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October 11, 2011



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
Response to Nodak's Reply Brief
Case No. PU-11-542**

Dear Mr. Nitschke:

I am filing this letter to respond to the claim in Nodak Electric Cooperative's ("Nodak's") Reply Brief that Otter Tail Power Company ("OTP") misled Nodak's counsel in order to gain a procedural advantage in this case. The claim is not accurate and it is inconsistent with OTP's position and the applicability of N.D.Admin.Code § 69-02-02-07(2).

OTP's position on its withdrawal request and the application of N.D.Admin.Code § 69-02-02-07(2) does not depend on when Nodak filed its objection and request for a hearing. N.D.Admin.Code § 69-02-02-07(2) does not require express Commission permission for the withdrawal of an Application unless a hearing has been "*held or convened*." The timing of the filing of any objections/requests for hearing does not make any difference in the applicability of the rule. To explain another way, if Nodak's objection and request for a hearing had been filed earlier than OTP's withdrawal, N.D.AdminCode § 69-02-02-07(2) would still not require express permission for the withdrawal.

This application of the rule can be seen in the Commission's April 6, 2011 Order in Case No. PU-11-37, in which Burke-Divide Electric Cooperative filed its objection and request for hearing prior to Montana-Dakota Utility's withdrawal of its Application for a CPC&N. In that case, the Commission acknowledged the withdrawal of MDU's Application in its Order. The Burke-Divide's filing did not alter the effectiveness of the withdrawal. Therefore, based upon the clear language of the rule and the

Commission's Order in Case No. PU-11-37, there would be no purpose served by OTP attempting to delay Nodak in filing its objection and request for a hearing as Nodak has claimed in its Reply Brief. For the avoidance of any doubt, OTP would not object in this case to the Commission deeming Nodak's filing as having been received prior to OTP's withdrawal.

In summary, OTP did not mislead Nodak's counsel to gain some procedural advantage in this matter, nor would have doing so served any purpose.

With respect to the additional claims made by Nodak in its Reply Brief, OTP is not asserting that it has jurisdiction in this matter. The State Water Commission requested OTP to withdraw its Application for a CPC&N and, based upon the Supreme Court's ruling in the City of Grafton case cited in OTP's prior pleadings, the State Water Commission has authority to make that request and to proceed under its own authority. Nodak's Reply Brief does not cite any authority that indicates the City of Grafton case has been overturned, and, specifically, Nodak's claim that there are no cases that cite the City of Grafton case after the TIA was enacted is not correct. For example, the 1984 Supreme Court decision cited by Nodak in its Reply Brief addresses the City of Grafton opinion, recognizing that it involved "the making of a contract by a state agency to purchase electrical energy" and stating that "the PSC does not have jurisdiction" over such contracts by a state agency. Application of Otter Tail Power Co., 354 N.W.2d 701, 705 (N.D. 1984).

For the reasons cited herein and in OTP's prior pleadings, OTP requests that the Commission acknowledge the withdrawal of its Application of a CPC&N, or in the alternative, affirmatively rule that it does not have jurisdiction over service to the North Dakota State Water Commission's Devil's Lake East Pumping Station.

Very truly yours,

/s/ BRUCE GERHARDSON
Bruce Gerhardson
Associate General Counsel

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

