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September 16, 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: Notice of Withdrawal - Otter Tail Power Company East Devils Lake Outlet Pumping  
Station Public Convenience & Necessity  
Case No. PU-11-542**

Dear Mr. Nitschke:

Enclosed for filing are the original and seven (7) copies of Otter Tail Power Company's 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](mailto:bgerhardson@otpco.com).

Very truly yours,

/s/ BRUCE GERHARDSON  
Bruce Gerhardson  
Associate General Counsel

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

*An Equal Opportunity Employer*

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Notice of Withdrawal  
Otter Tail Power Company

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Notice of Withdrawal

Otter Tail Power Company

STATE OF MINNESOTA     )  
  ) SS.  
COUNTY OF OTTER TAIL )

AFFIDAVIT OF SERVICE

**RE: Otter Tail Power Company East Devils Lake Outlet Pumping Station Public  
Convenience & Necessity  
Case No. PU-11-542**

I, Wendi A. Olson, being first duly sworn on oath, deposes and says: that on the 16th day of September, 2011, I served the attached **Notice of Withdrawal** on Mr. Darrell Nitschke and the North Dakota Public Service Commission by e-mail and over-night mail and to all other persons listed below by U.S. mail.

Gerad C. Paul  
Senior Attorney  
Minnkota Power Cooperative, Inc.  
1822 Mill Rd, PO Box 13200  
Grand Forks, ND 58208-3200

/s/ WENDI A. OLSON

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Subscribed and sworn to before me this  
16th day of September, 2011.

/s/ PENNY MICHELLE MOSHER

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Penny Michelle Mosher  
Notary Public, My Commission Expires on January 31, 2015.

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

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

**Case No. PU-11-542**

**NOTICE OF WITHDRAWAL**

Otter Tail Power Company ("Otter Tail") files with the Public Service Commission ("Commission") pursuant to N.D. Admin.C. § 49-02-02-07 notice of withdrawal of its application in this proceeding to extend electric service to the North Dakota State Water Commission at its Devils Lake East Outlet Project, with a location more particularly described in the application ("Water Commission Project"). 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. No hearing has been held or convened in this proceeding.

On April 6, 2011, the Commission approved a motion acknowledging a similar notice of withdrawal in *Montana-Dakota Utilities Co. City of Kenmare-Ward County Public Convenience and Necessity*, Case No. PU-11-37. In that case, Montana-Dakota Utilities Co. filed a Notice of Withdrawal of an Application for a Certificate of Public Convenience and Necessity on the grounds that the Commission does not have jurisdiction under N.D.C.C. Title 49 over the extension of service to the State of North Dakota or its political subdivisions. This notice repeats the explanation of the grounds for withdrawal made by Montana-Dakota in that case.

## **Background**

On July 29, 2011, Otter Tail filed an application for an order and a certificate of public convenience and necessity authorizing Otter Tail to extend electric service to the Water Commission Project. A notice of opportunity for hearing was issued by the Commission on August 24, 2011 indicating comments or protests should be filed on or before September 26, 2011. No response or protest has been filed as of the date of this notice.

On September 15, 2011, Otter Tail received a letter from the State Water Commission confirming its decision to contract with Otter Tail for the provision of power to the Water Commission Project and requesting that Otter Tail withdraw the application in this matter. (Letter attached as Exhibit 1). Consistent with the Water Commission's request, Otter Tail is providing this notice of its withdrawal of the application, or in the alternative, requesting an order of dismissal of the application, on the grounds the Public Service Commission does not have jurisdiction under N.D. C.C. Title 49 over the extension of electric service by Otter Tail to the State Water Commission.

### **Legal Basis for Withdrawal of Application**

As was explained in MDU's notice of withdrawal in Case No. PU-11-37, the North Dakota Supreme Court has consistently held the Public Service Commission does not have jurisdiction over utility services provided by a public utility to the State of North Dakota or its political subdivisions. In Western Electric Co. v. City of Jamestown, 47 N.D. 157, 181 NW 363 (1921) a dispute existed between the City of Jamestown and Western Electric Co. regarding electric rates that were established under a 1902 ordinance for city pumping service. Western sought to recover additional revenue for

electric service furnished to the City of Jamestown after 1919 pursuant to rates set forth in the Company's tariff. Western argued that by enactment of the Public Utilities Act in 1919, currently N.D.C. C. Chapter 49, the State of North Dakota, through what was then the Board of Railroad Commissioners, assumed full regulation and control concerning rates and charges for all public utilities and therefore Western was required to furnish electric service to the City at Western's tariff rates approved by the Board. The Supreme Court held that while the Public Utilities Act granted the Board regulatory ratemaking jurisdiction over public utilities, the Act did not deprive a city of its powers and privileges to create or enforce a franchise or the rates charged for the provision of electric service to the city in consideration for the franchise. Id. at 367-368. Accordingly, the Board's regulatory authority did not extend to the electric rates between Western and the City.

In Chrysler Light & Power Co. v. City of Belfield, 58 N.D. 33, 224 N.W. 871 (1929), a similar issue was presented. In 1915, the Village of Belfield granted a franchise to George Chrysler which was subsequently assigned to Chrysler Light & Power Company. The franchise included terms and conditions by which Chrysler would furnish electricity to the village at rates specified in the franchise. The Village subsequently incorporated and in 1920 Chrysler filed an application with the Board of Railroad Commissioners for an increase in the rates charged for electric service to the City of Belfield and its inhabitants. In response to the application, the Board set rates to be charged by Chrysler and the City paid the tariff rates until 1927 when it refused to pay rates above those specified in the 1915 franchise. In its opinion, the Supreme Court noted the power conferred upon the City to contract for street lighting for the City at a

certain fixed rate is quite different from the power to regulate the rates of an electric power company doing business within the City; in contracting for the provision of electricity for street lighting purposes, the City is acting in its own interest as a legal entity. Id. at 875. The Court held the Board of Railroad Commissioners had only such powers to regulate rates of public utilities as had been conferred upon it by the Legislature and the Public Utilities Act of 1919 did not cover any authority upon the Board to interfere with the rates for electric service furnished by a utility to a City when such rates were fixed by contract in the franchise granted by the city to the electric company. Id.

In 1957 the Supreme Court addressed a dispute between the City of Grafton, which operated a municipal electric power system, and Otter Tail Power Company regarding the provision of electric service to the North Dakota State Board of Administration for the State School of Grafton. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197 (ND 1957). In 1955, Otter Tail entered into an agreement with the Board of Administration to furnish supplemental electricity to the State School of Grafton. The service was to be provided over a transmission line constructed by the Board of Administration between a substation to be built by the Board and Otter Tail's transmission line facilities. The City of Grafton had previously provided electric service to the State School and filed a complaint against Otter Tail with the Commission seeking an order requiring Otter Tail to cease and desist from supplying service to the School. Following the hearing, the Commission issued an order directing Otter Tail to cease and desist from furnishing electric service to the School. On appeal, the District Court reversed the order of the Commission and the City of Grafton appealed to the Supreme

Court. On appeal, the City argued: (1) the Board of Administration could only contract with public utilities in accordance with rules and regulations of the Commission; and (2) the Commission could properly direct Otter Tail to cease and desist from furnishing electricity to be conveyed over a line erected and maintained in contravention of the constitutional powers of the City. Upon review, the Supreme Court repeated its holding in Chrysler that the commission has only such powers as have been conferred upon it by the Legislature. Id. at 201. The Court also recited from what is essentially now N.D.C.C. § 49-02-01.1 which in its current form states: "Nothing in this chapter or in chapter 49-21 authorizes the commission to make any order affecting rates, contracts, services rendered, adequacy, or sufficiency of facilities, or the rules or regulations of any public utility owned and operated by the state or by any city, county, township, or other political subdivision of the state . . ." The Court noted the statute indicated an intention on the part of the Legislature to, in large measure, withhold from the Commission jurisdiction and authority over public utilities owned and operated by the State. Id. at 202. The Court recognized the power plant, with the transmission line erected by the Board of Administration between the State School and Otter Tail, was not a public utility but only a facility for the exclusive use of the State School. The Court stated, however, "that the statute has some bearing as indicating a policy on the part of the Legislature to withhold from the Public Service 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 Court further recognized the statutory construction rule that statutes that tend to encroach upon the affairs of the government receive a strict interpretation favorable to the public and in the absence of express provision or necessary

implication, the sovereign remains unaffected. Id. at 203. In its holding on the first issue presented by the City of Grafton to require the State to comply with the regulations and orders of the Public Service Commission, the Court held:

“We find no provisions of the law which vest in the Public Service Commission power to interfere with the lawful conduct of the Board of Administration including the making and carrying out of contracts for the purchase of commodities reasonably necessary for the operation of the institution under its control. Such a commodity is light and power.”

On the City's second issue, the Court held that the Commission's jurisdiction over public utilities could not restrain the State's power to operate its facilities and therefore, the Public Service Commission had no authority to order Otter Tail to cease and desist from furnishing electric power to the Board of Administration. The Court held the Public Service Commission's order was beyond its authority and directed dismissal of the City's complaint before the Commission.

In 1965 the Public Service Commission issued an order to Montana-Dakota and the City of Williston to show cause why the rates charged by Montana-Dakota to the City for electric service to the City's facilities were not unjust, unreasonable, and unjustly discriminatory. Following hearing, the Commission concluded the rates were unreasonable and that a higher rate previously filed with and approved by the Commission was reasonable and should be charged to the City. On appeal, an argument was made by Northern States Power Company, as amicus curiae, that a decision by the Board of Railroad Commissioners that was not appealed following the Court's decision in Western Electric v. City of Jamestown, supra, provided the Commission with jurisdiction to determine the reasonableness of rates charged to a municipality whether or not they were part of a franchise. NSP argued that 1929 legislation which allowed a city

the authority to enter into contracts to furnish electric service to the city, but which included a provision that nothing within the statute deprived the Board of Railroad Commissioners of any of its existing regulatory powers with reference to such contract rates, effectively overruled the Court's decision in Western. The Public Service Commission argued that its jurisdiction extended to all the rates of public utilities, including contract rates to municipalities, and that no utility could discriminate through its contract rates by providing any locality undue or unreasonable preference or advantages. The Supreme Court rejected both arguments holding the 1929 legislation did not change the Court's earlier rulings and the Commission had no jurisdiction over electric service under contracts with cities.

The above line of cases was most recently noted in Otter Tail Power Company, North Dakota Public Service Commission, 354 N.W.2d 701 (N.D. 1984) in which the Court recognized the holding from these cases, that the PSC cannot interfere with or encroach upon the state's affairs, is consistent with federal court cases cited on the issue of federal preemption.

### **Conclusion**

In summary, the above cases hold the Legislature did not bestow upon the Public Service Commission authority to interfere with contracts for services between a public utility on one hand, and the State of North Dakota or its political subdivisions on the other hand. While the holdings in these cases dealt primarily with issues regarding rates for services, the holding in City of Grafton v. Otter Tail Power Company, supra, recognized the Commission does not have any jurisdiction to interfere with such contracts for utility service, directly or indirectly.

In the present case, the North Dakota State Water Commission is a State Agency assigned the duty of managing the State's water supply. The State Water Commission is authorized to enter into contracts for the purchase of commodities reasonably necessary for the operation of facilities necessary for managing the State's water supply. The statutory authority under N.D.C.C. § 49-02-01.1 and the Supreme Court precedent in City of Grafton v. Otter Tail Power Company, cited above, reflect the policy on the part of the legislature to withhold from the Public Service Commission authority to control the production, transmission and use of electric power by the sovereign State of North Dakota and its agencies, including the State Water Commission.

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. The authority to require that Otter Tail obtain such a certificate of public convenience and necessity would necessarily include the power to deny such a certificate and thereby deny the Water Commission the right to negotiate terms and conditions for the provision of electric service with the provider of its choice. Such a limitation would be in direct conflict with the limitations on the Commission's jurisdiction set forth in N.D.C.C. § 49-02-01 in the same manner as though the Commission sought to prohibit Otter Tail's service to the Water Commission.

For the foregoing reasons, Otter Tail withdraws, pursuant to N.D. Admin.C. § 69-02-02-07(2), its application for a certificate of public convenience and necessity to serve the Water Commission's Devils Lake East Pumping Station. Alternatively, Otter Tail requests the Public Service Commission to dismiss Otter Tail's application on grounds

that the Public Service Commission lacks jurisdiction over the electric service provided  
by Otter Tail to the North Dakota State Water Commission.

Respectfully submitted this 16th day of September, 2011.

OTTER TAIL POWER COMPANY

By:  /s/ BRUCE GERHARDSON

Bruce Gerhardson  
Associate General Counsel  
215 South Cascade Street  
Fergus Falls MN 56537  
(218) 739-8475



## North Dakota State Water Commission

900 EAST BOULEVARD AVENUE, DEPT 770 • BISMARCK, NORTH DAKOTA 58505-0850  
701-328-2750 • TDD 701-328-2750 • FAX 701-328-3696 • INTERNET: <http://swc.nd.gov>

September 15, 2011

Scott Sigette  
Otter Tail Power Company  
524 Fifth Ave. S  
Devils Lake, ND 58301

Re: East Devils Lake Outlet Project - Electric Service

Mr. Sigette:

As a result of discussions with Otter Tail Power Company, it is our understanding that as a State agency, the Water Commission can make the determination of which utility offers the best overall value in providing power to State owned facilities without Public Service Commission (PSC) approval. We would like Otter Tail Power Company to provide the power for the East Devils Lake Outlet Project, and based on our understanding that the PSC does not need to approve this service, we request you withdraw the application submitted to the PSC.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Sando". The signature is fluid and cursive, with a long horizontal stroke at the end.

Todd Sando, P.E.  
Chief Engineer and Secretary

TS/BE:416-15