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December 12, 2011

Mr. Darrell Nitschke
Executive Secretary and Director of Administration
North Dakota Public Service Commission
State Capitol
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0408

RE: Nodak Electric Cooperative, Inc. vs. Otter Tail Power Company
Case No. PU-11-654
OAH File No. 20110436

Enclosed for filing in the above-referenced matter is Otter Tail Power Company's ("OTP's") Reply Brief to Nodak Electric Cooperative's ("Nodak's") opposition to OTP's Motion to Dismiss Nodak's Complaint and a Notice of Appearance by Mr. Paul Sanderson of Zuger Kirmis & Smith.

The original and seven copies will be hand-delivered.

If you have any questions, please contact me at 218-739-8475 or at bgerhardson@otpc.com.

Sincerely,

/s/ Bruce Gerhardson
Bruce Gerhardson
Associate General Counsel

dm
Enclosure
By electronic filing and hand-delivery
c: Carol K. Larson
Gerad C. Paul
Al Wahl

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

Nodak Electric Cooperative, Inc.,)	
)	
Complainant,)	REPLY BRIEF IN SUPPORT
)	OF MOTION TO DISMISS
vs.)	
)	
Otter Tail Power Company,)	
)	Case No. PU-11-654
Respondent.)	OAH File No. 20110436

This Reply Brief responds to the arguments raised by Nodak Electric Cooperative, Inc. (“Nodak”) in its opposition to Otter Tail Power Company’s (“OTP’s”) Motion to Dismiss Nodak’s Complaint. OTP’s Motion should be granted because Nodak cannot cite any support for the position that the legislature has conferred upon the Public Service Commission (“Commission”) authority over a North Dakota State Water Commission contract for electric service. As explained in OTP’s Initial Brief in support of this Motion, the North Dakota Supreme Court has ruled that such authority was not conferred upon the Commission. Because Nodak has not provided support for a contrary ruling in this case, its complaint against OTP should be dismissed.

I. The issue of whether the Public Service Commission has regulatory authority over the North Dakota State Water Commission’s contract with OTP for the purchase of electric service for the East Devils Lake Outlet Pumping Station is a question of law that is ripe for adjudication.

Both OTP and Nodak agree the issue in this case is a question of law. Nodak concedes in its Brief that there are no genuine issues of material fact in dispute in this case. See Nodak’s Brief Responding to Motion to Dismiss, page 31. Absent any questions of material fact in this case, the issue to be decided is a question of law that is ripe for determination by the Commission. See Lucas v. Potter, 2008 ND 160, ¶ 8, 755 N.W.2d 88 (stating judgment is appropriate if there are no genuine issues of material fact or if the only issues to be resolved are questions of law).

The only issue in dispute essentially boils down to the legal determination of whether the enactment of the Territorial Integrity Act (“TIA”) in 1965 granted the Commission the power to regulate contracts entered into by State agencies. Nodak concedes in its Brief that the Commission would not have had the power to interfere with the Water Commission’s contract prior to 1965, as evidenced by the Grafton opinion. However, Nodak argues the enactment of the TIA in 1965 granted the Commission the authority to regulate a contract for electric service between the Water Commission and OTP.

Nodak fails to cite any provision in the TIA which would authorize the Commission to assert regulatory authority over the Water Commission’s contracts for purchase of electric service. Nodak also fails to address the legal standard for statutes that attempt to restrict the powers of the state government. The North Dakota Supreme Court set forth the following standard:

General words or language of a statute that tends to injuriously 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.

City of Grafton v. Ottertail Power Company, 86 N.W.2d 197, 203 (N.D. 1957) (citing Sutherland Statutory Construction § 6301, 3rd ed.). There is not a single provision in the TIA which expressly grants power to the Commission to regulate contracts entered into by the State of North Dakota or its agencies for the purchase of electric service for use at its facilities. Nodak’s assertion that the TIA somehow grants the Commission regulatory authority over State contracts for the purchase of electric service is incorrect.

Realizing that the TIA fails to provide any regulatory authority over State contracts, Nodak attempts to argue that even though the Commission would not have authority over the Water Commission’s contracts, it does have regulatory authority over the actions of OTP and, specifically, the construction of the line extension to the Water Commission. This same argument was raised in the Grafton case when the Supreme Court rejected the argument that while the Commission may not exercise control over the State School, it does have the power to regulate the conduct of OTP to the extent of directing it to cease and desist from furnishing power to the State School. City of Grafton, 86 N.W.2d at 203. Likewise in this case, if Nodak’s recommended limitations were placed on OTP, it would directly and fundamentally impact the

Water Commission's ability to contract for electric service. In essence, Nodak's position would allow the Commission to regulate through "back-door" what it could not do to the front. Any limitation on OTP's ability to provide electric service to the Water Commission's Devils Lake East End Pumping Station is in essence an interference with the Water Commission's contract and is prohibited under Grafton.

As indicated above, any TIA language argued by Nodak to create in the Commission the power to interfere with a Water Commission contract must receive a strict interpretation against the creation of such power. If the legislature had intended to confer upon the Commission new power over other state agencies when it enacted the TIA in 1965, surely it would have done so expressly, especially given the Supreme Court's ruling in the Grafton case just seven years prior. Since the legislature did not do so, the Grafton ruling remains the law.

II. Nodak's reliance on the Otter Tail (1990) case is misplaced.

Nodak spends a significant portion of its argument attempting to draw comparisons between the present case and the opinion in Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990). There are two significant flaws in Nodak's position. The first issue is that the facts and issues in present case are not analogous to the Otter Tail (1990) case. The issue in the present action is whether the Commission has the authority to regulate a contract between OTP and the State Water Commission. The issue in Otter Tail (1990) was whether tribal sovereign immunity prohibited the Commission from regulating service to the Tribe on the reservation. The Otter Tail (1990) case is factually distinguishable from the present action due to the unrelated issue that was decided in that case.

The other critical error in Nodak's reliance on the Otter Tail (1990) case is that the holding in that case has been overruled by the subsequent appellate history of the parties. The North Dakota Supreme Court concluded that that the Commission had regulatory authority over electric service provided to the tribe on the reservation. 451 N.W.2d at 107. However, following the Otter Tail (1990) opinion, the parties continued litigating this issue in a series of cases in federal court: Baker Electric Coop v. Otter Tail Power Co., 116 F.3d 1207 (8th Cir. 1997); Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995); and Baker Electric Coop v. Chaske, 28 F.3d 1466 (8th Cir. 1994).

Specifically, in the North Dakota Public Service Comm'n case, the court held that

the Tribe may by resolution or contract determine who is to supply electrical service to Tribal owned businesses located upon Indian owned or trust lands, without regard to the rate structure or other regulations of the North Dakota Public Service Commission, and the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service.

896 F.Supp. at 961 (noting the Public Service Commission did not appeal the holding of the district court). Nodak's reliance on legal precedent that has been subsequently overruled is erroneous.

The Otter Tail (1990) opinion is factually and legally distinguishable from the present case, is no longer good law, and should not be considered as binding legal precedent over this case.

Likewise, Nodak's argument that OTP is asserting the sovereign immunity of the State Water Commission is erroneous. OTP has never asserted that the doctrine of sovereign immunity is applicable to this dispute or asserted it as a defense in this case. Sovereign immunity is defined as a government or state's immunity from being sued without its consent. See A.P.I., Inc. v. United States, 430 N.W.2d 333, 335 (N.D. 1988); see also Black's Law Dictionary, p. 331 (2d pocket ed.). Either Nodak misinterpreted OTP's argument or it misinterprets the law regarding sovereign immunity. Regardless, OTP is not asserting sovereign immunity as a defense in this action.

As discussed above, this case turns on an issue of agency authority—whether the legislature has conferred upon the Commission authority over the Water Commission's contract with Otter Tail for electric service. Because Nodak has not cited adequate support for a determination that the legislature has conferred such authority on the Commission, Nodak's complaint should be dismissed.

III. Customer preference is not at issue in the present case.

This is not a case in which OTP is asserting the customer preference factor as referenced in TIA cases. Nodak spends a great deal of time in its Brief setting forth the law regarding customer preference in TIA cases. Unfortunately, this was a wasted effort since the TIA does

not apply to the present case and there is no assertion of customer preference on the part of OTP. The Water Commission's contract with OTP to provide electric service to the Devils Lake East End Pumping Station is beyond the reach of the Commission's regulatory authority under the TIA, so customer preference is a non-issue.

IV. Conclusion.

The North Dakota State Water Commission has statutory authority to enter into contracts for the purchase of commodities reasonably necessary for the operation of facilities necessary for managing the State's water supply. In complying with that authority, the Water Commission has contracted with Otter Tail Power Company to provide electric service to East Devils Lake Outlet Pumping Station. Under North Dakota law, the acts of the State Water Commission are deemed valid. Pursuant to the Supreme Court precedent in City of Grafton v. Ottetail Power Company, 86 N.W.2d 197, indicating a policy on the part of the legislature to withhold from the Public Service Commission the 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, the Public Service Commission does not have regulatory authority over the contract entered into between the North Dakota State Water Commission and Otter Tail Power Company. Accordingly, Nodak Electric Cooperative, Inc.'s Complaint requesting the Public Service Commission exert regulatory authority over the contract should be dismissed.

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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA


Nodak Electric Cooperative, Inc.,)
)
Complainant,)
)
vs.)
)
Otter Tail Power Company,)
)
Respondent.)

NOTICE OF APPEARANCE

Case No. PU – 11 - 654

PLEASE TAKE NOTICE that Paul R. Sanderson and Zuger Kirmis and Smith hereby notify the Public Service Commission and Nodak Electric Cooperative, Inc., that he appears in this case as co-counsel on behalf of Respondent Otter Tail Power Company.

Dated this 12th day of December, 2011.

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