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

REPLY BRIEF OF CROSS-APPELLANT OTTER TAIL POWER COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

LAW AND ARGUMENT

I. Nodak Electric has no right to serve new customers in the City of Drayton without a franchise.

[1] The scope of an unfranchised electric cooperative's authority to serve customers inside a city was decided in the Divide County case. See Montana-Dakota Utilities Co. v. Divide County School Dist., 193 N.W.2d 723 (N.D. 1971). In Divide County, the cooperative made the same argument Nodak Electric makes in the present appeal; it had the right to construct and operate electric facilities within city limits without a franchise. See id. at 728. The Divide County Court rejected that argument, holding that, when a customer resides in a city receiving central station service following annexation, the electric cooperative cannot serve that customer in the absence of a franchise from the city. Id. at 730.

[2] Nodak Electric attempts to distinguish the Divide County case by erroneously arguing the controlling factor whether a cooperative may serve is whether a city has adopted an ordinance prohibiting all electric service providers from providing service without a franchise. See Nodak Electric Reply Brief, at ¶ 6. Nodak Electric's argument is based upon a misguided interpretation of the Divide County holding. The Divide County Court determined the cooperative had no right to serve residents of the City of Crosby after annexation based upon the provisions in the Electric Cooperative Corporations Act, as the limited purpose for which a cooperative may be formed is to serve persons in rural areas who are not receiving central station service. Divide County, 193 N.W.2d at 729. (noting a cooperative may not be "organized and operated" in a rural area where people are receiving central station service). The Court recognized that the area which the cooperative serves may change from one which the inhabitants are not receiving

central station service, to one in which they are receiving central station service through annexation into a municipality. Id. at 730. In such a scenario, "persons within the annexed area become persons who are receiving central station service and, under the charter of the electric cooperative formed under the Act, these persons no longer qualify for membership in the electric cooperative corporation for the purpose of receiving electric service to their facilities located within the city." Id. The Divide County Court recognized that the Act does allow a cooperative to serve persons within a city receiving central station service, but only if the cooperative possesses a franchise. Id.

[3] This Court more recently affirmed the Divide County holding requiring a cooperative possess a franchise to serve customers within in city limits. Capital Electric Coop., Inc. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788. In confirming that a cooperative must possess a franchise to serve within city limits after annexation, the Capital Electric Court stated:

> Under North Dakota law, Capital Electric must have a franchise to serve Boulder Ridge after that area was annexed to Bismarck. See Montana–Dakota Utils. Co. v. Divide County Sch. Dist., 193 N.W.2d 723, 730–31 (N.D.1971) (holding right of electric cooperative without franchise to provide electric service to area outside city terminated when area became annexed to city that required franchise to provide service within city).

Id. at ¶ 13 (*emphasis added*). The Capital Electric Court went on to explain that if both public utility and coop have franchises to provide electric service to the annexed territory, then the Commission has authority to decide whether either entity's extension of services will unreasonably interfere with and duplicate services of the other under N.D.C.C. § 49–03–01.3. Id. Nodak Electric's argument that it is not required to possess a franchise to serve McFarland's Addition has been soundly rejected by this Court. See Capital Electric, 2007 ND 128 at ¶ 13; Divide County, 193 N.W.2d at 730.

II. A prohibitive ordinance is not required to preclude Nodak Electric from serving customers.

[4] Nodak Electric argues the City of Drayton's failure to enact a prohibitive ordinance requiring a franchise to serve in the city allows other service providers to provide service within the city without a franchise. Nodak Electric's argument misinterprets the holdings in Divide County and Capital Electric and is simply wrong. Such an interpretation would usurp the City of Drayton's franchise authority.

[5] Under Nodak Electric's erroneous interpretation, any provider would have the right to enter the City of Drayton, use city property to erect service facilities, and begin serving customers in the city unless the City expressly declares by ordinance that they cannot. As previously noted by Otter Tail and the League of Cities, the very definition of the word "franchise" demonstrates the fallacy of Nodak Electric's argument. A franchise would not constitute a special privilege conveyed by the city if every non-franchisee could exercise the same privilege absent an express ordinance to the contrary. See Williams Bros. Pipe Line Co. v. City of Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968).

[6] Nodak Electric fails to cite any legal authority to support its argument that a cooperative is permitted to provide electric service to customers inside city limits without a franchise if there is no ordinance directly prohibiting it. In prior cases before this Court addressing the cooperative's right to serve in a city, the cooperative had been granted a franchise or permission specifically to serve the disputed territory. See Capital Electric, 2007 ND 128, ¶ 3, (recognizing the City of Bismarck granted Capital Electric Cooperative a twenty-year franchise to operate in the city in 1993); N.S.P. v. P.S.C., 452 N.W.2d 340 (N.D. 1990); Cass County Elec. Coop v. N.S.P., 419 N.W.2d 181 (N.D. 1988). In the Cass County cases, the City of Fargo granted Cass County Electric Cooperative a franchise to

serve the annexed property. N.S.P., 419 N.W.2d at 183. In both the Capital Electric and Cass County cases, the cooperative possessed a valid franchise from the city to serve, which was the controlling factor for concluding the Commission had authority to determine whether interference or unreasonable duplication occurred. Id.

[7] While this Court has never directly addressed the question whether a prohibitive ordinance is required to preclude non-franchisees from providing electric service, other jurisdictions have held the granting of a franchise alone is sufficient to preclude others from exercising the same privileges without one. For example, the Iowa Supreme Court held that an electric company cannot enter a town and supply electricity without a franchise. See Town of Ackley v. Cent. States Elec. Co., 214 N.W. 879 (Iowa 1927) (finding that constructing electric facilities on city property without permission constitutes trespass). The Eighth Circuit explained that even where the franchise was non-exclusive in the sense that the city might grant similar rights to another, it was exclusive against anyone who assumed to exercise the privilege without one. City of Campbell, Mo. v. Arkansas-Missouri Power Co., 55 F.2d 560, 562 (8th Cir. 1932). In non-utility cases, courts have held that where a franchise is granted for a particular activity, it is implied that activity cannot be conducted by other entities without a franchise. See Jackson-Shaw Co. v. Jacksonville Aviation Auth., 510 F. Supp. 2d 691, 719 (M.D. Fla. 2007); see also Sea Lar Trading Co. v. Michael, 433 N.Y.S.2d 403, 406 (N.Y. Sup. Ct. 1980) (stating the very nature of granting a franchise demonstrates that a particular activity could not be done without a franchise). Nodak Electric's prohibitive ordinance argument is analogous to posting a "No Trespassing" sign. The sign does not create the underlying property right to exclude others—it merely advertises it.

[8] In the present case, Nodak Electric did not obtain a franchise from the City of Drayton and therefore has no right to enter city property to construct electric facilities and provide service to customers. As noted above, such an act would properly be construed as a trespass. If Nodak Electric had obtained a valid franchise from the City of Drayton to serve McFarland's Addition, it could then argue it had the ability to serve Love's and that, pursuant to the TIA, the Commission possessed the legal authority to determine whether to enjoin Otter Tail from interference and unreasonable duplication of its facilities. However, because Nodak Electric does not possess a franchise from the City of Drayton, it is prevented from constructing new facilities to serve customers therein.

[9] Nodak Electric's prohibitive ordinance argument also fails because of the City of Drayton's Resolution unequivocally granting Otter Tail the right to provide electric service to McFarland's Addition. While it is not a prohibitive ordinance, the Resolution in April 2020 clarified that Otter Tail was to provide electric service to Love's in McFarland's Addition. (R62). The combined effect of the City's actions leaves no doubt that Nodak Electric has no right to serve McFarland's Addition.

III. The constitutional question is a matter of statutory interpretation.

[10] The Commission in its Appellee Brief reiterates the District Court's analysis and conclusion that the Commission does not have the authority to address constitutional questions and cites to First Bank of Buffalo, 350 N.W.2d 580 (N.D. 1984) and Ash v. Traynor, 1998 ND 112, ¶3, 579 N.W.2d 180. However, both First Bank of Buffalo and Ash are inapplicable to the present case, as they were challenges to the constitutionality of a statute, not whether a specific interpretation of the statute is compatible with the constitution.

[11] Otter Tail does not assert that N.D.C.C. § 49-03-01.3 is unconstitutional, only that it has been misinterpreted by the Commission to unconditionally grant the Commission jurisdiction to hear the merits of Nodak Electric's complaint. A fundamental principle of statutory interpretation is that the Legislature's enactment of a statute is presumed to comply with the State Constitution. N.D.C.C. § 1–02–38(1). If a statute is open to divergent constructions, one that would make it of doubtful constitutionality and one that would not, North Dakota courts must adopt the construction that avoids a constitutional conflict. Gregory v. N. Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 28, 578 N.W.2d 101.

[12] The bigger picture is this: through N.D.C.C. § 49-03-01 the Legislative Assembly empowered the Commission to regulate the expansion of electric public utility systems by requiring a certificate of public convenience and necessity ("CPCN") from the Commission before doing so. Section 49-03-01.3 is an exception to the general rule which excuses the CPCN requirement inside a City's boundaries where the City has granted a franchise to the public utility. This exception is necessary to give effect to the reservation of authority found in Const. Art. VII, § 11 which constrains the Legislative Assembly from abridging cities' rights to franchise. While N.D.C.C. § 49-03-01.3 contains an exception to the exception upon a Commission finding of interference and unreasonable duplication, N.D.C.C. § 49-03-06(8) unmistakably acknowledges that the entire chapter, including N.D.C.C. § 49-03-01.3, is subject to the constitutional constraint. By narrowly focusing on this single phrase, the Commission and Nodak Electric would have this exception to the exception swallow the rule and create an unconstitutional delegation of authority.

[13] This Court previously harmonized the scope of the Commission's authority granted by N.D.C.C. § 49-03-01 in conjunction with a city's constitutional franchise power. See Capital Elec., 2007 ND 128, ¶ 13. As noted above, the Capital Electric Court held that when **both** the public utility and cooperative have franchises to provide electric service in the city, **then** the Commission has authority to decide whether either entity's extension of services will unreasonably interfere with and duplicate services of the other under N.D.C.C. § 49–03–01.3. Id. at ¶ 13. Such interpretation reconciles both the city's exclusive constitutional franchise power and the Commission's limited authority under the TIA to protect the public interest where two providers have been authorized by a City to serve. Id. at ¶ 27.

[14] Conversely, in requiring the Commission enjoin the franchised electric public utility from extending service if a hearing on the merits finds unreasonable duplication or interference—or even the threat of interference— N.D.C.C. § 49-03-01.4 would mandate an unconstitutional outcome because the Commission has no discretion to honor the city's franchise choice. The Legislative Assembly cannot be presumed to have intended the exception to apply where the coop lacks a franchise. Rather, the proper interpretation is that the Commission has authority to hear the complaint only if both the public utility and cooperative have franchises to provide service in the city. Id., at ¶ 13.

[15] The issue, thus, is not just that Nodak Electric has requested the Commission grant a remedy that the Commission is without authority to grant. Instead, the issue with an unconditional application of N.D.C.C. § 49-03-1.3 is that without a coop franchise the statute would *require* the Commission to do something that it legally cannot.

Notably, on this question the Commission acknowledges in its Brief that "[H]ad the Commission ruled in Nodak's favor…the Commission would not have the authority to address it."

CONCLUSION

[16] The North Dakota Constitution precludes the Legislative Assembly from empowering the Commission to abridge the City of Drayton's franchise authority. However, the absence of a coop franchise would command such abridging upon a finding of interference or unreasonable duplication by preventing sole franchisee Otter Tail from serving and effectively requiring the City to permit unfranchised Nodak Electric to serve Love's Truck Stop. The canons of statutory interpretation require that the Legislative Assembly be presumed to intend Commission jurisdiction only when both utilities possess a valid franchise so as to remain consistent with the Constitution and other relevant statutes. The Commission erred in denying Otter Tail's Motion to Dismiss, and Otter Tail respectfully requests this Court reverse the Commission's Order on this issue.

Dated this 29th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

The above-signed as attorney 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).

CERTIFICATE OF SERVICE

I, Paul Sanderson, a license attorney in the State of North Dakota and officer of the Court, certify that on the 29th day of September, 2022, a true and correct copy of the Brief of Appellee And Cross-Appellant Otter Tail Power Company was e-mailed to opposing counsel via electronic mail submission through the Supreme Court filing portal to the following:

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