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OCT 07 2011

PUBLIC SERVICE COMMISSION

October 7, 2011

DARRELL NITSCHKE
ND PUBLIC SERVICE COMMISSION
600 EAST BOULEVARD – DEPT 408
BISMARCK, ND 58505-0408

**OTTER TAIL POWER COMPANY v NODAK ELECTRIC COOPERATIVE INC.
CASE NO. PU-11-542**

Dear Darrell:

Enclosed for filing are the following in connection with the above referenced proceeding:

1. Original and seven copies of the Notice of Appearance;
2. Original and seven copies of NoDak Electric Cooperative's Notice of Appearance and Reply Brief for Rejection of Petitioner's Notice of Withdrawal and Alternative Request for Dismissal; and
3. Original and seven copies of the Affidavit of Service.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Carol K. Larson

Enclosures

By electronic filing and first class mail

cc: Gerad C. Paul
Bruce Gerhardson, Associate General Counsel, Otter Tail Power Company

10 **PU-11-542** Filed: 10/7/2011 Pages: 12
**Notice of Appearance; Notice of Appearance and
Reply Brief**

Nodak Electric Cooperative, Inc.

Carol Larson, Pringle & Herigstad, P.C.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**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 Pumping Station**

Otter Tail Power Company)	
	)	Case No. PU-11-542
Applicant,)	
vs.	)	Notice of Appearance
)	
NoDak Electric Cooperative, Inc.)	
)	
Respondent.)	

Carol K. Larson and Pringle and Herigstad, P.C. hereby notify the Commission and Otter Tail Power Company that she appears in this matter as co-counsel on behalf of the respondent, NoDak Electric Cooperative.

This notice of appearance supplements the notice of appearance previously filed by Gerad C. Paul.

Dated this 7 day of October, 2011.

PRINGLE & HERIGSTAD, P.C.

By: 

Carol K. Larson - #04406
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**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 Pumping Station**

Otter Tail Power Company)	
	)	Case No. PU-11-542
Applicant,)	
vs.	)	Respondent's Reply Brief
	)	for Rejection of Petitioner's
NoDak Electric Cooperative, Inc.	)	Notice of Withdrawal and
	)	Alternative Request
Respondent.	)	for Dismissal

On July 29, 2011, Applicant Otter Tail Power Company (Otter Tail) filed an application under NDCC 49-03 for authority to extend its service to the East Devils Lake Outlet Pumping Station in Benson County.

On August 24, 2011, the Commission issued a Notice of Opportunity for Hearing.

On September 19, 2011, NoDak Electric Cooperative (NoDak) requested a hearing on Otter Tail's application.

On September 16, 2011, Otter Tail filed a "Notice of Withdrawal" of its application and "Alternatively, Otter Tail moves the Commission for an order dismissing the application on grounds the Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission." (Otter Tail's September 16 Notice, p. 1)

On September 26, 2011, NoDak filed a response and request for hearing relative to Otter Tail's request to withdraw its application.

On October 3, 2011, Otter Tail filed a reply, asserting its notice of withdrawal "deprives the Public Service Commission of any further jurisdiction" over Otter Tail's

application for authority to extend service. Otter Tail expands its jurisdiction argument by asserting the Commission has no authority to hold a hearing on whether to permit Otter Tail to withdraw its application. (Otter Tail's October 3 brief, p. 4.)

By this reply brief, NoDak renews its request for a hearing on the jurisdictional issue raised by Otter Tail and renews its request for a hearing on the issue of public convenience and necessity under the Commission's August 24, 2011, Notice of Opportunity for Hearing.

The plain terms of the "Territorial Integrity Law," NDCC 49-03, confer jurisdiction on the Commission. Otter Tail acknowledged and invoked that jurisdiction by filing its application on July 29. NoDak also invoked the Commission's jurisdiction by its September 19 request for hearing. There is nothing in NDCC 49-03 that provides or implies the Commission's jurisdiction is limited as asserted by Otter Tail.

Otter Tail's privilege to withdraw its application (ND Admin Code 69-02-02-07) might be exercised if Otter Tail were to abandon its proposed extension of service. But that is not the case here. Otter Tail's September 16 Notice of Withdrawal and its October 3 brief make it clear that Otter Tail intends to proceed with its proposed extension of service, because Otter Tail has determined for itself that the Commission has no jurisdiction - as if that settled the issue. According to Otter Tail, the Commission not only lacks jurisdiction over Otter Tail's application, the Commission has no authority to decide the jurisdiction issue; Otter Tail will do that.

Otter Tail raised the jurisdiction issue and the issue remains undecided, not to be decided by Otter Tail and not to be decided by NoDak. The Commission must decide.

Otter Tail's procedural maneuver to avoid jurisdiction - first invoke the Commission's jurisdiction and then request the Commission to "acknowledge" that Otter Tail's notice of withdrawal "deprives" the Commission of jurisdiction without a hearing - is too clever. Otter Tail's argument that its notice of withdrawal should be effective because it was dispatched before NoDak filed its request for a hearing is less than compelling, it is also disingenuous. The Commission's Notice of Opportunity for Hearing afforded NoDak until September 26 to file its request for a hearing, an opportunity that was not and is not susceptible to early termination by any action taken by Otter Tail. The argument is disingenuous because Otter Tail misled NoDak to delay filing its request for hearing while Otter Tail was supposedly preparing an amended application when instead it was preparing to file its notice of withdrawal that included the argument that NoDak had not yet requested a hearing. See Otter Tail's September 16 Notice of Withdrawal, p. 2 and Affidavit of NoDak's co-counsel of record, Gerad C. Paul, filed concurrent with this brief. Otter Tail is ill situated to say NoDak was too slow, particularly when NoDak filed its request for hearing within the time allowed by the Commission.

Having invoked the Commission's jurisdiction under NDCC 49-03, Otter Tail has no unilateral power to deprive the Commission of jurisdiction. Otter Tail also has no unilateral power to deprive NoDak of its rights to a hearing on the issues raised by Otter Tail's application and by the Commission's notice of opportunity for hearing.

Where Otter Tail asserts the Commission has not the jurisdiction that Otter Tail first invoked and that NoDak also invoked, Otter Tail should make a motion for dismissal, so the jurisdictional issue may be addressed and decided by the

Commission, not decided by Otter Tail. This more orderly procedure has in fact been commenced by Otter Tail.

Otter Tail's Notice of Withdrawal includes "Alternatively, Otter Tail moves the Commission for an order dismissing the application on grounds the Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission." (Otter Tail's September 16 Notice, p. 1. See also pp. 2, 8 and 9). Otter Tail's alternative motion for dismissal is not only the correct procedure, for Otter Tail to make the alternative motion is a tacit admission that it cannot unilaterally deprive the Commission of the jurisdiction that attached to this case when Otter Tail filed its application and when NoDak filed its request for a hearing, on the issues of public convenience and necessity. Otter Tail's notice and alternative motion should be regarded as a motion made under N.D.Admin. Code 69-02-02-08, a motion to be decided by the Commission after a hearing on due notice.

On hearing Otter Tail's alternative notice and motion to dismiss on jurisdictional grounds the Commission should consider a number of points ignored by Otter Tail, such as:

1. The established practice that the Commission does exercise its jurisdiction over extensions of electric service to governmental entities in rural areas with more than Otter Tail's acquiescence, but its active acknowledgement of the Commission's jurisdiction - a point mentioned in NoDak's September 26 response to Otter Tail's September 16 notice. See Capital Electric Cooperative, Inc. v Public Service Commission, 534 N.W. 2d 587 (N.D. 1995). A few representative cases were mentioned in NoDak's September 26 response. The entire history can be researched for reference and the Commission's consideration.

2. The broad scope of the Commission's jurisdiction under NDCC 49-03, enacted in 1965 and as construed in a number of cases decided under NDCC 49-03 after 1965, all supporting the Commission's jurisdiction and the exercise of that jurisdiction to determine whether public utilities'

service extensions in rural areas shall be authorized. Cases decided before 1965 are certainly relevant background, but any conflict between an old case and the newer statute is superseded by the statute and current precedents – just as NDCC 49-03 superseded cases such as Cass County Electric Cooperative v Otter Tail Power Co., 93 N.W. 2d 47 (N.D. 1958). No case decided under NDCC 49-03 since 1965 supports Otter Tail’s notice of withdrawal or its motion to dismiss its application “on grounds the Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission.”

3. Application of Otter Tail Power Co., 354 N.W. 2d 701 (N.D. 1984) where the Commission and the Supreme Court addressed and dismissed Otter Tail’s argument that is virtually the same as the argument made in its notice and motion for dismissal. Otter Tail’s citation of this case in support of its September 16th notice, p. 7, is inaccurate. The court considered and rejected Otter Tail’s argument that the PSC’s exercise of jurisdiction under NDCC 49-03 presented an “obstacle” to another governmental entity’s functions. The decision and opinion in the 1984 Otter Tail case supports NoDak’s opposition to Otter Tail’s motion for dismissal.

4. Application of Otter Tail Power Co., 451 N.W. 2d 95 (N.D. 1990) where both the Commission and the Supreme Court addressed and dismissed Otter Tail’s argument that is virtually the same as the argument made under its motion for dismissal. The 1990 Otter Tail case also supports NoDak’s opposition to Otter Tail’s notice and motion to dismiss.

In the present case, Otter Tail asserts “the Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission.” (September 16 Notice, p. 1.)

In its 1990 Case, “Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe’s sovereign rights of self-government. However, because the Tribe (which did not appear) was the proper party to press the potential of harm to its governmental interests, we conclude that Otter Tail has no standing to advance the Tribe’s self-government interests.” Application of Otter Tail Power Co. at 97. Even if self-government rights were asserted by the governmental entity, the Commission may nevertheless have jurisdiction. Id. at 98.

The 1990 Otter Tail case is particularly interesting because of other similarities to the present case. In that case Otter Tail informed the Commission that it intended to extend service – not much different from its September 16 notice of withdrawal in this case or its October 3 brief stating that the Commission has no authority to decide the jurisdiction issue. The PSC responded and notified Otter Tail that the PSC had jurisdiction and Otter Tail should formally apply for a certificate of public convenience and necessity. Otter Tail did apply for a certificate but before the PSC acted Otter Tail extended service in defiance of the PSC’s jurisdiction. The PSC ultimately decided it had jurisdiction and that was upheld by the North Dakota Supreme Court.

Perhaps after it filed its application on July 29, Otter Tail had second thoughts and decided on an aggressive strategy similar to its approach in the 1990 case. Otter Tail apparently decided in September that it would attempt to undo its July 29 application and proceed to extend service to the Water Commission’s project without the Commission’s authority, despite one of the lessons Otter Tail should have learned in 1990: Otter Tail cannot apply for authority to extend service and then proceed to extend service without the Commission’s authority.

Otter Tail’s September 16 and October 3 documents urge that its notice of withdrawal and alternative motion to dismiss should be decided without a hearing, not decided by the Commission but that the Commission should “acknowledge” that Otter Tail is the decider and has decided to deprive the Commission of jurisdiction. Summary disposition without a hearing should not happen, but if it were to happen, the summary disposition should be the Commission’s rejection of the notice and denial of the motion to dismiss because the claim of no jurisdiction is not Otter Tail’s claim; it lacks standing.

Whether the Commission has jurisdiction might be addressed later, if that issue is raised by “the proper party to press the potential of harm to its governmental interests.” Application of Otter Tail Power, 451 N.W. 2d at 97. The State Water Commission might appear and intervene under ND Admin Code 69-02-02-05 to present a claim that the Public Service Commission has no jurisdiction to hear and decide whether there is a public convenience and necessity for Otter Tail to extend service to the East Devils Lake Outlet Pumping Station. Otter Tail might invite the Water Commission to intervene. The Public Service Commission might send a notice of opportunity for hearing to the State Water Commission, offering that Commission the opportunity to consider whether it wants to assert and to litigate whether the Public Service Commission “lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission.” If and when that happens, the issues of jurisdiction and of public convenience and necessity will be considered and determined by the Public Service Commission, and maybe by a court on appeal.

If and when the State Water Commission intervenes and claims the Public Service Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission, Otter Tail would likely argue in support of that position. Otter Tail does not have jurisdiction to decide whether “the Commission lacks jurisdiction over the extension of service by Otter Tail to the State Water Commission.” (September 16 Notice, p. 1.) Otter Tail cannot be the judge of its own case and cannot deprive the Commission of its jurisdiction.

The Commission should assert its jurisdiction, as in the 1984 and 1990 Otter Tail cases.

Dated this 7 day of October, 2011.

PRINGLE & HERIGSTAD, P.C.

By: 

Carol K. Larson - #04406

Attorneys for NoDak Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Power Company)	
	)	Case No. PU-11-542
Applicant,)	
vs.	)	AFFIDAVIT OF SERVICE
)	
NoDak Electric Cooperative, Inc.)	
)	
Respondent.)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF WARD)

LaRae A. Thomas, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age, and is not a party to nor interested in the above entitled action; that on the 7th day of October, 2011, this Affiant served by electronic mail and by depositing in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in the above entitled action:

1. Notice of Appearance; and
2. Respondent's Reply Brief for Rejection of Petitioner's Notice of Withdrawal and Alternative Request for Dismissal.

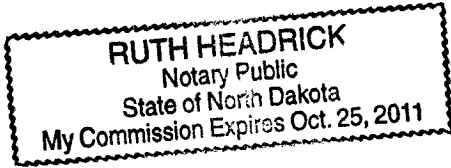
That said document was directed to the following email address and that said envelope was addressed to the following person at their known address as follows:

Bruce Gerhardson
Associate General Counsel
PO Box 496
Fergus Falls, MN 56538-049
bgerhardson@otpc.com

That the above provisions were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

LaRae A. Thomas
LaRae A. Thomas

SUBSCRIBED AND SWORN to before me this 7 day of October, 2011.



Ruth Headrick
Ruth Headrick, Notary Public
For the State of North Dakota
My Commission expires: 10-25-2011