

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

Nodak Electric Cooperative, Inc.,
Appellant and Cross-Appellee,
vs.
North Dakota Public Service Commission, and
City of Drayton,
Appellees and Cross-Appellees,
and
Otter Tail Power Company,
Appellee and Cross-Appellant.

Supreme Court No. 20220122
Civil No. 08-2021-CV-01508

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

BRIEF OF CROSS-APPELLEE
CITY OF DRAYTON

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STATEMENT OF THE ISSUES

- I. Whether the Public Service Commission lacked subject matter jurisdiction to hear a case which challenged the City of Drayton's franchise authority pursuant to N.D. Const. Art. VII, § 11.

STATEMENT OF THE CASE

[1] The City of Drayton concurs with the Statement of the Case set forth in Otter Tail's Cross-Appellant's Brief.

STATEMENT OF FACTS

[2] The City of Drayton concurs with the Statement of Facts presented in Otter Tail's Cross-Appellant's Brief. The City offers the following additional facts relevant to its interests and participation in this appeal. As established elsewhere, the property at issue in this action known as McFarland's Addition has been part of the City of Drayton since it was annexed on August 12, 2019. (R61)(Annexation of McFarland's Addition). At the time of its annexation, the City of Drayton concurrently passed a Resolution expressly authorizing Otter Tail to provide all electric services to McFarland's Addition. (R62) (Resolution on Electric Services to McFarland's Addition). The Resolution was passed to reinforce the City's intent and decision that Otter Tail provide electric service to McFarland's Addition and states: "Otter Tail Power Company's franchise to provide electrical services within the City of Drayton in accordance with Ordinance 51, be extended without ambiguity to McFarland's Addition." (R62).

[3] On July 21, 2020, Nodak Electric filed a Complaint with the Commission requesting that Otter Tail be enjoined from providing utility services in McFarland's

Addition. (R8) (Complaint). Specifically, Nodak Electric requested “the Commission, with or without notice, to make its order restraining, enjoining and requiring Otter Tail to cease and desist from constructing an extension of its electric public utility plant and system to and from any customer at the place to be served.” Id. The City petitioned the Commission to intervene in the action to challenge the Commission’s jurisdiction over the City’s decision to have Otter Tail provide electric service to McFarland’s Addition. (R26) (City of Drayton’s Petition to Intervene).

[4] The City of Drayton has never granted Nodak Electric a franchise permitting it to provide electric service to customers within city limits. (R91:255:5-24). City of Drayton Mayor Charles Olson testified that it was “very important that Love’s come to town, and part of that was Otter Tail supplying power to them.” (R91:242:23-25) Mayor Olson also testified that this project was “huge for the City of Drayton”; that he did not want Love’s’ electric costs to “possibly make them change their mind”; and that he “wanted to eliminate any possible roadblocks for them coming to town.” (R91:241:11-22) Mayor Olson further testified that he made it clear to Nodak Electric that the City requested they not challenge or do anything to interfere with Love’s development of this project. (R91:252:5-10)

STANDARD OF REVIEW

[5] The City of Drayton accepts and agrees with the Standard of Review set forth by Nodak Electric and Otter Tail in their respective Briefs.

LAW AND ARGUMENT

A. The District Court erred in declining to address the City of Drayton’s subject matter jurisdiction challenge.

[6] The District Court erred in declining to address whether the Commission

had subject matter jurisdiction to hear Nodak Electric's Complaint. According to the District Court, because Otter Tail and the City of Drayton prevailed on the merits, it was unnecessary to decide the jurisdictional challenge. (R117). Subject matter jurisdiction is a threshold issue that must be addressed prior to the merits of a claim. Smith v. City of Grand Forks, 478 N.W.2d 370, 371 (N.D. 1991); Franciere v. City of Mandan, 2019 ND 233, ¶12, 933 N.W.2d 907 (recognizing "the elementary principle that it is essential to the rendition of a valid judgment that the district court have both subject matter jurisdiction over the cause of action and personal jurisdiction over the parties."). As such, the District Court erred in refusing to address the issue of subject matter jurisdiction.

[7] This Court has defined subject matter jurisdiction as "the court's power to hear and determine the general subject involved in the action." A challenge based on subject matter jurisdiction cannot be waived and may be raised sua sponte. Munson v. Indigo Acquisition Holdings, LLC, 2019 ND 197, ¶ 23, 931 N.W.2d 679. Because a challenge to a court's subject matter jurisdiction is a threshold issue, it must be addressed prior to the merits of a case. Smith, 478 N.W.2d at 371. A court "may not consider an action whenever it appears the court lacks jurisdiction on the subject matter." Munson, at ¶ 23.

[8] In this case, both the City of Drayton and Otter Tail challenged the Commission's subject matter jurisdiction. On December 11, 2020, Otter Tail filed a Motion to dismiss Nodak Electric's claim, arguing the Commission lacked subject matter jurisdiction. (R34). The Commission denied the Motion, but explicitly reserved the issue of subject matter jurisdiction based on the constitutional franchise challenge for the judiciary. Id. On appeal, the District Court declined to address the issue. (R117). The

District Court concluded the City of Drayton’s franchise authority is a constitutional issue which must be avoided because Otter Tail and the City prevailed on the merits, in other words, because it could be resolved on other grounds. Id. The District Court’s conclusion was erroneous because the Commission did not have authority to rule on the merits, as it lacked jurisdiction from the beginning. This Court has made clear a subject matter jurisdiction challenge must be decided prior to a case’s merits. Smith, 478 N.W.2d at 371. As a result, the District Court erred in declining to address the City of Drayton’s subject matter jurisdiction challenge.

B. The Commission lacked subject matter jurisdiction to decide the merits of this case.

[9] The North Dakota Constitution provides all cities, including the City of Drayton, with the sole authority to franchise the operation of public utilities in its boundaries. N.D. Const. Article VII, § 11:

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. The plain language of the N.D. Constitution provides cities with the unabridged right to decide who provides utilities to its residents. Id. Thus, the Legislative Assembly and the regulatory bodies it creates, including the Commission, are without authority to interfere with a city’s franchise right. Id. Only a city can grant a utility franchise, and only an entity with a valid franchise may provide services within a city’s boundaries. See Capital Elec. Co-op., Inc. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788 (stating a coop must have a franchise to serve in the city after the property was annexed).

[10] Moreover, North Dakota’s Century Code authorizes municipalities to

grant utility franchises:

The governing body of a municipality shall have the power:

Franchises. To 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 provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.

N.D.C.C. § 40-05-01(57). Thus, both the North Dakota Constitution and the Century Code provide cities with the exclusive and unabridged authority to grant utility franchises.

[11] While the Commission and the District Court did not address subject matter jurisdiction in this case, the language of North Dakota's Constitution is unambiguous. The Constitution provides a city's franchise right "shall not be abridged by the legislative assembly." N.D. Const. Art VII, § 11. The Commission is a regulatory body created by statute and wholly derives its regulatory powers from the North Dakota Legislative Assembly. Env'tl. Law and Policy v. N. Dakota Pub. Serv. Comm'n, 2021 N.D. 192, ¶ 11, 948 N.W.2d 838 (stating the Commission's authority to regulate is limited to that authority provided to it by the legislature). As a creation of the Legislative Assembly, the Commission has no legal authority to determine which entity is permitted to provide electric services in the City of Drayton if the City has not first permitted it.

[12] In spite of the plain language of the law, the District Court relied on an erroneous statutory interpretation to find the Commission could usurp the City of Drayton's franchise authority:

Sections 49-03-01(1) and 49-03-01.4(1) grant the Commission jurisdiction over a complaint filed by an electric cooperative alleging an electric public utility's construction or extension of its line, plant, or system unreasonably

interferes with or is about to interfere unreasonably with the service or system of the electric cooperative...Nodak Electric's complaint falls under section 49-03-01(1). Accordingly, the Commission had jurisdiction to hear Nodak Electric's Complaint.

(R117). The District Court's holding is flawed. The final word of the Century Code chapter cited by the District Court, N.D.C.C. Ch. 49-03, is dispositive in this case: "[n]othing 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). Both the Commission's denial of Otter Tail's motion to dismiss and the District Court's affirmation ignore this crucial caveat to remain congruent with the preeminent authority set forth in N.D. Const. Art VII, § 11.

[13] The City of Drayton granted Otter Tail the sole franchise to provide electric services within its boundaries, including McFarland's Addition. This action alone is sufficient to preclude Nodak Electric or anyone else from serving inside the City. The franchise and the subsequent Resolution directing Otter Tail to serve McFarland's Addition eliminate any doubt as to who possesses the sole right and obligation to provide electricity to McFarland's Addition. And yet, if N.D.C.C. § 49-03-01.3 is held to give the Commission jurisdiction to decide Nodak Electric's Complaint, then had interference or unreasonable duplication been found (including upon review), the Commission has no choice but to enjoin Otter Tail from serving Love's. The result would be untenable under the law: either the City must enfranchise an electric service provider against its wishes or else risk losing one of the biggest economic development projects in the City's history. In such a scenario, the Commission's order enjoining Otter Tail from providing service to McFarland's Addition would usurp the City of Drayton's franchise and Resolution in violation of North Dakota's Constitution. See N.D. Const. Article VII, § 11.

CONCLUSION

[14] North Dakota's Constitution protects the rights of cities to determine who may provide utility services in their boundaries. The Commission does not have authority to interfere with this right because the Legislative Assembly cannot empower it to do so. The City of Drayton granted an exclusive franchise to Otter Tail. Nodak Electric does not have a franchise and cannot provide electricity services to McFarland's Addition. The Commission did not have subject matter jurisdiction in this case and lacked authority to rule on its merits. The District Court's decision should be reversed, and this case should be dismissed in accordance with the City of Drayton's constitutional franchise authority.

Dated this 8th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned as attorney for the Cross-Appellee City of Drayton in the above matter, and as author 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).

CERTIFICATE OF SERVICE

I, Steven C. Ekman, a license attorney in the State of North Dakota and officer of the Court, certify that on the 8th day of September, 2022, a true and correct copy of the Brief of Cross-Appellee City of Drayton was e-mailed to opposing counsel via electronic mail submission through the Supreme Court filing portal to the following:

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