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October 13, 2011

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**PSC Case No. PU-11-542, Otter Tail Power Application and
PSC Case No. PU-11- _____, Nodak Electric Cooperative Complaint vs Otter Tail**

We understand from the discussion at the Commission's October 12, 2011, that a Commission and staff work session will be held on Monday, October 17, 2011, to consider future proceedings in these two related cases both affecting the State Water Commission's Devils Lake East Outlet project.

If you, other staff, or any Commissioner want additional information from Nodak or its legal counsel before the meeting, we will endeavor to provide it even though the time is short. One particular fact you should be aware of is that Nodak is presently providing electricity at the place to be served, a fact also addressed below.

Otter Tail's claim that the Commission has no jurisdiction is easily understood but not as easily resolved as Otter Tail proposes. Its citation of the 1957 Grafton case argues the issue, but does not resolve the issue. Otter Tail's October 11th letter asserts that case has not been overturned. Neither has another case of the same age, Cass County Electric Cooperative v Otter Tail Power Co., 93 N.W. 2d 47 (N.D. 1958), been overruled by judicial action, but both are certainly affected by legislative action, the 1965 Territorial Integrity Act, and by later judicial action under the Act.

In every litigated case under the 1965 statute where similar jurisdiction arguments were made, the Commission asserted jurisdiction and its jurisdiction was upheld. The current cases include not only the 1984 and 1990 Otter Tail cases, but also the 2007 case,

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Capital Electric Coop., Inc. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788, where the Commission and the Supreme Court rejected Montana-Dakota Utilities' assertion that the City of Bismarck's franchise authority deprived the Commission of its jurisdiction. At this point in the proceedings affecting the Water Commission's project, these three cases are precedents to show that public utilities' claims the Commission lacks jurisdiction are usually resolved by Commission and Supreme Court decisions that the Commission does have jurisdiction. If there is something about this case arising in 2011 that should overturn all the post-1965 precedents, the jurisdiction issue can only be resolved by a hearing that fully addresses the issue where the other government entity asserts the Public Service Commission lacks jurisdiction.

Is it to be imagined that the State Water Commission has authority that supersedes the jurisdiction of the Public Service Commission? At this stage, it can only be imagined, because the Water Commission has not intervened to assert that claim. At this stage, the Commission has jurisdiction under the Act, invoked by Otter Tail's application, invoked by Nodak's request for a hearing on the application, and invoked by Nodak's Complaint. Otter Tail may deny the Commission's jurisdiction, or even defy it, but Otter Tail cannot deprive the Commission of its jurisdiction. The Commission must decide, but it can only decide if the Water Commission chooses to intervene and assert this claim.

We understand from some comments at the October 12th discussion that there is a concern about electric service being available on a timely basis for Water Commission's project. Otter Tail has not made an ordinary request for temporary authority, nor is such a request expected in this case where Otter Tail asserts the Commission has no authority and has indicated it is about to construct an extension without first obtaining authority from the Commission. Any sense of urgency does not excuse Otter Tail from seeking authority to extend its facilities. Instead of seeking to withdraw its application, Otter Tail should proceed in the normal course to seek temporary authority to construct the extension. Of course Otter Tail would be subject to the risk it will not prevail in a routine PC&N proceeding, but there seems to be no reason for Otter Tail to be reluctant about asking for temporary authority and assuming that risk, because it seems confident in its jurisdiction arguments.

Nor is there any reason for the Commission to be concerned if the Water Commission's project might be delayed during the course of litigation. The Devils Lake Eastern Outlet project is under construction, with construction power provided by Nodak. Nodak is presently ready, willing and able to provide electricity to this important project.

This dispute could be put on a fast track to resolution by consolidating these two cases and issuing a Notice of Hearing in the near future, including notice to the State Water Commission so that it may intervene if it chooses to assert the jurisdiction issue on its own behalf. We believe a hearing could be held, fully briefed and decided within three

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months, possibly as early as the end of January 2012. The Commission's experience in the Capital Electric/MDU/Bismarck (Case No. PU-05-551) shows that both the jurisdiction and PC&N issues can be presented in one hearing day. Certainly not more than two days are needed. In the meantime, the Commission could issue a cease and desist order, subject to Otter Tail's continuing privilege to consider whether it wants to seek temporary authority. In either case, the Water Commission's project will proceed with electric energy furnished by Nodak.

We anticipate someone might ask if it is possible to address the jurisdiction issue first and separate from the PC&N issues as a way to expedite the case. To separate the issues often has the undesirable side effect and unintended consequence of extending the litigation. In this case, the PC&N issues and jurisdiction issues are inseparable because some of the fact issues in a normal PC&N case would necessarily affect the jurisdiction issue. The jurisdiction issue is not an abstract question to be answered in the absence of relevant and material evidence whether the Public Service Commission's exercise of jurisdiction would amount to an "encroachment, infringement, interference, obstacle or harm" to the Water Commission's performance of its duties. (Words quoted are taken from some of the Supreme Court cases.) Indeed, the 1990 Otter Tail case indicates there is another side to the issue – whether the State's interest in regulating a public utility outweighs a minimal burden on the State Water Commission. 451 N.W.2d at 107. These questions are highlighted by the fact that Nodak is presently providing electricity to the place to be served and that Otter Tail proposes to serve by 29,000 feet of new construction – nearly 5 miles. A more gross case of duplication contrary to the underlying policy of the Territorial Integrity Act is difficult to imagine. If that were allowed to happen, it should be the result of the Commission's deliberate decision after a full hearing, not as the result of Otter Tail's effort to deprive the Commission of its jurisdiction by so simple a device as withdrawing its application.

Yours truly,



Carol K. Larson

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