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October 3, 2011

PUBLIC SERVICE COMMISSION

Mr. Darrell Nitschke
Director of Administration/Executive Secretary
North Dakota Public Service Commission
State Capitol
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0408

**RE: Otter Tail Power Company East Devils Lake Outlet Pumping Station Public Convenience & Necessity
Reply to Nodak Electric Cooperative's Objection to Notice of Withdrawal
Case No. PU-11-542**

Dear Mr. Nitschke:

Enclosed for filing are the original and seven (7) copies of Otter Tail Power Company's Reply to Nodak Electric Cooperative's Objection to Notice of Withdrawal in the above-referenced proceeding.

Should you have any questions, please feel free to call Bruce Gerhardson at 218-739-8475 or bgerhardson@otpco.com.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce Gerhardson", written over a horizontal line.

Bruce Gerhardson
Associate General Counsel

dm
Enclosures
By electronic filing and overnight mail
c: Gerad C. Paul

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**Reply to Nodak Electric Cooperative's objection to
Notice of Withdrawal**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Power Company
East Devils Lake Outlet Pumping Station
Public Convenience and Necessity

Case No. PU-11-542

**REPLY TO NODAK ELECTRIC COOPERATIVE'S OBJECTION
TO NOTICE OF WITHDRAWAL**

Otter Tail Power Company ("Otter Tail") hereby submits the following Reply to Nodak Electric Cooperative's Response and Request for Hearing Relative to Otter Tail's Request to Withdraw Application for a Certificate of Public Convenience and Necessity ("CPC&N").

I. Nodak erroneously argues the City of Grafton case is inapplicable because it involved a question of electric service within the city limits.

Nodak misinterprets the North Dakota Supreme Court's holding in City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1957). The key issue in that case was whether the Public Service Commission ("Commission") had jurisdiction over contracts entered into between the State of North Dakota and public utilities. In the City of Grafton, the Supreme Court found the Legislature placed restrictions on the Commission's regulatory authority, as evidenced by N.D.C.C. § 49-02-01.1. 86 N.W.2d at 202. The Supreme Court ruled that this statute indicates a policy on the part of the Legislature to withhold from the Commission authority to control the production, transmission and use of electric power by the sovereign State of North Dakota and its political subdivisions. Id. at 202-203. The Supreme Court also held that there is no provision of law which vests in the Commission the power to interfere with the lawful conduct of the State in

making and carrying out contracts for the purchase of commodities, including electric power, reasonably necessary for the operation of facilities under the State's control. Id. at 203.

Nodak erroneously attempts to distinguish the holding of the City of Grafton case on the fact that the dispute arose within the city limits. Contrary to Nodak's argument, the City of Grafton Court concluded that the PSC did not have authority to interfere with the State's sovereign powers to manage, maintain and operate its facilities, regardless of whether they are located within or outside the city limits. Id. at 204-205.

Nodak has failed to cite any legal authority that has overturned the City of Grafton precedent holding the Commission does not have the power to interfere with contracts entered into by the State of North Dakota for the purchase of commodities, including electric power, necessary for the operation of its facilities. In the present case, the North Dakota State Water Commission has contracted with Otter Tail to provide electric service to a State Water Commission Project. The North Dakota Supreme Court precedent in the City of Grafton opinion clearly provides that the Public Service Commission lacks authority to interfere with the contract between the State Water Commission and Otter Tail.

II. The past practice of public utilities in other non-contested cases does not overturn the City of Grafton precedent.

Nodak cites to three Certificate of PC&N proceedings to support its argument that the Commission has jurisdiction over a contract between a State agency and a public utility. However, a closer review of the three cases cited by Nodak indicates that none of the cases were contested; nor did any of them address the question of the Commission's jurisdiction over contracts of the State or its political subdivisions. The fact that the Commission administratively approved uncontested requests for CPC&Ns in these prior cases cannot be interpreted as explicitly overruling the North Dakota Supreme Court precedent in City of Grafton, which holds

that the PSC does not have the power to interfere with contracts entered into by the State of North Dakota for the purchase of commodities. In none of those cases did a State Agency or subdivision expressly assert its authority to make its own determination of electrical supplier. In this case, the State Water Commission has asserted that authority, and requested Otter Tail to withdraw its application for a CPC&N. Pursuant to the Supreme Court's Ruling in the City of Grafton, the Public Service Commission is not authorized to interfere with that decision by the State Water Commission.

III. Nodak's public policy argument is misguided and does not support the PSC's jurisdiction in this case.

Nodak argues that allowing public utilities to enter into contracts without being regulated by the Public Service Commission could give the public utility an advantage in future CPC&N cases. However, Nodak's argument ignores the fact that the State Water Commission is the party that contracted with Otter Tail for electric service and requested Otter Tail withdraw its application. This is not some scheme by Otter Tail to infringe on Nodak's territory and expand its service. Furthermore, Otter Tail has offered its service to the State Water Commission at its standard rates and terms of service, so any claim by Nodak that Otter Tail has sought some advantage in this case is without any factual support.

Nodak's arguments on this point can serve as a demonstration as to the wisdom of the Supreme Court's ruling in the Grafton case. State agencies such as the State Water Commission are in a different position than are private customers that might request service, as State Agencies are acting in the public interest when they enter into service contracts. The Supreme Court in the City of Grafton, considered whether the interests being weighed by the Public Service Commission in typical CPC&N cases should trump the public interests being served by State Agencies and subdivisions when they contract for electrical service. The Supreme Court

determined that they should not. For example, in the instant case, the State Water Commission has identified, as one of its considerations, that it is in the public interest to have electric service to this site as soon as reasonably possible and optimally by April 1, 2012. If the electricity to the project site is unnecessarily delayed, it will have a detrimental impact on the public interest that is being served by the State Water Commission's project. On this point, it is Otter Tail's understanding that the State Water Commission has determined Otter Tail is more likely to keep the project on schedule. It would not be appropriate, for example, for the Public Service Commission to overrule the State Water Commission on its determination on this point, or on any other point for which the Water Commission made its determination. The Supreme Court recognized in the City of Grafton case that State agencies and subdivisions determination of what is in the public interest is not subject to review by the Public Service Commission.

In addition, it is inappropriate for Nodak to make arguments in this case based upon assumptions as to future development and electric service needs in the area. See Tri-County Electric Coop v. Elkin, 224 N.W.2d 785, 793 (N.D. 1974).

IV. Otter Tail's Notice of Withdrawal deprives the Public Service Commission of any further jurisdiction over the Application for CPC&N.

On September 16, 2011, Otter Tail served its Notice of Withdrawal pursuant to N.D.Admin.Code § 69-02-02-07. At the time of service, Nodak had not filed any objection, nor had any hearing been scheduled. Pursuant to the express language of the rule, permission of the PSC to withdraw a pleading is only necessary when a hearing has been held or convened. See N.D.Admin.Code § 69-02-02-07(2). Accordingly, the Commission has no authority to hold a hearing on the application or whether to permit the withdrawal once Otter Tail gave notice of its intent to withdraw the application under N.D.Admin.Code § 69-02-02-07(2).

CONCLUSION

The North Dakota Supreme Court has determined that the Public Service Commission does not have the power to interfere with the lawful conduct of the State in making and carrying out contracts for the purchase of commodities, including electric power, reasonably necessary for the operation of facilities under its control. The North Dakota State Water Commission has contracted with Otter Tail to provide electric service to one of its facilities. Accordingly, Otter Tail is not required to obtain a Certificate of Public Convenience and Necessity to provide electric service to the North Dakota State Water Commission. Otter Tail respectfully requests the Commission acknowledge its withdrawal of its application for a Certificate of Public Convenience and Necessity to extend service to the East Devils Lake Outlet Pumping Station of the North Dakota State Water Commission, Case No. PU-11-542.

Respectfully submitted this 3rd day of October 2011.

OTTER TAIL POWER COMPANY

By: 

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