly, Otter Tail has 3-phase adjacent to the McFarland's Addition.

[¶64] The costs of each extension were 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 is not duplicative, and even if it is duplicative, it is not unreasonable. Otter Tail's extension is approximately 1000 feet in length and estimated to cost \$52,000. (R89:48:20-24). Nodak's proposed extension is 350 feet (R89:34:8-19) and would cost approximately \$19,037.50 (R89:37:3).

[¶65] Nodak in its brief tries to raise the issue of wasteful duplication of services. Wasteful duplication is not a criterion for the Commission to look at in this case. The standard is unreasonable duplication and comes directly from N.D.C.C. 49-03-01.3. Nodak cites to Capital Electric Cooperative, Inc., v. City of Bismarck, 2007 ND128; 736 N.W.2d 788 (N.D. 2007). In 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 facts of this case are not as similar as Nodak would make them out to be. The fact patterns do give the Commission guidance to determine what unreasonable duplication is.

[¶66] Capital Electric had a very high dollar amount of investment in the Boulder Ridge area that was in excess of \$7 million dollars. *Id.* at 801 ¶20. Nodak did not provide any dollar amount for any investment in the area.

[¶67] In N. States Power Co. v. N.D. Pub. Serv. Comm’n, NSP challenged the Commission’s decision after remand. 452 N.W.2d 340 (N.D. 1990). Upon remand and rehearing the Commission found that there would be a duplication of capital-intensive investment based on filings by Cass:

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

Id. at 344

[¶68] No matter how you look at the case at hand the investment and development of the annexed area does not reach the same level. The Commission is not looking at millions of dollars in investment in distribution by Nodak, who failed to state or enter into the record the cost of any infrastructure they claim as investment in future development.

Looking to Capitol electric:

“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."

736 N.W.2d 788, 801 ¶ 34 (N.D. 2007).

[¶69] In the Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv.Comm'n, the facts are not similar and do little for guidance in this case. 2020 ND 12; 938 N.W.2d 118 (N.D. 2020). In the case at hand both have 3-phase power available without constructing or adding equipment. Here we have only a line extension one of which is longer than the other, and modestly more expensive due mostly to having to bore under I-29. 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.

[¶70] 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

[¶71] Nodak does not have an extensive system in place for the annexed territory. Nodak again misuses terminology that comes from a traditional Territorial Integrity Act case that uses the standard wasteful duplication and not unreasonable duplication. Otter Tail's extension in the case at hand is not unreasonable and would also serve orderly economic development of the annexed area. Both are similarly situated to serve the annexed area, so orderly economic development of the area isn't a factor in the case at hand.

[¶72] There is substantial evidence to support the decision of the Commission. There is nothing in the record or in Nodak's brief that shows the findings of fact made by the Commission are not supported by a preponderance of the evidence; or the conclusions of law and order of the agency are not supported by its findings of fact. The Commission found and the District Court confirmed that there would not be unreasonable duplication.

3. The Commission did not err 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)."

[¶73] Nodak and Otter Tail operate under a service area agreement signed in 1968 that encompasses many different areas where rural meets municipal populations. (R53). The service area agreement is meant to be a guideline as to who serves what area to avoid disputes. In the case at hand, a service area exists and Nodak states the service area agreement grants them the authority to serve the McFarland's Addition. Otter Tail disagrees and claims the annexation grants them the authority to now serve the new area.

[¶74] 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. Prior to the passage of this law, the Commission could take into consideration the service agreement, but it ultimately was a contract between two parties which the Commission does not have the authority to enforce. No disputes of service areas agreements have been brought before the Commission as a singular matter. Service area agreements have been looked at by the Commission as part of other cases.

[¶175] As stated in Capital, “The interpretation of a written contract to determine its legal effect is a question of law for a court to decide, and on appeal, this Court will independently examine and interpret the contract to determine whether it has been erroneously construed. (Internal citations omitted) 736 N.W.2d 795 ¶15.

[¶176] The passage of N.D.C.C. § 49-03-06 gave the Commission the authority it did not have prior to its existence. Since the 1968 service agreement does not meet the requirements of N.D.C.C. § 49-03-06 it is a contract that the Commission does not have the expressed authority to determine its legal effect. Nodak acknowledges in its brief that the Commission does not have the jurisdiction to settle any breach of contract dispute arising out of Otter Tail’s extension into Nodak’s service territory and that a separate action in District Court would be more appropriate. Appellate Brief pg. 27 ¶44. The Commission has never stated the service area agreement is invalid, just not enforceable by the Commission.

[¶177] The Commission and subsequently the District Court correctly 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 enforceable by the

Commission.

4. The Commission did not err in denying Otter Tail Power Company's Motion to Dismiss.

[¶78] Otter Tail's motion to dismiss is largely based on a constitutional argument regarding the extent of a municipality's franchise authority. The Commission does not have the authority to resolve a constitutional issue. Had the Commission ruled in Nodak's favor, there may have been a question on the constitutional authority of Drayton to franchise. The Commission's decision did not impact their right to franchise and even if it did, the Commission would not have the authority to address it.

[¶79] The District Court cited to First Bank of Buffalo v. Conrad, 350 N.W.2d 580 (N.D. 1984). In First Bank of Buffalo this Court wrote that chapter 28-32, "the administrative agencies Practice Act is not designed to resolve constitutional questions. Neither do administrative agencies have the authority to accomplish this." Id. at 584. As "creatures of legislative action" this Court Continued, administrative agencies "have only such authority or power as is granted to them or necessarily implied from the grant." Id. at 584-585. "As a general rule, administrative agencies do not determine constitutional issues" Id. at 585 : cf. Ash v. Traynor, 1998 ND 112, ¶13, 579 N.W.2d 180.

[¶80] The Commission has the power and jurisdiction established under N.D.C.C. Chapter 49-02. N.D.C.C. § 49-02-01(4) extends the Commission's jurisdiction to electric utilities. N.D.C.C. Chapter 49-03 addresses electric utility franchises. In N.D.C.C. § 49-03-01 through 49-03-01.5, "Electric provider means either an electric public utility or a rural electric cooperative."

[¶81] Under N.D.C.C. § 49-03-01(1) an electric public utility must obtain a certificate of public convenience and necessity before beginning construction or operation of a

public utility plant or system, or an extension of a plant or system. It also states that an electric public utility is not required to secure a certificate for an extension within any municipality which the electric public utility has lawfully commenced operations. Id.; see also N.D.C.C. §49-03-01.3 (providing “[s]ections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations”). Also included in Section 49-03-01(1) “if any electric public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation the Commission, on complaint of the electric public utility, or any electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offering electric public utility and prescribe just and reasonable terms and conditions.”

[¶82] Nodak had the right to file a complaint, and the Commission had the jurisdiction to hear the complaint. The Commission properly noticed the hearing and the hearing was held. The Commission in its Order properly found no interference with Nodak’s current service and system by Otter Tail’s extension. Otter Tail was not required to obtain a certificate of public convenience and necessity to make its extension. The Commission did so without infringing on Otter Tail’s right to franchise. This results in the proper denial of Otter Tail’s Motion to Dismiss.

[¶83] The Commission properly denied, and the District Court properly found the denial of Otter Tail’s Motion to Dismiss by the Commission was proper.

CONCLUSION

[¶184] Based on the foregoing, as well as the entire record in this matter, the Commission respectfully requests that this Court uphold the decision of the Commission and District Court relative to the dismissal of Nodak Electric's Complaint and its relief requested therein. The Commission asks that this Court affirm the decision of the Commission denying Otter Tail's Motion to Dismiss. Lastly, the Commission asks that this Court affirm the Commission holding regarding N.D.C.C. § 49-03-06 to pre-2005 service area agreements.

CERTIFICATE OF COMPLIANCE

[¶185] The undersigned, as attorney for the Appellee the North Dakota Public Service Commission 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 26 pages.

Respectfully submitted at Bismarck, ND, this 2nd day of September 2022.



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

Certificate of Service

Supreme Court No. 20220122
Burleigh Co. Court No. 2021-CV-01508

[¶1] Brian Johnson, states that he is of legal age and that on September 2nd, 2022, he served the Brief of Appelle North Dakota Public Service Commission in the above matter electronically as follows:

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I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct. Signed on September 2nd, 2022, at Bismarck, ND, USA.

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