

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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

NOTICE OF APPEARANCE

Case No. PU – 11 - 701

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 16th day of January, 2012.

By: 
Paul R. Sanderson (ID# 05830)
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government. This power is an aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, an American Indian Tribe, limited only to the extent that such power has been specifically limited or withdrawn by federal law.” Id. at § 21.0101(1). The Tribal Utility Code was enacted pursuant to the sovereign tribal powers delegated to the Tribal Council under the Tribal Constitution. Id. at § 21.0101(4).

The Sky Dancer Casino is a gaming casino owned and operated by the Tribe and located on the Turtle Mountain Reservation. Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Sky Dancer Casino is located on Tribally-owned Trust land. See Exhibit A (Warranty Deed).

North Central is currently providing electric service to the Sky Dancer Casino. See Complaint. However, on November 23, 2011, the Tribal Council passed Resolution Number TMBC598-11-11 authorizing the Tribe to enter into a contract with OTP to provide electric service to the Sky Dancer Casino starting June 1, 2012. See Exhibit B (Tribal Resolution TMBC598-11-11).

On December 12, 2011, North Central filed a Complaint with the North Dakota Public Service Commission (“Commission”) seeking to enjoin OTP from constructing an extension of its public utility system to serve the Sky Dancer Casino. See Complaint. The basis for North Central’s Complaint was that the North Dakota Public Service Commission (“Commission”) has regulatory authority over OTP’s providing electric service to the Tribe on the Reservation under the Territorial Integrity Act pursuant to the North Dakota Supreme Court case Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as “Otter Tail (1990)”).

OTP served its Answer to North Central's Complaint on January 16, 2012. See Answer. OTP denied the Commission has any regulatory control over a federally recognized Indian Tribe's determination of who will provide electric service to Tribal-owned facilities located on Tribal land on the Reservation. Id. OTP's position is based the legal precedent set forth in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). Id.

ISSUE

Whether the Public Service Commission has regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company to supply electric service to the Tribally-owned Sky Dancer Casino located on Tribal Trust land within the exterior boundaries of the Turtle Mountain Reservation.

LAW AND ARGUMENT

OTP moves the Commission for an order dismissing North Central's Complaint because the Commission does not have regulatory authority over the Tribe's determination to permit OTP to provide electric service for the tribal-owned Sky Dancer Casino located on the Tribe's land within the exterior boundaries of the Turtle Mountain Reservation. OTP files the Motion to Dismiss as a supplemental pleading pursuant to N.D.C.C. § 28-32-21(1)(h).

A. Standard of Review.

OTP's Motion to Dismiss is brought pursuant to N.D.R.Civ.P. 12(b)(vi). "The purpose of a N.D.R.Civ.P. 12(b)(vi) motion is to test the legal sufficiency of the statement of the claim presented in the complaint." See Ziegelmann v. DaimlerChrysler Corp., 2002

ND 134, ¶ 5, 649 N.W.2d 556. A motion to dismiss a complaint under Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure should be granted "if it is disclosed with certainty the impossibility of proving a claim for which relief can be granted." *Id.* A judgment dismissing a complaint for failure to state a claim should be found if the court cannot "discern a potential for proof to support it." *Id.* If matters outside the pleadings are presented in support of a motion to dismiss under N.D.R.Civ.P. 12(b)(vi), the motion is treated as a motion for summary judgment under N.D.R.Civ.P. 56. Zutz v. Kamrowski, 2010 ND 155, ¶ 8, 787 N.W.2d 286.

B. An Indian Tribe may by resolution determine who is to supply electrical service to a Tribally-owned business located on Tribal land without regard to the regulations of the North Dakota Public Service Commission.

OTP seeks to dismiss North Central's Complaint because the current law provides that the Commission has no regulatory authority over an Indian Tribe's resolution determining who will provide electric service to a Tribally-owned facility located on Tribal land within the exterior boundaries of the Reservation. North Central's Complaint in this case is based upon its interpretation of the Otter Tail (1990) case. However, North Central's reliance upon the Otter Tail (1990) case is misplaced as it was overruled by the subsequent appellate history of the parties.

North Central erroneously relies upon the Otter Tail (1990) case as support for its claim that the Commission has regulatory authority over the Tribe's resolution to permit OTP to supply electric service to the Sky Dancer Casino. In the Otter Tail (1990) case, the North Dakota Supreme Court held that that the Commission had regulatory authority over OTP's electric service contract to provide service to the Devils Lake Sioux Tribe's facility

located on the reservation. 451 N.W.2d at 107. One of the key factors in the Supreme Court's decision was that the Devils Lake Sioux Tribe had not previously attempted any regulation of electric utilities. Id. at 101. The Court concluded that the Devils Lake Sioux Tribe did not have the authority through its inherent sovereignty to regulate electric service to its facilities. Id. at 103-04.

However, the Otter Tail (1990) holding was just the beginning of the legal dispute between OTP, the Commission, the Devils Lake Sioux Tribe, and the electric cooperatives. Following the Otter Tail (1990) opinion, the parties continued litigating the issue of the Commission's authority over the Tribe's electric service in a series of cases in federal court. See 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).

The issue of whether the Commission had regulatory authority over the Devils Lake Sioux Tribe's resolution permitting OTP to provide electric service to a Tribally-owned business located on Tribal land culminated in the North Dakota Public Service Comm'n case. 896 F.Supp. 955. Following the Otter Tail (1990) case, the Devils Lake Sioux Tribe brought a direct action against the Commission in federal court. Id. Prior to commencing its action against the Commission, the Devils Lake Sioux Tribe enacted a complex utility regulation scheme and claimed it had the sovereign power to regulate electric service on the reservation. Id. at 957. The court determined that the Tribe has the inherent sovereignty to contract with whomever it will for the provisions of electric service to its lands and businesses and such sovereignty takes precedence over power of the State of North

Dakota on the reservation. Id. (finding that where the service is to a Tribal business located on Tribal land, the necessary nexus between Tribal interests and inherent sovereignty is present). In the North Dakota Public Service Comm'n case, the North Dakota District 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. The Commission did not appeal the holding of the district court. The holding of the North Dakota Public Service Comm'n case is the current status of the law regarding the Commission's regulatory authority over Tribal resolutions for electric service to Tribal facilities located on the reservation. Id. The North Dakota Public Service Comm'n opinion effectively overruled the holding in the Otter Tail (1990) case.

In the present case, the Sky Dancer Casino is owned and operated by the Tribe on Tribal Trust land located on the Turtle Mountain Reservation. See Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Tribe passed a Resolution authorizing it to enter into a contract with OTP to provide electric service to the Sky Dancer Casino starting June 1, 2012. See Exhibit B. The inherent sovereignty of the Tribe to determine who will provide electric service to its facilities located on its land takes precedent over the right of the Commission to regulate OTP. North Dakota Public Service Comm'n, 896 F.Supp. at 957. The Commission has no regulatory authority over the Tribe's determination of who provides electric service to the Sky Dancer Casino. Id. at 961. Accordingly, North Central's Complaint seeking to have the Commission exercise

regulatory authority over OTP's agreement with the Tribe for service to the Sky Dancer Casino should be dismissed. Id.

North Central's Complaint asserts North Dakota's Territorial Integrity Act, N.D.C.C. Ch. 49-03, grants the Commission jurisdiction and regulatory authority over the OTP's agreement with the Tribe for electric service to the Sky Dancer Casino as evidence by the Otter Tail 1990 case. However, as previously outlined above, the Otter Tail (1990) opinion was overruled by the subsequent appellate history and is no longer good law. North Dakota Public Service Comm'n, 896 F.Supp. at 961. North Central's reliance on legal precedent that has been overruled is erroneous. The Commission litigated the same issue following the Otter Tail (1990) case. The end result of the Commission's subsequent litigation is that the Commission does not have regulatory authority over a Tribe's resolution for electrical service for Tribal owned businesses located upon Tribal lands. Id. The Otter Tail (1990) case should not be considered as binding legal precedent in this case. Accordingly, North Central's reliance on the Otter Tail 1990 case is erroneous and its Complaint should be dismissed.

In addition, the Otter Tail 1990 case is factually distinguishable from the present case. In Otter Tail 1990, one of the key factors the court relied upon was that the Devils Lake Sioux Tribe had not enacted any regulations governing electric utilities and it was the first time the Tribe attempted any regulation of the electric utilities. 451 N.W.2d at 101. However, prior to commencing an action against the Commission, the Devils Lake Sioux Tribe adopted a comprehensive set of electric utility regulatory ordinances which regulate the rates and service within the exterior boundaries of the Reservation. See North Dakota

Public Service Comm'n, 896 F.Supp. at 958-59.

In the present case, the Tribe has enacted a comprehensive regulatory scheme to regulate electric service on the Turtle Mountain Reservation. See Title 21, Turtle Mountain Tribal Code. The Tribe specifically found that the power to regulate public utilities on the reservation is an essential aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, limited only to the extent that such power has been specifically limited or withdrawn by federal law." See Turtle Mountain Tribal Code, § 21.0101(1). The Tribe's enactment of the Turtle Mountain Tribal Utility Code to regulate electric service on the Reservation is factually analogous to the North Dakota Public Service Comm'n case and distinguishable from the Otter Tail (1990) case. Because the Tribe has adopted its own regulatory code governing electric service on the Turtle Mountain Reservation, North Central's Complaint should be dismissed as the Commission has no regulatory authority over the Tribe's resolution permitting OTP to provide electric service to a Tribal facility located on Tribal land. See North Dakota Public Service Comm'n, 896 F.Supp. at 961.

CONCLUSION

Otter Tail Power Company respectfully requests the North Dakota Public Service Commission grant its Motion to Dismiss North Central Electric Cooperative, Inc.'s, Complaint because the Commission has no regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company to supply electric service to the Tribally-owned Sky Dancer Casino located on Tribal Trust land within the exterior boundaries of the Turtle Mountain Reservation. The Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with

whomever it will for the provisions of electric service to its lands and businesses. North Central's reliance on legal precedent that has been subsequently overruled provides no support for its Complaint.

Dated this 16th day of January, 2012.

By: /s/ Bruce Gerhardson
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Office of Indian Affairs
Apr 19 1941 24028

This Indenture, Made this 21st day of FEBRUARY in the year of our Lord
One Thousand Nine Hundred and Forty-one between Walter John Charlton, Unmarried

80965

whose postoffice address is 30 South Ninth Street, Minneapolis, Minn.

part Y of the first part, and United States of America in trust for the Indians of the Turtle Mountain Reservation whose postoffice address is Washington, D. C.

part Y of the second part;
WITNESSETH, That the said part Y of the first part, in consideration of the sum of Five Hundred and no/100 to him in hand paid by the said part Y of the second part, the receipt whereof is hereby acknowledged, do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said part Y of the second part, his SUCCESSORS and assigns, FOREVER, all that tract or parcel of land lying and being in the County of Rolette and State of North Dakota, to-wit: North Half of the Southwest Quarter of Section Thirty-four in Township One Hundred Sixty-two North of Range Seventy-one West of the Fifth Principal Meridian, North Dakota, containing eighty acres, more or less, according to the United States Government Survey thereof. (N 1/2 of SW 1/4 Sec. 34, Twp. 162, Rge. 71)

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said part Y of the second part, his SUCCESSORS and assigns, FOREVER. And the said Walter John Charlton part Y of the first part, for himself, his heirs, executors and administrators do hereby covenant with the said part Y of the second part, his SUCCESSORS and assigns that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in the manner aforesaid, that the same are free from all incumbrances.

Amount \$ 554

and the above bargained and granted lands and premises in the quiet and peaceable possession of the said part Y of the second part, his SUCCESSORS and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said part Y of the first part will Warrant and Defend.

IN TESTIMONY WHEREOF, the said part Y of the first part has herunto set his hand and seal the day and year next above written.

Signed, Sealed and Delivered in Presence of
Patricia Ellis
E. A. Laesilla
Walter John Charlton (SEAL)
(SEAL)
(SEAL)
(SEAL)

MINNESOTA
STATE OF MINNESOTA
County of Hennepin

On this 21st day of FEBRUARY A. D. 1941, before me personally appeared Walter John Charlton, Unmarried known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.



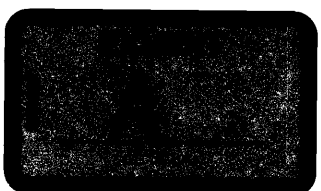
F. L. Durand
Notary Public, Hennepin County, Minn.
My commission expires August 11 1943

Delinquent
taxes and special assessments, or installments of special assessments paid) and transfer entered AUG 27 1941

By V.C.J. Deputy. Jas. H. Penny Auditor, Rolette County, North Dakota.

Filed for record this 27th day of August A. D. 1941 at 4:10 P. M. and recorded in Deed Record 28, on page 370

By [Signature] Deputy. [Signature] Register of Deeds.



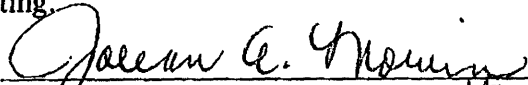
RESOLUTION NUMBER TMBC598-11-11 (*Revised) ELECTED AND CERTIFIED
GOVERNING BODY OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

- WHEREAS, the Turtle Mountain Band of Chippewa Indians, hereinafter referred to as the Tribe, is an unincorporated Band acting under a revised Constitution and By-Laws approved by the Secretary of the Interior on June 16th, 1959 and amendments thereto approved; and
- WHEREAS, Article IX (a) Section 1 of the Turtle Mountain Constitution and By-Laws empowers the Tribal Council with the authority to represent the Band and to negotiate with Federal, State, and Local Governments and with private persons; and
- WHEREAS, Article 1X (C) Section 10 of the Turtle Mountain Band Constitution and By-Laws as amended May 14th, 1990, and approved by the Secretary of the Interior on October 25th, 1990, empowers the Tribal Council with the authority to manage, lease, permit, or otherwise deal with Tribal land, interest in lands and other assets under Tribal Jurisdiction and to purchase or otherwise acquire lands, or interest in lands within and outside the boundaries of the Turtle Mountain Reservation in accordance with law, or dispose of any such lands or interest in lands authorized by law; and
- WHEREAS, Otter Tail is proposing to be the electric service provider at the Sky Dancer Casino and anything built or residing on the casino grounds; and
- WHEREAS, the start-up date for the Electric Service Agreement is June, 2012 and construction power would generally be obtained from existing facility, with one (1) meter; and
- WHEREAS, current cost savings/future cost savings, will be greater when new facility is up and running because of rate structure; now

THEREFORE BE IT RESOLVED that the Tribe is entering into a ten (10) *year Electric Service Agreement with Otter Tail Power Company to provide electric service to the Sky Dancer Casino and anything built or residing on the casino grounds and is hereby authorizing the Tribal Chairman to sign the agreement, with a starting date of June 1, 2012.

CERTIFICATION

I, the undersigned Tribal Secretary of the Turtle Mountain Band Chippewa Indians, do hereby certify that the Tribal Council is composed of nine (9) members of whom **nine (9)** constituting a quorum were present at a meeting duly called, convened and held on the 8th day of November, 2011, that the foregoing resolution was adopted by an affirmative vote of **five (5) in favor** - Representatives Curtis L. Poitra, Cindy Malaterre, Larry DeCoteau, Jeff 'BJ' Delorme and Zelma Peltier, three (3) absent-Representatives Mike Malaterre, Lorne Jay and Elmer Davis, Jr.; with the Chairman not voting.


Jolean A. Morin, Tribal Secretary 11/22/11

SIGNED INTO LAW/Dated this 23 day of November, 2011
 VETOED/Dated this ___ day of _____, 2011


Merle St. Claire, Chairman



BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)

Complainant,)

vs.)

Otter Tail Power Company,)

Respondent.)

AFFIDAVIT OF ELECTRONIC SERVICE

Case No. PU – 11 - 701

STATE OF NORTH DAKOTA)

: ss.

COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that: I am a United States citizen, over 18 years of age, and on January 17, 2012, I served a copy of the attached:

1. Notice of Appearance;
2. Notice of Motion to Dismiss;
3. Motion to Dismiss; and
4. Brief in Support of Otter Tail Power Company's Motion to Dismiss

by electronic mail upon counsel at the below e-mail addresses:

Debra L. Hoffarth

dhoffarth@srt.com



 Brenda Vitek

Subscribed and sworn to before me, today, January 17, 2012.



 Notary Public, State of North Dakota

