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November 30, 2011

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**OTTER TAIL POWER COMPANY v NODAK ELECTRIC COOPERATIVE INC.
CASE NO. PU-11-654**

Dear Darrell:

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

1. Original and seven copies of the Brief of Nodak Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss; and
2. 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
lat

Enclosures

By electronic filing and first class mail

cc: Gerad C. Paul
Bruce Gerhardson, Associate General Counsel, Otter Tail Power Company
Al Wahl, Administrative Law Judge

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**Brief of Nodak Electric Cooperative, Inc. responding
to Otter Tail's Motion to Dismiss**

the rural electric cooperative serving the area, Nodak's, request for a hearing on the application. This typical conflict has some atypical features.

Otter Tail withdrew its application in Case No. PU-11-542, asserting "... 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 Commission acknowledged Otter Tail's withdrawal despite Nodak's intervening request for a hearing on the application. The Commission did not rule on Otter Tail's alternative motion "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."

This conflict is presented in Nodak's complaint under N.D.C.C. §§ 49-03-01.4 and 49-03-05 that Otter Tail threatens to and is about to begin construction of an extension of its public utility plant and system without having first obtained a certificate of public convenience and necessity.

In addition to the atypical procedural aspects of the case, this conflict is factually unusual because Otter Tail's application in Case No. PU-11-542 shows it seeks to make this construction far from any city and over 5 miles from Otter Tail's nearest electric lines.

Otter Tail's assertion in Case No. PU-11-542 that the Commission lacks jurisdiction is repeated in its answer and its motion to dismiss in Case No. PU-11-654.

Procedural Background

On July 29, 2011, Otter Tail filed an application under N.D.C.C. Ch. 49-03 for authority to extend its service 29,000 feet to the North Dakota State Water Commission's East Devils Lake Outlet Pumping Station in the NW¼ of Section 8, Twp

151 N, R 62 W, Benson County, North Dakota (the Pumping Station). PSC Case No. PU-11-542.

On August 24, 2011, the Commission issued a Notice of Opportunity for Hearing in Case No. PU-11-542.

On September 16, 2011, Otter Tail filed a "Notice of Withdrawal" of its application in Case No. PU-11-542 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."

On September 19, 2011, Nodak requested a hearing on Otter Tail's application in Case No. PU-11-542.

On October 10, 2011, Nodak filed a complaint alleging that Otter Tail threatens to and is about to begin the construction of an extension of its public utility plant and system to serve the Pumping Station without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and that construction by Otter Tail without first obtaining a certificate is a violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5.

On October 14, 2011, Otter Tail filed an answer to Nodak's complaint, stating "...OTP specifically denies that a Certificate of Public Convenience and Necessity is required to supply electric service pursuant to a request from the North Dakota State Water Commission to provide service to its East Devils Lake Outlet Pumping Station" and "OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the contract between the North Dakota State Water Commission and

OTP to provide electric service to the East Devils Lake Outlet Pumping Station....”

Answer ¶¶ IV and XI.

On October 26, 2011, the Commission acknowledged the withdrawal by Otter Tail of its application for a certificate of public convenience and necessity to extend electric service to the East Devils Lake Outlet Pumping Station in Case No. PU-11-542.

On October 26, 2011, the Commission found the October 10, 2011, complaint filed by Nodak in Case No. PU-11-654 states a prima face case and moved to serve the complaint on Otter Tail.

On November 1, 2011, the Commission served Nodak’s complaint in Case No. PU-11-654 on Otter Tail.

On November 1, 2011, Otter Tail filed a motion to dismiss the complaint in Case No. PU-11-654 and a brief in support of the motion.

Facts of the Case

The pleadings establish the following pro forma facts:

1. Nodak is a “rural electric cooperative” under N.D.C.C. § 49-03-01.5(6). Nodak is an interested electric cooperative corporation under ND.C.C. § 49-03-05. Complaint, ¶ 1; Answer ¶¶ II and V. (Answer ¶ II might be understood as denying Nodak’s status as an “interested” electric cooperative, but Nodak’s interest is admitted by Otter Tail’s Answer ¶ V, admitting Complaint ¶ 5.).
2. Otter Tail is an “electric public utility” under N.D.C.C. 49-03-01.5(2). Complaint, ¶ 2; Answer ¶ III.
3. The place to be served is not located within the corporate limits of any municipality. Complaint, ¶ 4; Answer ¶ V.

4. The place to be served is located in Nodak's service area. Complaint ¶ 5; Answer ¶ V.
5. On July 29, 2011, Otter Tail Power filed an application under N.D.C.C. Ch. 49-03 for authority to extend service to the place to be served. Complaint, ¶ 6; Answer ¶ VI.
6. On September 16, 2011, Otter Tail filed a notice of withdrawal of its application in PSC Case No. PU-11-542. Complaint, ¶ 6; Answer ¶ VI.

Otter Tail denied the central fact alleged by Nodak:

Otter Tail threatens to and is about to begin the construction of an extension of its public utility plant and system in the NW¼ of Section 8, Twp 151 N, R 62 W, Benson County, North Dakota (the place to be served), without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction.

Complaint, ¶ 3; Answer ¶¶ I and IV.

Answer ¶ I is a general denial. Answer ¶ IV does not specifically deny the allegation about construction; it "specifically denies that a Certificate of Public Convenience and Necessity is required to supply electric service pursuant to a request from the North Dakota State Water Commission to provide service to its East Devils Lake Outlet Pumping Station." This is not a denial of Nodak's allegation of facts; it is a statement of Otter Tail's legal position.

The central fact - that Otter Tail threatens to and is about to begin the construction of an extension of its public utility plant and system - is deemed admitted for purposes of Otter Tail's motion to dismiss. "We construe the complaint in the light

most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint.” Ziegelmann v. DaimlerChrysler Corp. 2002 N.D. 134, ¶ 5; 649 N.W.2d 556. Otter Tail’s brief (p. 3) cites and quotes this same case and paragraph regarding principles applied on a motion to dismiss. See also Perry Center, Inc. v. Heitkamp, 1998 ND 78, ¶ 42; 576 N.W.2d 505, 515.

Otter Tail’s brief in support of its motion to dismiss refers to the background in Case No. PU-11-542 as “necessary to provide the framework for understanding the origin of this action.” Otter Tail brief, p. 1. The brief refers to some documents in that case; one that was included as an exhibit attached to Otter Tail’s motion documents. As a result of presenting matters outside the pleadings, Otter Tail’s motion for dismissal under N.D.R.Civ.P. Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56. See N.D.R.Civ.P. Rule 12 (d). If there are no genuine issues as to material facts, judgment may be entered as a matter of a law. N.D.R.Civ.P. Rule 56(c).

Under N.D. Admin. Code 69-02-05-08, the Commission may take notice of any fact in its records and files. Otter Tail’s application and notice of withdrawal in Case No. PU-11-542 show the central fact that Otter Tail threatens to and is about to begin the construction of an extension of its public utility plant and system to supply electric service to the Devils Lake East Outlet Pumping Station without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and service. Otter Tail’s documents in Case No. PU-11-542 showing this central fact include:

Otter Tail’s request “that this matter be expedited in order that Otter Tail can take the necessary steps to construct the facilities that are required for service to commence

by the spring of 2012. To meet that schedule, there are construction activities and procurements that will be required in the fall of 2011.” (July 29 application letter.)

Correspondence from the State Water Commission referring to “discussions with Otter Tail” leading the Water Commission to an “understanding that the PSC does not need to approve this service.” (September 16, 2011, notice of withdrawal.)

This correspondence is also presented by Otter Tail as Exhibit A attached to its motion to dismiss the complaint in Case No. PU-11-654.

Certified copies of these documents are attached to Nodak’s Brief. (Original certificates attached to brief filed with the executive secretary; copies attached to all other copies of the brief.)

These documents from Case No. PU-11-542, Otter Tail’s reference to the documents in its brief, and the principle that a motion to dismiss operates to admit alleged facts combine to establish for purposes of the pending motion the central fact that Otter Tail threatens to and is about to begin the construction of an extension of its public utility plant and system without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction, as alleged in Nodak’s complaint, ¶ 3.

The Devils Lake East Outlet Pumping Station

“Devils Lake is a 125,000 acre lake in northeastern North Dakota. The lake is located within the Hudson Bay drainage basin, but it has no natural outlet and currently is not hydrologically connected to any other surface waters in the Hudson Bay basin. Devils Lake is about fifteen miles from the Sheyenne River, which is a tributary to the Red River. The Sheyenne River generally flows in a southeasterly direction and forms

Lake Ashtabula at the Bald Hill Dam, which is about 270 miles upstream from the Sheyenne River's confluence with the Red River. The Red River forms the boundary between North Dakota and Minnesota and flows north across the Canadian border into Lake Winnipeg in Manitoba, which in turn drains into the Hudson Bay. Because Devils Lake has no natural outlet, the water level of the lake generally increases during wet periods and decreases during dry periods. Since 1993, the Devils Lake area has received above normal precipitation, and Devils Lake has risen nearly 25 feet in elevation, which has resulted in the flooding and the destruction or relocation of numerous homes, businesses, and roads near Devils Lake. A three-pronged approach has been developed to provide relief from the flooding, including infrastructure protection, upper-basin water storage, and an outlet to the Sheyenne River. ... In 1999, the North Dakota Legislature authorized the construction of a state outlet project. See 1999 N.D. Sess. Laws ch. 535, § 3." People to Save the Sheyenne River v. N.D. Department of Health, 2005 N.D 104, ¶¶ 2, 3, & 5, 697 N.W.2d 319.

The Territorial Integrity Act

Before enactment of the Territorial Integrity Act in 1965, there had been a series of disputes about which supplier of electricity was entitled to serve a customer in a rural area. See, e.g., Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d 47 (N.D. 1958); and Williams Elec. Coop. v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956).

Before 1965, both rural electric cooperatives and electric public utilities were legally authorized to provide service in rural areas. Rural electric cooperatives were

authorized to serve in "rural areas." N.D.C.C. § 10-13-03. An electric public utility was permitted to extend its system into any area "contiguous" to areas already served by the company. 49-0301 N.D.R.C. 1953 Supp. As the old law was interpreted, almost any area was "contiguous." Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d 47 (N.D. 1958); Williams Elec. Coop. v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956). Similarly, it was beyond the statutory power of the Commission to order Otter Tail to cease and desist from supplying electric service to a location in the City of Grafton. City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1957).

In 1965, the North Dakota Legislature enacted legislation to provide ". . . limitations on electric public utilities serving customers in designated areas." S.L. 1965, Ch. 319, codified as N.D.C.C. §§ 49-03-01 through 49-03-01.5. The designated areas are those areas "beyond or outside of the corporate limits of any municipality." N.D.C.C. § 49-03-01.1. The "electric public utilities" limited by the 1965 law are privately owned suppliers of electricity, such as Otter Tail. Rural electric cooperatives such as Nodak are not limited by the 1965 law. N.D.C.C. § 49-03-01.5. This statute is commonly called the Territorial Integrity Act. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 418 (N.D. 1967).

The Territorial Integrity Act provides two limitations on electric public utilities, a limitation on construction and a limitation on service. Electric public utilities' construction of extensions and service outside municipalities are prohibited:

"...unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer."

N.D.C.C § 49-03-01.1.

Under the 1965 Act and after the cases of the 1950s (Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d 47 (N.D. 1958); Williams Elec. Coop. v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956), & City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1957)), an electric public utility may not construct an extension of its plant, system, transmission or distribution lines and may not serve any customer outside the limits of any municipality unless it has obtained an order from the commission authorizing such extension and service. The law has the effect to preserve the territorial integrity of the rural service areas of rural electric cooperatives because rural area extensions by regulated electric public utilities are limited, but rural area extensions of service by rural electric cooperatives are not limited.

The Territorial Integrity Act was enacted with a legislative intent to change the results of the permissive interpretation of the "contiguous" area standard, Application of Otter Tail Power Co., 169 N.W.2d 415, 417 (N.D. 1969). "The primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity." Cass County Elec. Coop. v. Northern States Power Co., 419 N.W.2d 181, 184-185 (N.D. 1988). See also Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d 587, 590 (N.D. 1995).

"Under our statutory scheme, electric public utilities must, with few exceptions, secure a certificate of public convenience and necessity from the PSC in order to extend their electric distribution facilities. [citations omitted]. On the other hand, electric cooperatives are largely unregulated in the sense that they have the ability to expand their electrical services without having to first obtain a certificate of public convenience and necessity. [citations omitted]."

Northern States Power Co v. Public Service Commission, 452 N.W.2d 340, 344. (N.D. 1990).

Now, 46 years after the Territorial Integrity Act was enacted, Otter Tail denies that a Certificate of Public Convenience and Necessity is required to extend its facilities to supply electric service to a customer in a rural area. Otter Tail asserts it is immune from the Commission's jurisdiction under the Act, immune because the customer at the place to be served is an agency of the State, the State Water Commission. The claim of immunity by Otter Tail is claimed to be supported by the decision in Grafton v. Otter Tail decided in 1957, before enactment of the Territorial Integrity Act. Answer ¶¶ IV and XI.

Customer Preference

"Customer preference" is a factor in cases under the Territorial Integrity Act.

Before adoption of the Territorial Integrity Act, territorial disputes were usually settled by the customer's choice. See Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d at 589 and Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d at 50 (" . . . since it is in the territory served by both, the customer could choose which service he wanted."). See also City of Grafton v. Otter Tail Power Co., 86 N.W.2d at 203, where the Supreme Court found no provisions in the pre-TIA law to empower the Public Service Commission to interfere with the State Board's contracting with Otter Tail to provide standby electric service for the Grafton State School, choosing Otter Tail rather than Grafton's municipal electric system.

After adoption of the Territorial Integrity Act, customer choice or preference has a different status in cases where a customer requests an electric public utility to extend its service into a rural area served by a rural electric cooperative.

". . . [C]ustomer preference does not govern the Commission in its decision but subjects the customer's preference for a regulated public

utility service to an inquiry and decision by the Commission on the question of public convenience and necessity."

Application of Montana-Dakota Utilities Co., 219 N.W.2d 174, 181 (N.D. 1974).

In the electric public utilities' constitutional challenge to the Territorial Integrity Act in 1963, they argued that the potential of customers' preference for regulated utilities' service in rural areas had status as a constitutional right. The Supreme Court's answer was:

". . . the contention that the law disregards customer preference is without merit."

Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d at 423.

The claimed constitutional status of customer preference was also considered in 1974 in Application of Montana-Dakota Utilities Co., 219 N.W.2d 174. In that case, the customer took an active role as a party, claiming "a constitutional right to receive electric power from a regulated public utility when he so chooses." 219 N.W.2d at 179. The Court reiterated there is no such constitutional right.

In another of the early cases under the new Territorial Integrity Act, Otter Tail argued the customer's preference to be served by it should determine that a certificate of public convenience and necessity should be granted. The Court said:

"While under circumstances as here presented customer preference should be considered, there are a number of other factors which also must be considered in determining whether the application of Otter Tail for a certificate of public convenience and necessity should be granted."

Application of Otter Tail, 169 N.W.2d 415, 418 (N.D. 1969). The status of customer preference was further explained in another Otter Tail case:

"While we have previously said that customer preference should be considered, we never have held that it is controlling In rural areas, our decisions indicate, customer preference is a minor consideration"

Customer preference, therefore, invokes consideration by the Public Service Commission, but it is not to be a controlling factor It is the *public* convenience and necessity, after all, with which the Commission is concerned, not private preference."

Tri-County Elect. Coop. v Elkin, 224 N.W.2d 785, 792 (N.D. 1974).

The most recent Supreme Court case under the TIA involving Otter Tail reiterated and reinforced the Public Service Commission's prominent authority to control an electric public utility's construction of an extension of its plant and system and the minor status of customer preference.

"[T]he Territorial Integrity Act implicitly gives preference to the interests of the public in general over the preference of a particular electric customer to have a certain supplier furnish it with electricity."

Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (hereafter referred to as "Application of Otter Tail 1990")

Otter Tail's Affirmative Defense and Motion to Dismiss – Sovereign Immunity

Despite all this history, Otter Tail asserts that the Water Commission has a controlling customer preference for electric service at the Devils Lake East Outlet Pumping station to be furnished by Otter Tail. Otter Tail does not assert the Water Commission's preference is a controlling factor in the Public Service Commission's determination of public convenience and necessity under the TIA. Otter Tail makes a more extreme assertion, that the Water Commission's preference immunizes Otter Tail from the Public Service Commission's jurisdiction under the Territorial Integrity Act. Public convenience and necessity are non-issues, according to Otter Tail.

". . . OTP specifically denies that a Certificate of Public Convenience and Necessity is required to supply electric service pursuant to a request from the North Dakota State Water Commission to provide service to its East Devils Lake Outlet

Pumping Station” and “OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the contract between the North Dakota State Water Commission and OTP to provide electric service to the East Devils Lake Outlet Pumping Station pursuant to the North Dakota Supreme Court's precedent in City of Grafton v. Ottertail Power Co., 86 N.W.2d 197 (N.D. 1957).” Answer ¶¶ IV and XI. (Other cases cited in Otter Tail's brief regarding rates in contracts between utilities and municipalities are not pertinent, as recognized in Otter Tail's notice of withdrawal (p.6) of its application in Case No. PU-11-542.) The motion to dismiss (p. 3) asserts “... the Commission does not have regulatory authority to control the production, transmission and use by the sovereign state of North Dakota and its agencies, including the State Water Commission's contract with OTP to provide electric service to the East Devils Lake Pumping Station.”

Otter Tail's Sovereign Immunity Defense is Overruled by the Territorial Integrity Act and Precedents Under the Act.

The Territorial Integrity Act and all the precedents of the past 46 years, particularly Application of Otter Tail 1990., 451 N.W.2d 95, 105, overrule Otter Tail's 2011 sovereign immunity defense that Otter Tail claims is supported by City of Grafton v. Ottertail Power Co., 86 N.W.2d 197 (hereafter Grafton case, opinion, or decision).

The Grafton case predates enactment of the Territorial Integrity Act. Otter Tail's theory of sovereign immunity was also asserted in later cases under the TIA and the sovereign immunity defense was rejected by the Public Service Commission and by the Supreme Court after enactment of the Territorial Integrity Act in 1965 and after the 1957 Grafton case – twice. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) and Application of Otter Tail 1990, 451 N.W.2d 95, 105 (N.D. 1990).

The Grafton decision was an appeal from the Public Service Commission's order directing Otter Tail to cease and desist from supplying electric power to the Grafton State School. The Board of Administration was a party to the proceeding, at Otter Tail's request. The order was issued after hearing on a complaint in which the city of Grafton contended the agreement between Otter Tail and the State Board violated statutes, rules and regulations of the Public Service Commission. The Grafton opinion does not show what statutes were relied on by the city of Grafton in its complaint or by the Commission in its order.

There is some factual similarity between the Grafton and the Pumping Station case. The Board of Administration of North Dakota made an agreement for Otter Tail to provide standby electric service at the State School in Grafton. The City of Grafton had a municipal electric system that previously provided some electric service to the State School. The City of Grafton objected to the new arrangement. The North Dakota State Water Commission has requested Otter Tail to provide electric service to the Water Commission's Devils Lake East Outlet Pumping Station. Nodak objects to that arrangement. However, the factual dissimilarities are more significant and are of substantial legal consequence.

One factual dissimilarity between the cases is that in Grafton the State had its own electric generating plant which furnished most of the electric energy normally needed at the State School in Grafton. The legal consequence of this fact was the Board's operation of the plant, including the standby arrangement with Otter Tail, was deemed beyond the Public Service Commission's authority under section 49-0213 of the 1943 North Dakota Revised Code (now N.D.C.C. § 49-02-01.1), the same statute

that withheld Commission jurisdiction over Grafton's municipal utility. Grafton, 86 N.W.2d at 202.

This factual dissimilarity is related to a second and more significant factual dissimilarity between the cases: The Grafton case did not involve any construction or extension of transmission or distribution lines by Otter Tail unlike the current case. "The service agreed to be furnished by the company is to be rendered at the company's transmission line. The Board of Administration agreed to construct a substation at the school and build a transmission line from it to the company's transmission line on the west side of the road, a distance of approximately one-fourth mile, and to install suitable metering equipment. The company agreed to make such changes in its transmission line as were necessary to provide a suitable structure on which the line from the school could be constructed to the company's line, and the company was to receive \$1030 to compensate it for making these changes in its facilities." Grafton, 86 N.W.2d at 199.

This factual difference has legal consequences in our Pumping Station case because the Territorial Integrity Act imposes two limitations, on construction and on service. The Grafton case did not involve Otter Tail's construction to extend its transmission or distribution lines. In our Pumping Station case, Otter Tail proposes construction to extend its transmission or distribution lines from a point on Otter Tail's lines over 5 miles distant from the Pumping Station. Application in Case PU-11-542. The application does not describe a construction route or the line miles distance of construction.

Otter Tail particularly relies on these words of the Grafton case, quoted in Otter's notice of withdrawal in Case No. PU-11-542 (p. 6) and referred to throughout its brief in support of the motion to dismiss:

"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 institutions under its control. Such a commodity is light and power."

Grafton, 86 N.W.2d at 203. This follows the Grafton court's introductory statement:

"The Public Service Commission is a constitutional body. ... The powers and duties of its members are prescribed by law. ... The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can initiate no public policies of its own. It can act in no field which the Legislature has not authorized it to enter."

Id. at 202. This remains the law after the enactment of the Territorial Integrity Act. Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d 587, 589 (N.D. 1995). ("The PSC has only the powers and duties conferred upon it by the Legislature.")

Interpreting the statutory powers and jurisdiction over public utilities conferred on the Public Service Commission, the Supreme Court concluded the order in Grafton was "beyond the power of the Commission to issue." 86 N.W.2d at 206. The Grafton decision in 1957 was consistent with other decisions of that era. Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d 47 (N.D. 1958); Williams Elec. Coop. v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956).

There is a decisive legal difference between the 1957 Grafton case and the 2011 Pumping Station case. In Grafton, there were no provisions in the law empowering the Commission to regulate electric public utilities' construction such as Otter Tail proposes in the Pumping Station case. In 2011 – ever since 1965 - there are powers conferred

on the Commission by the Legislature. In the 2011 Pumping Station Case it is not beyond the power of the Commission, it is within the power of the Commission to regulate electric public utilities' construction such as Otter Tail proposed in its application in Case No. PU-11-542. The Commission's powers under the Territorial Integrity Act and all the precedents cited above are unaffected by claims of sovereign immunity, under Application of Otter Tail 1990., 451 N.W.2d 95, 105.

In the Pumping Station case now before the Commission, 54 years after Grafton and 46 years after enactment of the Territorial Integrity Act, North Dakota's Public Service Commission and its courts do find provisions in the law supporting Nodak's complaint and not supporting Otter Tail's affirmative defense and motion to dismiss. These include:

N.D.C.C. § 49-03-01.1. Limitation on electric transmission and distribution lines, extensions, and service by electric public utilities.

No electric public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation, nor shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, nor shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer."

N.D.C.C. § 49-03-01.4. Enforcement of act.

If any electric public utility or electric transmission provider violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric cooperative, the commission, after complaint, notice, and hearing as provided in chapter 28-32, shall make its order restraining and enjoining the electric public

utility or electric transmission provider from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe any terms and conditions as the commission deems reasonable and proper.

...

N.D.C.C. § 49-03-05. Complaint upon violation of chapter.

If a public utility or electric transmission provider engages or is about to engage in construction or operation as described in this chapter without having secured a certificate of public convenience and necessity as required by the provisions of this chapter, or if a public utility or electric transmission provider constructs or extends its line, plant, or system, or supplies, or offers to supply electric service in violation of this chapter, any interested municipality, public authority, utility, electric cooperative corporation, or person, may file a complaint with the commission. The commission acting on the complaint, or upon its own motion without complaint, with or without notice, may make its order requiring the public utility complained of to cease and desist from the construction or operation or other prohibited activity until the further order of the commission. Upon hearing had after due notice given, the commission shall make an order with respect to the public utility and prescribe terms and conditions as are just and reasonable.

Under the Territorial Integrity Act the Commission has power and authority:

- 1.) to restrain Otter Tail from constructing an extension of its plant and system and its electric transmission or distribution lines outside the limits of any municipality, and
- 2.) to restrain Otter Tail from serving any customer outside the limits of any municipality, if Otter Tail has not obtained an order from the Commission authorizing such extension and service.

The Territorial Integrity Act confers on the Public Service Commission authority over Otter Tail's activities, including its construction or extension of transmission and distribution lines and its service to the Pumping Station, despite Otter Tail's claim that such an order would interfere with the Water Commission's making a contract for the

purchase of electric service. Regardless of the purpose of Otter Tail's intended construction, to supply electric service to a State agency, Otter Tail's construction is prohibited unless and until it obtains an order from the commission authorizing such extension and service. The Commission's authority does not turn on the identity of the customer and Otter Tail's performance of any contract to serve any customer in a rural area outside the corporate limits of any municipality requires its compliance with N.D.C.C. § 49-03-01.1.

Otter Tail's obligation to comply with N.D.C.C. § 49-03-01.1 is exemplified by Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶¶ 27 & 28, 736 N.W.2d 788. Bismarck and Montana-Dakota argued the Commission's assertion of jurisdiction on Capital's complaint against Montana-Dakota interfered with the city's franchise authority. In interpreting franchise contracts, the Court's interpretation favored the public's interest in preventing unreasonable duplication of facilities while recognizing a municipality's constitutional authority to grant a franchise. Even though Bismarck had authority to issue a franchise, Montana-Dakota's activities under its franchise contract were subject to the Commission's jurisdiction under the Territorial Integrity Act.

Additionally, there are remarkable factual and legal similarities between the Pumping Station case and Application of Otter Tail 1990. In the Application of Otter Tail 1990, Otter Tail filed a "Notice of Intent to Extend Service" to a customer on an Indian reservation. In response, the Commission notified Otter Tail that the Commission 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 Commission acted Otter Tail extended service in defiance of the Commission's jurisdiction, without formal

notice that Otter Tail wanted to withdraw its application. In its 1990 case, Otter Tail asserted the Commission did not have jurisdiction because assumption of jurisdiction would unlawfully interfere with the Indian tribe's sovereign rights of self-government. The Commission's decision that it had jurisdiction was ultimately upheld by the North Dakota Supreme Court.

In the 2011 Pumping Station case, Otter Tail lacks standing to assert the Public Service Commission lacks jurisdiction over service to the Water Commission under sovereign immunity concepts. Otter Tail has no sovereign immunity and it is not the Water Commission's surrogate to assert sovereign immunity on behalf of either Otter Tail or the Water Commission.

Both the Public Service Commission and the Supreme Court addressed and dismissed Otter Tail's sovereign immunity claims made in 1990 now repeated by Otter Tail's Answer (¶¶ IV and XI) and the motion to dismiss Nodak's complaint in the 2011 Pumping Station case.

"Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe's sovereign rights of self-government. ... Otter Tail had no standing to advance the Tribe's self-government interests.

...

"Otter Tail could not assert the self-government interests of the Tribe to defeat the PSC's authority over Otter Tail's activities."

Application of Otter Tail 1990, 451 N.W.2d at 97-98.

Assuming Otter Tail had standing to assert the immunity defense, in Application of Otter Tail 1990 the court addressed the immunity defense and concluded that the Commission still had jurisdiction. Rather than describe what the court concluded regarding jurisdiction, the opinion is quoted with some editorial license, replacing

references to the facts of the 1990 case with facts of the 2011 Pumping Station case.

Those instances are indicated by use of *italics*. Internal citations are omitted.

“Even assuming that Otter Tail had standing to assert the self-government interests of the *Water Commission*, we nevertheless conclude that the PSC had jurisdiction in this case.

...

“The question is whether the PSC had authority over activities by Otter Tail, a *non-governmental entity, on the Water Commission’s Pumping Station site*.

...

“*The Water Commission* made no appearance in these proceedings to explain how its *Devils Lake East Outlet project* would be threatened by the PSC’s exercise of jurisdiction.

...

“Otter Tail’s theoretical arguments fall short of demonstrating any serious effect on the *Water Commission’s economic interests*.”

Id. at 98-106.

How might Otter Tail avoid the clear import of Application of Otter Tail 1990 as overruling Otter Tail’s 2011 immunity defense that Otter Tail claims is supported by the old pre-TIA case, Grafton? Perhaps by arguing the Grafton case is on point because the Grafton case involved the claimed sovereign immunity of a State agency whereas Application of Otter Tail 1990 involved the claimed sovereign immunity of an Indian tribe that has a different quality of sovereignty. That is, as the saying goes, a distinction without a difference. Whatever is the status of the purported sovereign, immunity may be asserted only by the sovereign entity, not by Otter Tail. The State Water Commission is “the proper party to press the potential of harm to its governmental interests.” Application of Otter Tail 1990, 451 N.W.2d at 97. Standing is a threshold issue. Otter Tail cannot pass the threshold. The Water Commission might assert

sovereign immunity or unique powers under Title 61, but Otter Tail cannot assert the Water Commission's interests to defeat the Public Service Commission's authority over Otter Tail's activities. (The Board of Administration was a party in Grafton and the City of Bismarck was a party in Capital Elec. Coop. v City of Bismarck, 2007 ND 128.) Even assuming that Otter Tail has standing to assert sovereign immunity interests of the State Water Commission, nevertheless the Public Service Commission has jurisdiction. Application of Otter Tail 1990, 451 N.W.2d at 98.

As noted above, there is a significant factual distinction between the Grafton and Pumping Station cases that does make a difference. Grafton involved only service by Otter Tail, not construction. Otter Tail's application in Case No. PU-11-542 requested authorization of service and construction of an extension of approximately 29,000 feet. Otter Tail's answer and its motion to dismiss the complaint in Case No. PU-11-654 address only service, not construction. Even if the Grafton case were a viable precedent that the Public Service Commission lacks power to "interfere" with a contract between Otter Tail and another State agency, that case does not support Otter Tail's position that another State agency's authority to contract to purchase electric service includes a power to authorize an electric public utility to construct an extension of its transmission or distribution lines to deliver electricity and certainly not an extension from a point on Otter Tail's lines over 5 miles distant from the Pumping Station and perhaps many miles more in construction that zigs and zags. If there is any inter-agency interference involved in the Pumping Station case, it is Otter Tail's assertion that the Water Commission has a power to interfere with the Public Service Commission's

exercise of its explicit authority under the Territorial Integrity Act, authority over electric public utilities' extensions of electric transmission and distribution lines in rural areas.

It strains credulity to consider Otter Tail's argument that the Water Commission has exercised a power to defeat the Public Service Commission's authority over Otter Tail's activities. If it is true - and it is true - that the Public Service Commission has only the powers conferred on it by the Legislature and it can act in no field which the Legislature has not authorized it to enter, it is also true that the Water Commission has only the powers conferred on it and the Water Commission can act in no field which the Legislature has not authorized it to enter. The Legislature has not conferred on the Water Commission the power to authorize Otter Tail to construct extensions of its system into rural areas. The power to authorize or to decline to authorize Otter Tail to construct extensions of its system into the electric cooperatives territory is a power the Legislature has conferred on the Public Service Commission under the Territorial Integrity Act.

The State Water Commission is not a party to this action asserting immunity on its own behalf or on behalf of Otter Tail. The Water Commission's executive secretary's correspondence attached to Otter Tail's motion as exhibit A, if admitted as evidence, does not amount to an appearance. Application of Otter Tail 1990, 451 N.W.2d at 97. The Water Commission has not asserted a power to immunize Otter Tail or to supersede, pre-empt, over-ride or otherwise interfere with the Public Service Commission's exercise of its jurisdiction over Otter Tail's activities. The Water Commission has not asserted that its preference to purchase electric service from Otter Tail defeats the Public Service Commission's jurisdiction over Otter Tail's activities.

Even if the Water Commission were to appear and assert sovereign immunity, nevertheless the Public Service Commission has jurisdiction. Id. at 98.

Both Grafton and Application of Otter Tail 1990 and all the other cases after enactment of the Territorial Integrity Act were decided by statutory interpretation. The Century Code establishes the law of the State and its provisions are to be liberally construed with a view to effecting its objects and promoting justice. N.D.C.C. Ch. 1-02-01.

“In construing the Act, our duty is to ascertain the intent of the Legislature. (Citation) Statutes must be construed as a whole to determine legislative intent, and they must be harmonized, if possible, to give full force and effect to each provision.”

Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d at 589 (N.D. 1995);

Cass County Elec. Coop. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988).

The Supreme Court has ascertained the legislative intent.

“The primary purpose of the Territorial Integrity Act was ‘to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity.’ (citation omitted.) Although customer preference is a factor to be considered in deciding whether public convenience and necessity requires the extension of a utility system in a rural area, it is a ‘minor consideration’ which ‘cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice.’ (citation omitted).”

Application of Otter Tail 1990, 451 N.W.2d at 104. The cited cases and others include

Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d 587, 590 (N.D. 1995),

Cass County Elec. Coop. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988),

Tri-County Elect. Coop. v. Elkin, 224 N.W.2d 785 (N.D. 1974), Application of Montana-

Dakota Utilities Co., 219 N.W.2d 174 (N.D. 1974), and Application of Otter Tail 1969.

The Territorial Integrity Act “explicitly gives the PSC jurisdiction.” Capital Elec. Coop. v. Public Service Commission, 534 N.W.2d at 591. There is no explicit exemption or immunity in the TIA where the customer is a State agency or any other governmental entity. If the Legislature intended an exemption or immunity as asserted by Otter Tail, the Legislature would surely have been explicit to enact that intent, as it did in N.D.C.C. § 49-21.1-05. No such exemption was enacted in 1965, and no such exemption has been enacted by amendment of the Territorial Integrity Act after 1965 or after the decision in Application of Otter Tail 1990. (Nodak agrees with Otter Tail’s brief, pp. 10-11, that S.L. 2005 ch. 394 adding N.D.C.C. § 49-03-06 to the Act does not affect this case. Otter Tail and Nodak have not agreed which party should provide electric service to the Devils Lake East Outlet Pumping Station.)

Otter Tail’s affirmative defense and motion to dismiss are based on the 1957 Grafton case. “The City of Grafton precedent is controlling in the present case.” (Otter Tail’s November 1, brief, p. 4; Answer ¶¶ IV and XI.) Grafton does not support Otter Tail’s sovereign immunity defense in 2011. Otter Tail’s reliance on Grafton in 2011 implies the bizarre notion that the 1957 Grafton opinion established a fixed and immutable principle that the Legislature is forever barred from conferring on the Public Service Commission the power and authority to regulate an electric public utility’s extension of service to a State agency in a rural area. The words of Otter Tail’s brief do not go quite that far. Otter Tail recognizes the Grafton decision was based on interpretation of statutes in effect in 1957. (Otter Tail’s November 1, 2011, brief, pp. 4-7.) The process of statutory interpretation exercised in Grafton in 1957 leads to rejection of the sovereign immunity defense in 2011. Again employing some editorial

license and adopting the structure of the decisive paragraph in Grafton, 86 N.W.2d at 203:

Here we have a state agency and an explicit statute, the Public Service Commission and the Territorial Integrity Act that is clearly designed to regulate privately owned utilities for the benefit and protection of the public welfare. On the other hand we have an agency of the state, the State Water Commission, to which has been assigned the duty and responsibility of managing and operating a certain flood control project and as an incident to that management and operation has control of property of the state reasonably necessary for the operation of that project, the Devils Lake East Outlet Pumping Station. We find no provisions in the law which vests in the State Water Commission power to interfere with the lawful exercise of the Public Service Commission's jurisdiction under the Territorial Integrity Act, including jurisdiction over Otter Tail's construction of extensions of its plant or system or extensions of its transmission and distribution lines for carrying out of contracts for the sale of electric energy to the State Water Commission. We find provisions of the law, the Territorial Integrity Act, which confer on the Public Service Commission the power to regulate Otter Tail's activities to supply electric service to the Water Commission at a place to be served outside the limits of a municipality. In this case, and in accordance with Application of Otter Tail 1990 and other precedents of the Supreme Court under the Territorial Integrity Act, we conclude that Otter Tail does not have standing to assert the interests of the Water Commission to defeat the Public Service Commission's authority over Otter Tail's activities. Even assuming that Otter Tail has standing to assert the

interests of the Water Commission, we nevertheless conclude that the Public Service Commission has jurisdiction in this case.

Analysis of the Territorial Integrity Act and all the precedents leads inexorably to the conclusion that Otter Tail's reliance on Grafton is unavailing and the sovereign immunity defense is nothing more than a variation of the customer preference argument that is "without merit." Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d at 423. The Commission should reject Otter Tail's "thinly veiled attempt" to "leapfrog" past the Commission's jurisdiction into Nodak's service area, over 5 miles from Otter Tail's nearest electric lines. (Quoted words taken from Northern States Power v. Public Service Commission, 452 N.W.2d at 345 and Williams v. Montana-Dakota, 79 N.W.2d at 520.) If customer preference is a minor factor under the Territorial Integrity Act, it cannot also be a major factor that defeats the Commission's jurisdiction under the Act. Whether sovereign immunity is asserted by Otter Tail or by the Water Commission, the Public Service Commission has jurisdiction. Application of Otter Tail 1990.

Cases outside N.D.C.C Title 49

The conclusion that the Territorial Integrity Act and all the post-Grafton cases decided under the Act lead to rejection of Otter Tail's sovereign immunity defense is supported by cases in legal arenas other than the Public Service Commission's jurisdiction under N.D.C.C. Title 49.

People to Save the Sheyenne River v. Department of Health, 2005 N.D. 104, 697 N.W.2d 319, is the principal supporting case. The North Dakota Supreme Court affirmed a decision by the North Dakota Department of Health to grant the North Dakota State Water Commission a permit for an outlet to discharge water from Devils Lake into

the Sheyenne River. The relevance of that decision to the Water Commission's Pumping Station case before the Public Service Commission is self evident. The management of Devils Lake flooding is certainly important, but the Legislature's delegation of responsibility to the Water Commission under N.D.C.C. Title 61 does not include a power to pollute waters. The Water Commission must comply and did comply with statutes enacting environmental policies (N.D.C.C. Ch. 61-28) within the Health Department's jurisdiction. Likewise, the Water Commission is not immune from statutes enacting economic policies inherent in the Territorial Integrity Act, and the Water Commission has no power to immunize Otter Tail from the jurisdiction of the Public Service Commission under the Act.

The Water Commission cannot ignore the Legislature's delegation of authority to any other agency. The Water Commission did not ignore environmental issues when it applied for a permit from the Department of Health. Just as the Water Commission's application for a permit from the Department of Health accomplished the coordination of those two agencies' powers and responsibilities, so also the powers and responsibilities of the Water Commission must be coordinated the Public Service Commission's powers and responsibilities under Title 49.

Why the Water Commission did not insist that Otter Tail comply with North Dakota's statutes administered by the Public Service Commission - just as the Water Commission complied with statutes administered by the Department of Health (or as the Water Commission should expect any contractor to comply with regulatory statutes) - is puzzling. (N.D.C.C. § 1-06-03, cited in Otter Tail's brief (p. 6) is not prospective *carte blanche* for the Water Commission to act without regard to other statutes. N.D.C.C. § 1-

06-03 is one of 7 sections in Chapter 1-06 resolving uncertainty about the validity of past official acts.) Whatever the explanation for the Water Commission's action or inaction regarding Otter Tail's compliance or non-compliance with the Territorial Integrity Act, Otter Tail cannot ignore the jurisdiction of the Public Service Commission when it does business with any State agency in its status as a consumer of electric energy. Under N.D.C.C. § 9-08-01, a contract is "unlawful" if it is contrary to an express provision of law. Otter Tail's performance of any contract to serve any customer in a rural area outside the corporate limits of any municipality requires its compliance with N.D.C.C. § 49-03-01.1.

Otter Tail's sovereign immunity theory is not based on any statute but on words taken from the opinion in Grafton, a theory that one State agency cannot interfere with another, a concept related to the judge made rule of sovereign immunity from tort responsibility. Not only can and should judges overrule outmoded judicial concepts of immunity, but legislators can and do modify judicial precedents affecting sovereign immunity. See Kitto v. Minot Park District, 224 N.W.2d 795 (N.D.1974) where the North Dakota Supreme Court overruled a long standing concept of sovereign immunity to which the Legislature responded by enacting N.D.C.C. Ch. 32-12.1. Just as the Legislature modified the new version of sovereign immunity announced in Kitto, so also the Legislature's enactment of the Territorial Integrity Act and the judicial decision in Application of Otter Tail 1990 overrule the theory of sovereign immunity that Otter Tail finds in the Grafton opinion.

Summary Judgment Should Be Entered Against Otter Tail

Otter Tail's motion to dismiss under N.D.R. Civ. Proc. Rule 12(b) must be treated

as a motion for summary judgment under Rule 56 as a result of presenting materials outside the pleadings. Rule 12 (d). Under Rule 56(c), “The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment, when appropriate, may be entered against the moving party.”

Otter Tail’s answer to Nodak’s complaint and its motion to dismiss including matters outside the pleadings in this case – materials from Case PU-11-542 – show that there is no genuine issue as to the central material fact in Case No. PU-11-654, the fact that Otter Tail threatens to and is about to construct an extension of its electric public utility plant and system to serve the State Water Commission’s Pumping Station without first obtaining from the Public Service Commission a certificate of public convenience and necessity. Under the Territorial Integrity Act, all the precedents and particularly Application of Otter Tail 1990, the moving party is not entitled to judgment as a matter of law to dismiss the complaint against that activity.

Otter Tail’s only basis for its affirmative defense and motion to dismiss is a theory of sovereign immunity, a theory that Otter Tail lacks standing to assert under Application of Otter Tail 1990. If asserted by a party with standing, the immunity defense would also be rejected, under Application of Otter Tail 1990. Otter Tail’s motion shows no facts in support of its motion. There is no genuine issue as to any material fact. Because material facts are undisputed, it is appropriate for summary judgment to be entered against Otter Tail in favor of Nodak under Rule 56(c). See Spier v. Power Concrete, 304 N.W.2d 68 (N.D. 1981).

CONCLUSION

In the Grafton case, the City of Grafton complained that the Otter Tail's sale and delivery of electrical energy to the Board of Administration was in violation of statutes and rules of the Public Service Commission. In 1957, the Supreme Court found no provisions in the law to support the complaint and concluded that a cease and desist order was "beyond the power of the Commission to issue." 86 N.W.2d at 201, 203, 205.

In Application of Otter Tail 1990, after enactment of the Territorial Integrity Act, the Supreme Court determined Otter Tail has no standing to assert sovereign immunity "... to defeat the PSC's authority over Otter Tail's activities" and "[e]ven assuming that Otter Tail had standing ... we nevertheless conclude that the PSC had jurisdiction in this case" and "[t]he question is whether the PSC had authority over activities by Otter Tail." Application of Otter Tail 1990, 451 N.W.2d at 97-99.

The issue is not as stated by Otter Tail's brief (p.3) "[w]hether the Public Service Commission has regulatory authority over the North Dakota State Water Commission's contract with Otter Tail Power Company for the purchase of electric service for the East Devils Lake Outlet Pumping Station". The issue is better stated by Otter Tail's answer (¶ IV) to Nodak's complaint: "OTP specifically denies that a Certificate of Public Convenience and Necessity is required to supply electric service pursuant to a request from the North Dakota State Water Commission to provide service to its East Devils Lake Outlet Pumping Station," essentially repeating the stated reasons for Otter Tail's notice of withdrawal of its application in Case No. PU-11-542. The issue is best stated by the court in Application of Otter Tail 1990: "The question is whether the PSC had authority over activities by Otter Tail." 451 N.W.2d at 99.

Nodak does not complain about any action of the State Water Commission. The subject of the complaint is Otter Tail's activities and the issue is - as stated by Otter Tail - whether a Certificate of Public Convenience and Necessity is required to supply electric service pursuant to a request from the North Dakota State Water Commission to provide service to its East Devils Lake Outlet Pumping Station.

Under precedents of the Commission and of the North Dakota Supreme Court, the Public Service Commission does not take a narrow view of its jurisdiction under the Territorial Integrity Act. See Capital Elect. Coop.v. Montana-Dakota Utilities Co., PSC Case No. PU-05-551, Order ¶ 10, affirmed at Capital Elec. Coop. v. City of Bismarck, 2007 N.D. 128, 736 N.W.2d 788. Under the Territorial Integrity Act, the Legislature has conferred on the Commission power and authority over Otter Tail's activities. The 2011 Pumping Station Case it is not beyond the power of the Commission, it is within the power of the Commission to regulate electric public utilities' construction such as Otter Tail proposed in its application in Case No. PU-11-542.

As a matter of law, a Certificate of Public Convenience and Necessity is required for Otter Tail to construct an extension of its electric transmission and distribution lines to supply electric service to the North Dakota State Water Commission at its East Devils Lake Outlet Pumping Station. The Commission should assert and exercise its jurisdiction over Otter Tail's activities in rural areas, under the Territorial Integrity Act and all the precedents from Montana-Dakota v. Johanneson in 1967 through Capital v. Bismarck in 2007, and particularly Application of Otter Tail 1990.

The Commission should deny Otter Tail's motion to dismiss and enter its order under N.D.C.C. §§ 49-03-01.4 and 49-03-05 and N.D.R.Civ.P. Rule 56 restraining and

enjoining Otter Tail from constructing an extension of its electric public utility plant and system to serve the North Dakota State Water Commission's East Devils Lake Outlet Pumping Station in the NW¼ of Section 8, Twp 151 N, R 62 W, Benson County, North Dakota, without first obtaining from the Public Service Commission a certificate that public convenience and necessity under N.D.C.C. § 49-03-01.1 require such construction and operation.

Dated this 30 day of November, 2011.

PRINGLE & HERIGSTAD, P.C.

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Nodak Electric Cooperative, Inc.,)	
)	
Complainant,)	AFFIDAVIT OF SERVICE
vs.)	
)	Case No. PU-11-654
Otter Tail Power Company)	
)	
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 30 day of November, 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. **BRIEF OF NODAK ELECTRIC COOPERATIVE, INC. RESPONDING TO OTTER TAIL'S MOTION TO DISMISS.**

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

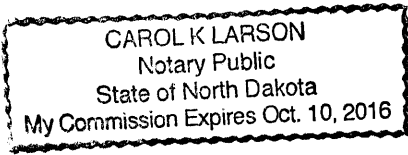
Bruce Gerhardson
Associate General Counsel
PO Box 496
Fergus Falls, MN 56538-049
bgerhardson@otpc.com

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



LaRae A. Thomas

SUBSCRIBED AND SWORN to before me this 30 day of November, 2011.



Carol K Larson

Notary Public
For the State of North Dakota
My Commission expires: _____