

215 South Cascade Street
PO Box 496
Fergus Falls, Minnesota 56538-0496
218 739-8200
www.otpc.com (web site)



May 17, 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. vs. Otter Tail Power Company
Case No. PU-11-701**

Dear Mr. Nitschke:

Enclosed for filing in the above-referenced matter are an original and seven copies of Otter Tail Power Company's Proposed Findings of Fact, Conclusions of Law, and Order. This document was also submitted electronically to dnitschk@nd.gov and to ndpsc@nd.gov.

Sincerely,

/S/ BRUCE GERHARDSON

Bruce Gerhardson
Associate General Counsel

dm
Enclosures
By electronic filing and hand-delivery

c: Debra L. Hoffarth (e-mail only)
Judge Allen Hoberg (e-mail only)
Mark Gruman (e-mail only)
Larry Baer (e-mail only)
Rjay Brunkow (e-mail only)
Paul Sanderson (e-mail only)
Tracy Kolb (e-mail only)

On January 16, 2012, Otter Tail served its Answer to North Central's Complaint asserting the Turtle Mountain Band of Chippewa Indians ("Tribe") had exclusive jurisdiction over the determination of which provider is to supply electric service to the Sky Dancer Casino, a tribal owned facility located on tribal trust land.

On January 16, 2012, Otter Tail also served its Motion to Dismiss North Central's Complaint asserting the Commission lacks jurisdiction to Order the relief requested by North Central in its Complaint; specifically the Commission lacks jurisdiction to issue an Order that would deprive the Tribe of its authority to determine by resolution or contract who is to supply electrical service to a tribal owned business located upon Indian owned or trust lands.

On February 2, 2012, North Central served its Brief Responding to Otter Tail's Motion to Dismiss.

On February 13, 2012, Otter Tail served its Reply Brief in Support of its Motion to Dismiss addressing the issues raised by North Central in its Brief.

On April 23, 2012, the parties held a Prehearing Conference and agreed to stipulations of fact.

On April 25, 2012, the Commission issued its Notice of Hearing for the May 7th hearing. The Notice of Hearing identified the following issues to be considered:

1. Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant.
2. Whether Respondent's motion to dismiss should be granted.
3. Whether Respondent should be restrained and enjoined from constructing or extending its lines, plant, or system to the Sky Dancer Campus without first obtaining a Certificate of Public Convenience and Necessity from the Commission.
4. Whether Respondent should be required to remove its service extension facilities already constructed.

On May 1, 2012, the Tribe served a Petition to Intervene for Special Appearance to Object to Jurisdiction.

On May 3, 2012, the Administrative Law Judge granted the Tribe's Petition to Intervene for Special Appearance to Object to Jurisdiction.

On May 4, 2012, North Central served a supplemental stipulation of facts for the Commission's consideration.

On May 7, 2012, at 10:00 a.m. CDT, a hearing on this matter was held before the Commission. No evidence was presented at the hearing and the parties proceeded on the facts stipulated at the prehearing conference and those included in the supplemental stipulation of facts. Each party, through their counsel, was given the opportunity to argue its position before the Commission.

Having allowed all interested persons the opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

FINDINGS OF FACT

1. Otter Tail has begun construction of an extension of its public utility plant and system and distribution lines to provide electric service to the Sky Dancer Hotel and Casino.
2. The Sky Dancer Casino is a tribal owned facility.
3. The Sky Dancer Casino is located on tribal trust property on the Turtle Mountain Reservation.
4. The Tribe is a federally recognized Indian tribe.
5. The Tribe passed a resolution on November 23, 2011, determining that Otter Tail shall provide electric service to the Sky Dancer Casino.
6. The Tribe made a special appearance in this action to assert it has sole jurisdiction to determine which utility will provide electric service to the Sky Dancer Casino.

CONCLUSIONS OF LAW

1. The issue of the Commission's jurisdiction over electric service to tribal owned facilities located on Indian owned and tribal trust land was previously decided in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995).
2. In that case, the Court held, based upon the Tribe's inherent sovereignty, 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." *Id.* at 961.

3. Based upon this prior precedent and the stipulated facts in this case, the Commission concludes that it lacks jurisdiction over the Tribe's determination that Otter Tail will supply electric service to the Sky Dancer Casino, and therefore the Commission lacks jurisdiction to Order the relief requested in North Central's Complaint.
4. Contrary to the arguments made by North Central, the fact that Otter Tail's extension of service to the Sky Dancer Casino crosses Highway 5 does not give the Commission jurisdiction over this matter. Highway 5 is not property of the State of North Dakota. The land is held in trust for the Tribe and the State has merely been given a right-of-way easement. Even if Highway 5 was constructed on state land, restricting such a crossing of the highway would be an inappropriate attempt to assert a concurrent jurisdiction over the service extension which would deprive the Tribe of its jurisdiction to determine the electric service provider for a tribal owned facility on tribal trust land. The Commission does not have a concurrent jurisdiction over the extension of service lines to such facilities. *Id.*
5. Also, contrary to the arguments made by North Central, the Gaming Compact between the Tribe and the State of North Dakota does not grant the Commission jurisdiction over the Tribe's determination of which utility will provide electric service to the Sky Dancer Casino. By the Compact's express terms, it does not expand the jurisdiction of the State of North Dakota over the Tribe.

ORDER

The Commission orders:

1. Otter Tail's Motion to Dismiss is hereby granted.
2. North Central's Complaint is hereby dismissed.

PUBLIC SERVICE COMMISSION

Kevin Cramer
Commissioner

Tony Clark
Chairman

Brian P. Kalk
Commissioner

**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 MINNESOTA)
) SS
COUNTY OF OTTER TAIL)

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

Otter Tail Power Company’s Proposed Findings of Fact, Conclusions of Law, and Order

by electronic mail upon counsel and other interested individuals at the below e-mail addresses:

North Dakota Public Service Commission	ndpsc@nd.gov
Darrell Nitschke	dnitschk@nd.gov
Debra L. Hoffarth	dhoffarth@srt.com
Judge Allen Hoberg	ahoberg@nd.gov
Mark Gruman	mgruman@nd.gov
Larry Baer	lmbaer@baerlodge.com
Rjay Brunkow	rjaybru@hotmail.com
Paul Sanderson	psanderson@zkslaw.com
Tracy Kolb	tkolb@zkslaw.com

/S/ DIANE MERZ

Diane Merz

Subscribed and sworn to before me
this 17th day of May 2012.

/S/ WENDI OLSON

Wendi Olson, Notary Public