

RECEIVED

September 26, 2011

SEP 27 2011

PUBLIC SERVICE COMMISSION

**VIA NEXT-DAY DELIVERY and E-MAIL**

Executive Secretary  
North Dakota Public Service Commission  
State Capitol Building  
600 East Boulevard Avenue, Dept 408  
Bismarck, ND 58505-0480

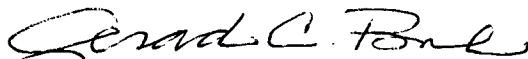
RE: Docket Number PU-11-542

*In the Matter of the Application of Otter Tail Power Company  
for an Order and Certificate to Extend Service to the East  
Devils Lake Outlet Project of the North Dakota State Water Commission*

Dear Secretary:

Enclosed for filing in the above captioned matter is an original and seven (7) copies of Nodak Electric Cooperative's RESPONSE AND REQUEST FOR HEARING RELATIVE TO OTTER TAIL POWER'S REQUEST TO WITHDRAW APPLICATION FOR A PC&N CERTIFICATE.

Respectfully submitted,



GERAD C. PAUL  
Senior Attorney  
Assistant General Counsel  
Attorney for Nodak Electric Cooperative, Inc.

Enc.  
pc: Service List (via U.S. Mail)

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

Case No.: PU-11-542

In the Matter of the Application of Otter Tail Power Company  
for an Order and Certificate to Extend Service to the East  
Devils Lake Outlet Project of the North Dakota State Water Commission

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**RESPONSE AND REQUEST FOR HEARING RELATIVE TO OTTER TAIL POWER'S  
REQUEST TO WITHDRAW APPLICATION FOR A PC&N CERTIFICATE**

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Nodak Electric Cooperative, Inc. hereby **RESPONDS** and **REQUESTS A HEARING** as to the September 16, 2011, request and motion of Otter Tail Power Company to withdraw its application for a certificate of public convenience and necessity (PC&N) relating to the Devils Lake East End Pumping Station. In support of this filing, Nodak Electric states and alleges as follows:

**I. The Territorial Integrity Act (N.D. Cent Code Chap. 49-03-01) explicitly gives the Public Service Commission sufficient jurisdiction to hear and determine a request by an electric public utility to extend service to areas outside the corporate limits of a municipality.**

Section 49-03-01 of the North Dakota Century Code provides that “[a]n electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction

and operation.” The Commission has “jurisdiction to hear and determine an electric utility's application for a Certificate of Public Convenience and Necessity to extend service to areas outside the corporate limits of a municipality.” Capital Electric Cooperative, Inc. v. Public Service Commission, 534 N.W.2d 587, 591 (N.D. 1995). A customer's request for service by an electric public utility outside the city limits triggers the Commission's jurisdiction. Id. at 592. While the legislative history of the Territorial Integrity Act is extensive, the rationale for its enactment was summarized in Capital Electric where the Court observed that the Territorial Integrity Act was adopted “to prevent public utilities from 'pirating' rural areas,” and the “primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities.” Id. at 590.

**II. The cases cited by Otter Tail do not establish that the Commission is deprived of jurisdiction in this instance.**

In Western Electric Co. v. City of Jamestown, 47 N.D. 157, 181 N.W. 363, 367 (N.D. 1921), it was the authority of the City of Jamestown to grant or permit a franchise for the use and regulation of city streets and to operate an electric light plant within the city limits that was determinative as to the Board's regulatory authority over rates. Similarly, in Chrysler Light & Power Co. v. City of Belfield, 58 N.D. 33, 224 N.W. 871 (N.D. 1929), the Court in addressing who had authority to establish electric rates within the city limits of Belfield where a previously granted franchise agreement specified a rate for electrical service to the city for street lighting, determined that the Board lacked power to regulate rates. Likewise, City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197 (1957), involved a question over electric service within the city limits of Grafton to a state facility. Finally, Otter Tail Power Company v. North Dakota Public

Service Commission, 354 N.W.2d 701 (1984), involved the question of jurisdiction of the Commission on an Indian Reservation and is not applicable to the situation at hand. Otter Tail has failed to cite applicable case law regarding the Commission's jurisdiction to issue a Certificate of PC&N.

**III. Electric public utilities, including Otter Tail, have historically sought Certificates of PC&N for the extension service outside of a franchised municipality for municipal, county or state government customers.**

The following list, publicly available through the Commission's on-line docket, is a small sample taken from just the past two years of Certificate of PC&N proceedings:

<u>Docket</u>	<u>Customer</u>	<u>Electric Public Utility</u>
PU-10-069	City of Fairmont (lift station)	Otter Tail Power Company
PU-09-403	City of New Salem (lagoon)	Montana Dakota Utilities
PU-09-230	City of Bottineau (lift station)	Otter Tail Power Company

For several years, decades really, electric public utilities have presented, and the Commission has exercised jurisdiction over, matters involving the extension of facilities and electric service to cities and other political subdivisions. The North Dakota Supreme Court has observed that "the practical construction of a statute by the agency administering the law is entitled to some weight in construing the statute, if the agency interpretation does not contradict clear and unambiguous statutory language." Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989). In addition, the Legislature is presumed to be aware of the Commission's long standing interpretation and the failure to amend the statutes indicates legislative acquiescence to the construction being employed by the Commission. Effertz v. North Dakota Workers Compensation Bureau, 525 N.W.2d 691, 693 (N.D. 1994), citing Northern States Power Co. v. Board of R.R. Comm'rs, 71 N.D. 1, 298 N.W. 423 (1941).

**IV. Concluding that the Commission lacks jurisdiction would be contrary to the plain intent of the Legislature.**

Allowing electric public utilities to extend electric service to any state or political subdivision customer, without regard to the Territorial Integrity Act and without consideration and approval of the Commission, could render the Act meaningless in many other instances. The criteria employed by the Commission when it evaluates a request for a PC&N are generally set forth in Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 791 (N.D.1974) where the Court observed:

“[I]n Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D.1969), ... it was stated that ‘customer preference should be considered’ and “ ‘there are a number of other factors which also must be considered ... These factors include: the location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application and which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.’ 169 N.W.2d 415, at 418.”

Allowing an electric public utility, without regard to these factors, to freely extend its existing facilities outside of municipal limits merely by reaching acceptable terms with the customer could well give the electric public utility an upper hand in any subsequent requests for a Certificate of PC&N in that area. This is not to mention the incentive that might well exist for some electric public utilities to offer artificially low terms for the extension of that service at the expense of other ratepayers in order to complete a non-jurisdictional facilities extension and then be in better position to expand further. Indeed, the results could be absurd and completely contrary to the purpose of the Territorial Integrity Act to minimize conflicts between electric public utilities and rural electric cooperatives and to provide territorial certainty for rural electric cooperatives.

While the jurisdiction of an administrative agency is dependent upon the terms of a statute, these terms must be construed logically so as not to produce an absurd result. Fireman's Fund Mortgage Corp. v. Smith, 436 N.W.2d 246 (N.D.1989).

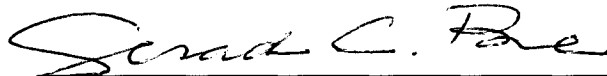
As an illustration of how soon a scenario could arise, attached hereto as Exhibit A is a copy of a residential plat for Stone Ridge Subdivision. The plat was recently recorded in the Office of the Ramsey County Recorder on May 13, 2011, as Document Number 251128. The plat reflects the genuine intentions of a residential developer to develop sixty-eight (68) lakeside residential lots in rural Ramsey County – all of which would require electric service as those lots are improved. Noteworthy is the fact that the platted property is located in the same township and within less than one-half of one mile to the immediate north of the proposed pumping station. While Nodak Electric has yet to receive a request for electric service, and while the Commission has not yet been asked to issue a Certificate of PC&N relative to this area, it is nevertheless useful for the Commission to consider what might transpire should such a request for a Certificate of PC&N be made following construction of the transmission line and substation facilities that were initially proposed by Otter Tail in its application in the immediate case. To be sure, the presence of the new facilities in the area could provide a substantial advantage not presently available to Otter Tail as to important factors such as location of existing investments, cost and duplication on investment.

## **CONCLUSION**

On the underlying merits to be examined by the Commission under the Territorial Integrity Act, Nodak Electric Cooperative, Inc. firmly believes, and wishes to

demonstrate at hearing, that it is best suited to serve the State Water Commission. Requiring Otter Tail to proceed with a PC&N hearing before the Commission best serves the citizens of the state of North Dakota by minimizing conflict and by ensuring that there is no wasteful duplication of investment in capital-intensive utility facilities. For these reasons and the others that would be more fully developed at hearing, Nodak Electric Cooperative respectfully requests that Commission disallow Otter Tail's request to withdraw its application or, alternatively, urges the Commission to conclude that it has jurisdiction over the service proposed to the State Water Commission.

Respectfully submitted this 26th day of September, 2011.



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GERAD C. PAUL (N.D. Id No: 05340)  
Senior Attorney and Asst. General Counsel  
Minnkota Power Cooperative, Inc.  
Attorney for Nodak Electric Cooperative, Inc.  
P.O. Box 13200  
1822 Mill Road  
Grand Forks, ND 58208-3200  
(701)795-4000 (phone) (701)795-4214 (fax)  
[gpaul@minnkota.com](mailto:gpaul@minnkota.com)

## CERTIFICATE OF SERVICE

I, Gerad C. Paul, hereby certify that I have this day, served a true and correct copy of the foregoing document to the persons at the addresses indicated below electronic filing, electronic mail, courier, interoffice mail or by depositing the same enveloped with postage paid in the United States mail at Grand Forks, North Dakota.

### **Via e-mail and Next Day Delivery**

Executive Secretary  
North Dakota Public Service Commission  
State Capitol Building  
600 East Boulevard Avenue, Dept 408  
Bismarck, ND 58505-0480

Docket Number PU-11-542

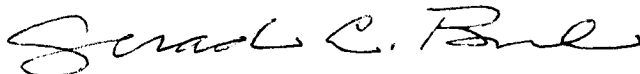
### **Via U.S. Mail**

Mr. Bruce Gerhardson  
Associate General Counsel  
Otter Tail Power Company  
215 South Cascade Street  
Fergus Falls, MN 56537

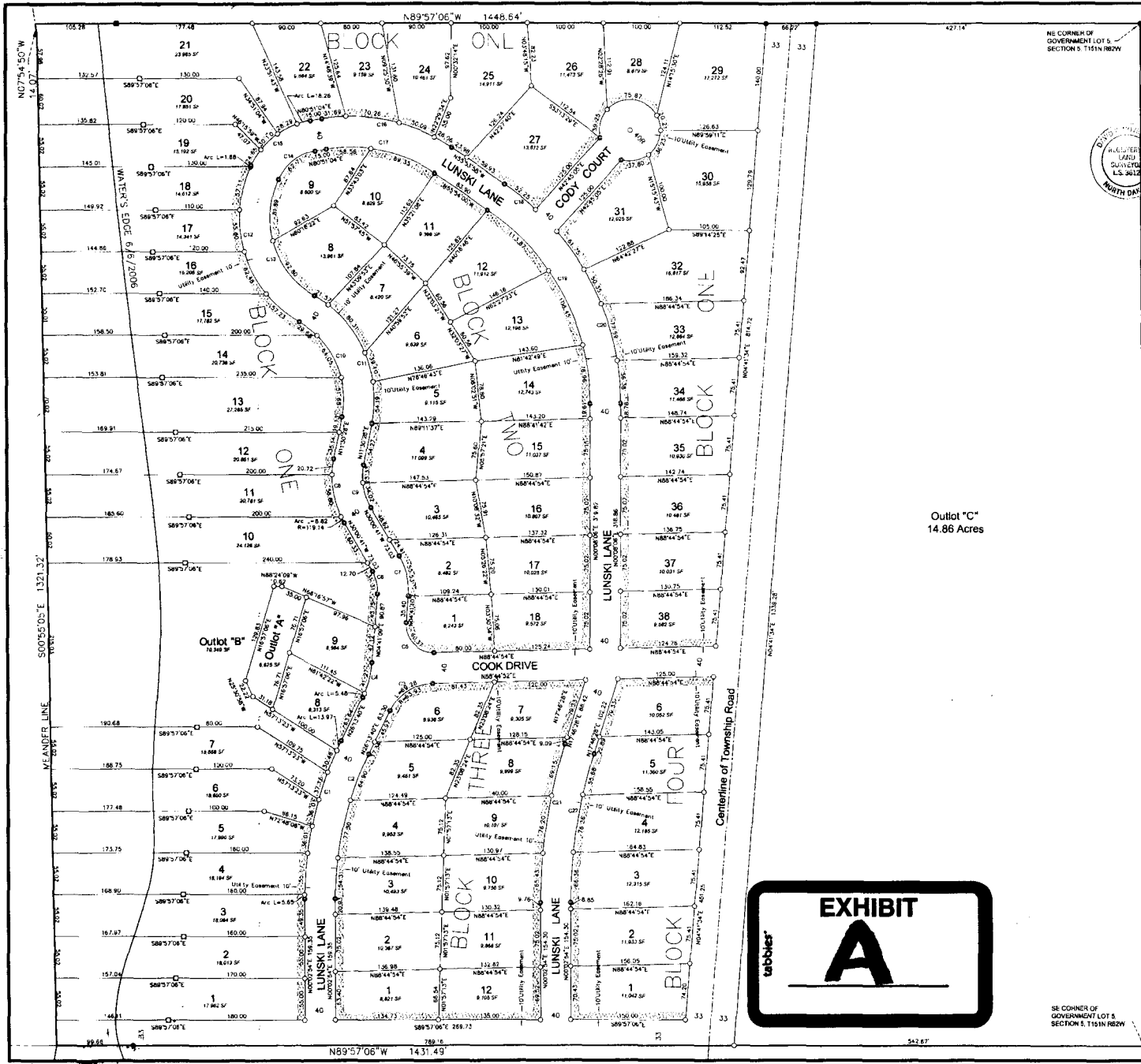
### **Via U.S. Mail**

Mr. Todd Sando, P.E.  
Chief Engineer – Secretary  
North Dakota State Water Commission  
900 East Boulevard Avenue, Dept 770  
Bismarck, ND 58505-0850

Dated this 26<sup>th</sup> day of September, 2011



GERAD C. PAUL



# STONE RIDGE SUBDIVISION

## GOVERNMENT LOT 5, SECTION 5, TOWNSHIP 151 NORTH, RANGE 62 WEST

**CERTIFICATE OF SURVEY:**  
I, David K. Hovendick, Registered Land Surveyor in the State of North Dakota, do hereby certify that this is a true and correct representation of a portion of land surveyed by me or under my direct supervision, that monuments for the guidance of future surveys have been placed in the ground as indicated and that said data as described are as follows:  
All of Government Lot 5, Section 5, Township 151 North, Range 62 West of the 5th Principal Meridian, Ramsey County, North Dakota. Said parcel contains 44.1 acres, more or less.



Dedication  
We the abovesigned do hereby certify that we are the owners of the land described in the plat of Stone Ridge Subdivision and have caused it to be surveyed and placed as shown on said plat and certificate of David K. Hovendick, Registered Land Surveyor. Said Subdivision is situated in Government Lot 5, Section 5, Township 151 North, Range 62 West of the 5th Principal Meridian, Ramsey County, North Dakota. We hereby declare that the subdivision shall be known as Stone Ridge Subdivision and we hereby dedicate Lunski Lane, Cook Drive and Cody Court for private road and drainage easements and also as public utility easements. Outlot "B" is designated as Lake Access for all lots situated within this Subdivision and may also be used as a site for future rental cabins.

State of North Dakota )  
County of Ramsey )

On this 22 day of April, 2011 A.D. before me a Notary Public for said County and State, personally appeared Danna Lunski, known to me to be the person described herein and who executed the foregoing instrument and acknowledged to me that he executed the same as his free act and deed.

*Danna Lunski*  
Notary Public  
Ramsey County, State of North Dakota  
My commission expires 10/15/2012

On this 22 day of April, 2011 A.D. before me a Notary Public for said County and State, personally appeared Skipper S. Cook, known to me to be the person described herein and who executed the foregoing instrument and acknowledged to me that he executed the same as his free act and deed.

*Skipper S. Cook*  
Notary Public  
Ramsey County, State of North Dakota  
My commission expires 11/1/2011

Planning and Zoning Commission/Township Board Approval:  
This plat of Stone Ridge Subdivision, situated in a part of Government Lot 5, Section 5, T151N, R62W, Ramsey County, North Dakota is hereby approved on this 5 day of May, 2011 A.D.

*Scott Demmer* 5-13-2011  
Scott Demmer, Chairman  
Debbie Township Planning & Zoning Commission  
Date  
Don Caldwell, Secretary/Treasurer  
Date  
Commission Deputies/Township Board

On this 15 day of May, 2011 A.D. before me a Notary Public for said County and State, personally appeared Scott Demmer and Don Caldwell known to me to be the persons described herein and who executed the foregoing instrument and acknowledged to me that they executed the same as their free act and deed.

*Scott Demmer*  
Notary Public  
Ramsey County, North Dakota  
My commission expires 12/14/2014

State of North Dakota )  
County of Ramsey )

I hereby certify that Ramsey County, North Dakota taxes and special assessments are paid and transfers accepted on this 13th day of May, 2011 A.D.

*Stephanie St. Simons*  
Stephanie St. Simons, Auditor  
Ramsey County Auditor

State of North Dakota )  
County of Ramsey )

I hereby certify that this instrument was filed in the office of record on the 13th day of May, 2011 A.D. and was filed as document number 51247. Need in past cabinet number 2011-390 and was filed as

*Kate Naclian*  
Kate Naclian  
Ramsey County Recorder

CURVE DATA:	CURVE DATA:	CURVE DATA:
Curve #1 - C1 R = 470.08 Delta = 208°17' L = 214.45 T = 109.12	Curve #2 - C2 R = 430.08 Delta = 20°10'40" L = 195.51 T = 100.00	Curve #3 - C3 R = 539.31 Delta = 92°56'32" L = 68.24 T = 40.40
Curve #4 - C4 R = 124.35 Delta = 21°27'33" L = 46.72 T = 23.66	Curve #5 - C5 R = 36.66 Delta = 92°56'31" L = 62.37 T = 40.40	Curve #6 - C6 R = 31.70 Delta = 34°11'51" L = 31.31 T = 16.15
Curve #7 - C7 R = 117.23 Delta = 34°41'50" L = 55.63 T = 28.85	Curve #8 - C8 R = 79.74 Delta = 41°31'08" L = 57.35 T = 30.30	Curve #9 - C9 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13
Curve #10 - C10 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13	Curve #11 - C11 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13	Curve #12 - C12 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13
Curve #13 - C13 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13	Curve #14 - C14 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13	Curve #15 - C15 R = 157.23 Delta = 85°12'33" L = 174.99 T = 108.13

**NORTH**  
GRAPHIC SCALE  
1" = 100 FEET

- SUBDIVISION BOUNDARY LINE
- LOT LINE
- EXISTING MONUMENT
- REBAR SET AND CAPPED
- REBAR AT CURVE POINT
- REBAR SET ON PROPERTY LINE
- SECTION LINE
- GOVERNMENT LOT LINE
- 10' UTILITY EASEMENT



SE CORNER OF GOVERNMENT LOT 5, SECTION 5, T151N, R62W

**LSS Inc.**  
David K. Hovendick  
Professional Surveyor  
Registration No. 3612

507 3rd Street NE  
Dawson Lake, ND 58301  
701-682-8095  
lss@lssinc.com

**CLIENT**  
Danna Lunski  
378 Dammer Ave  
Naples, Florida 34108  
888-227-8004

**PROJECT No.**  
2011001 Lunski

**SHEET**  
1 of 1