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February 13, 2012

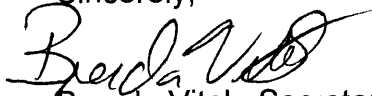
Mr. Darrell Nitschke  
Executive Secretary and Director of Administration  
North Dakota Public Service Commission  
State Capitol  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0408

**Re: North Central Electric Cooperative, Inc. v. Otter Tail Power Company  
Case No. PU-11-701**

Enclosed for filing in the above matter is an original and seven copies of the Reply Brief in Support of Otter Tail Power Company's Motion to Dismiss.

If you have any questions, please contact Paul Sanderson at 701-223-2711 or at [psanderson@zkslaw.com](mailto:psanderson@zkslaw.com).

Sincerely,

  
Brenda Vitek, Secretary to  
Paul Sanderson

Enclosure  
By electronic filing and hand-delivery

c: Debra L. Hoffarth (e-mail only)



**A. The Otter Tail 1990 case does not reflect the current state of the law.**

North Central's opposition to OTP's Motion to Dismiss is based solely on the precedent of the North Dakota Supreme Court's opinion in Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as "Otter Tail (1990)"). North Central's reliance on that case is misplaced and fails to recognize the significance of the federal cases that followed. North Centrals' arguments that OTP does not have adequate standing are based on their mistaken view that OTP is arguing for "sovereign immunity." That is not correct. OTP moved to dismiss North Central's Complaint because the Commission lacks jurisdiction over this matter. The determination of who is to provide electric service to the Casino is within the sovereign jurisdiction of the Tribe. For that reason, the Complaint should be dismissed.

Following the Otter Tail 1990 opinion, the parties, including OTP and the Commission, continued litigating the issue of service to a tribal facility. That litigation culminated in a concise determination on the question of when a tribe has jurisdiction over electric service — a determination that is directly applicable to this case. In the key case in that extensive line of cases, on remand from the Eight Circuit Court of Appeals, the North Dakota District Court articulated that the Tribe has the inherent sovereignty to contract with whomever it will for the provision of electric service to its lands and businesses and such sovereignty takes precedence over power of the State of North Dakota and the Commission acting pursuant to the Territorial Integrity Act:

**"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."**

Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955, 961 (D.N.D. 1995).

This is precisely what occurred in the present case. The Tribe, by resolution, determined who is to supply electrical service to a Tribal-owned business located on trust land. In such instances, the Commission may not issue sanctions against OTP for providing such service. North Central's Complaint is a request for such sanctions, so it must be dismissed. See id. As explained by the district court, this narrow exception to State regulatory jurisdiction protects the Tribe's sovereignty and authority to regulate consensual relationships between the Tribe and utilities, while protecting the political integrity, economic security, and health and welfare of the Tribe. See id. (citing Montana v. United States, 450 U.S. 544 (1981)).

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 determinations for electric service to Tribal facilities located on Tribal land. Id. It effectively overruled the holding in the Otter Tail (1990) case.

**B. The Commission lacks jurisdiction over the Tribe's determination as to the electric service provider to the Casino.**

One of North Central's main arguments in opposition to OTP's Motion is that OTP lacks standing to assert the Tribe's sovereign immunity claim. North Central misinterprets the premise of OTP's Motion. OTP is not raising the defense of sovereign immunity,<sup>1</sup> but rather that the Tribe is sovereign<sup>2</sup> over the electric service to its facility located on tribal-

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1 "Sovereign Immunity" is a doctrine which precludes bringing suit against the government without its consent. Black's Law Dictionary (1990).

2 A "Sovereign" is a person, body or state in which independent and supreme authority is vested. Black's Law Dictionary (1990).

trust land and therefore, the Commission lacks subject-matter jurisdiction over this matter.

Subject-matter jurisdiction is a court's power to hear and determine the general subject involved in the action. Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 9, 800 N.W.2d 842. When the jurisdictional facts are not in dispute, the question of subject-matter jurisdiction is a question of law. Id.; see also Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 8, 674 N.W.2d 9 (holding North Dakota courts do not have subject-matter jurisdiction over action brought against Indian defendant arising from actions on the reservation). Subject-matter jurisdiction issues may be raised by any party at any stage of the proceedings. Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 492-93 (N.D. 1989); North Dakota Game & Fish Dep't v. Brashears, 325 N.W.2d 671, 674 (N.D. 1982). The general rule is that proceedings conducted or decisions made by a court are legally void where there is an absence of jurisdiction over the subject matter. Center State Bank v. State Banking Bd., 276 N.W.2d 132, 134 (N.D. 1979). If subject-matter jurisdiction is lacking, a court is powerless to act and North Dakota Rule of Civil Procedure 12 compels the dismissal of the action. Trottier v. Bird, 2001 ND 177, ¶ 6, 635 N.W.2d 157.

In this case, because the Tribe is sovereign over the electric service to its facility located on Tribal-trust land, the Commission lacks subject-matter jurisdiction over this matter, and it must be dismissed. See North Dakota Public Service Comm'n, 896 F.Supp. at 961.

North Central also argues that OTP's Motion to Dismiss should be denied because part of OTP's electric system crosses State Highway 5. North Central erroneously argues that Highway 5 is State property subject to the jurisdiction of the Commission. North

Central's argument is in error for two reasons. First, it amounts to a request for the Commission to indirectly interfere with the Tribe's clear sovereign right to contract as it chooses for service to its facility. Secondly, contrary to North Central's argument, Highway 5 is not property of the State of North Dakota. Rather, the land is owned by the Tribe and the State has been given an easement. Winer, 2004 ND 21, at ¶ 20. Highways within an Indian reservation are considered Indian country as defined by Federal law. Id. at ¶ 12 (citing Gorneau v. Smith, 207 N.W.2d 256 (N.D. 1973)). North Central's attempt to confer jurisdiction to the Commission based upon the ownership of Highway 5 is misplaced.

Likewise, North Central's argument that the Gaming Compact between the Tribe and the State of North Dakota somehow is relevant to the jurisdictional determination at issue is equally misplaced. Contrary to North Central's argument, the Gaming Compact specifically provides that, "Nothing in this Compact shall be interpreted as extending the civil jurisdiction of the State of North Dakota or the Tribe." See North Central's Exhibit B, § 17.2. The Gaming Compact has no relevance over the Commission's lack of jurisdiction over OTP's contract with the Tribe to provide electric service to the Sky Dancer Casino. If anything, it further solidifies the Tribe's intent to assert its sovereignty over the facility.

The basis of OTP's Motion to Dismiss is that the Commission lacks jurisdiction over the contract between OTP and the Tribe to provide electric service to the Tribe's Casino located on Tribal-trust land. There are no material facts in dispute in the present case. The Tribe is a federally-recognized Indian tribe that owns and operates the Sky Dancer Casino, which is located on Tribal-trust land within the Turtle Mountain Reservation. As outlined in this Brief, the Tribe has sovereign jurisdiction to determine who is to supply electrical service to Tribal-owned businesses located upon Tribal-trust lands, without

regard to the regulations of the North Dakota Public Service Commission. See North Dakota Public Service Comm'n, 896 F.Supp. at 961. Accordingly, the Commission is without jurisdiction and OTP's Motion to Dismiss North Central's Complaint should be granted. See id.

### **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 jurisdiction 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.

Dated this 13th day of February, 2012.

By: /s/ Bruce Gerhardson  
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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 February 13, 2012, I served a copy of the attached:

Reply 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](mailto:dhoffarth@srt.com)

  
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Brenda Vitek

Subscribed and sworn to before me, today, February 13, 2012.

  
Notary Public, State of North Dakota

