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May 17, 2012

Mark Gruman
ND Public Service Commission
600 East Boulevard Avenue, Dept 108
Bismarck ND 58505-0408

Via Electronic Mail and US Mail
ndpsc@nd.gov

Re: North Central Electric Cooperative, Inc. v. Otter Tail Power Company
Case Number PU-11-701

Dear Mr. Gruman:

Enclosed for filing in the above-named matter, please find an original and seven copies of North Central Electric Cooperative, Inc.'s, Proposed Findings of Facts, Conclusions of Law and Order in regards to the above-named matter.

I am also including one additional copy and kindly ask that you stamp as received and return it to our office in the envelope provided.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Debra L. Hoffarth
DLH/js

cc Paul R. Sanderson - via electronic mail only
Bruce Gerhardson - via electronic mail only
ALJ Alan Hoberg- via electronic mail only
Tracy Kolb - via electronic mail only
Turtle Mountain Tribe, Rjay Brunkow - via electronic mail only
Wayne Martian, North Central Electric Cooperative, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.)	
)	
Complainant,)	
)	Case No. PU-11-701
vs.)	OAH File No. 20120087
)	
Otter Tail Power Company,)	
)	
Respondent,)	
)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Intervener.)	

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER

May 7, 2012

Appearances

Chairman Tony Clark, Commissioner Kevin Cramer, and Commissioner Brian P. Kalk.

Debra L. Hoffarth and Donald A. Negaard, Pringle & Herigstad P.C., PO Box 1000; 2525 Elk Drive; Minot, ND 58702-1000, on behalf of North Central Electric Cooperative, Inc.

Bruce Gerhardson, Otter Tail Power Company, 215 South Cascade Street; Fergus Falls, MN 56538-0496; and Paul Sanderson, Zuger Kirmis & Smith, PO Box 1695; Bismarck, ND 58502-1695, on behalf of Otter Tail Power Company.

Rjay Brunkow, PO Box 900; Highway 5 West; Belcourt, ND 58316, on behalf of the Turtle Mountain Band of Chippewa Indians.

Mark Gruman, Public Service Commission, State Capital; 600 E. Boulevard Avenue; Bismarck, ND 58505, on behalf of the Public Service Commission.

Preliminary Statement

On December 12, 2011, North Central Electric Cooperative, Inc. (North Central) filed a Complaint and Affidavit alleging that Otter Tail Power Company (Otter Tail) (1) threatened to and had begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve the Sky Dancer Casino, which is not located within the corporate limits of any municipality, without first obtaining from the Public Service Commission a certificate that public convenience and necessity requires or will require such construction and service in violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5; (2) that the place to be served was within North Central's service area; (3) that North Central was already providing service to the Sky Dancer Casino; (4) that such service would unreasonably interfere with the service or system of North Central; and (4) that such service was a wasteful duplication of facilities.

On December 21, 2011, the Public Service Commission found that North Central's complaint stated a prima facie case.

On January 16, 2012, Otter Tail filed an Answer. Otter Tail admitted (1) it had begun construction of its public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians facility on the Turtle Mountain Reservation; and (2) that North Central was providing service to the facility. Otter Tail asserted that the Public Service Commission did not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally-owned facility on Tribal land on the Turtle Mountain Indian Reservation. Otter Tail denied that a certificate of public convenience and necessity is required to serve the Turtle Mountain Band of Chippewa Indians facility. Otter Tail's Answer also denied North Central's interference and wasteful duplication of facilities claims. Answer, ¶¶ IV and XI.

On January 16, 2012 Otter Tail filed a Motion to Dismiss asserting that the Public Service Commission lacks regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail 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. Otter Tail also asserted that the Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with whomever it wishes for electric service to its lands and businesses.

On February 2, 2012, North Central filed a Response Brief to Otter Tail's Motion to Dismiss asserting that the Public Service Commission had jurisdiction and Otter Tail could not assert the rights of the Turtle Mountain Band of Chippewa Indians. North Central also requested summary judgment against Otter Tail as Otter Tail had admitted to construction of its public utility plant and system without a certificate of public convenience and necessity.

On February 3, 2012, Otter Tail filed its Reply Brief in Support of its Motion to Dismiss again asserting that the Public Service Commission lacked jurisdiction over Otter Tail's actions.

On February 14, 2012, the Public Service Commission requested an Administrative Law Judge to serve as a procedural administrative law judge only.

On February 14, 2012, the Turtle Mountain Band of Chippewa Indians, through Chairman Merle St. Claire, filed a letter indicating it is aware of the Public Service Commission proceedings and "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino..."

On April 23, 2012, Administrative Law Judge Alan Hoberg held a Prehearing Conference and issued "Prehearing Conference Summary and Stipulations" setting forth a scheduling order and stipulations. Administrative Law Judge Hoberg also ordered that the May 7, 2012 hearing was to be held "only for the purpose of oral argument on a motion to dismiss and argument for summary disposition of the Complaint." Any request for an evidentiary hearing on May 7, 2012 was to be made on May 4, 2012 prior to 5:00 p.m. Administrative Law Judge Hoberg also ordered that only parties and interveners would be allowed to make oral argument, or present evidence, if so requested, at the May 7, 2012 hearing. Administrative Law Judge Hoberg ordered that any petitions to intervene must be filed at least 10 days prior to the May 7, 2012 hearing.

The following stipulations, subject to the right to argue the relevancy of the stipulated facts in oral argument, were agreed upon by the parties on April 23, 2012:

1. Sky Dancer Casino is a Tribal owned facility;
2. Sky Dancer Casino is located on Tribal trust property;
3. The Tribe passed a resolution on November 23, 2011, stating that the Tribe wants Otter Tail Power Company to provide electric service to the Sky Dancer Casino facility;
4. The Tribe has a long-standing tribal utility code;
5. The Tribe filed a letter with the Commission through its tribal chairman on February 15, 2012, stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino pursuant to the legal precedent set forth in Devils Lake Sioux

Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995).”

On April 25, 2012, the Commission issued a Notice of Hearing, specifying the following issues:

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.

All parties waived the 45-day rule concerning notice of hearing.

On April 25, 2012, Chairman Merle St. Claire, on behalf of the Turtle Mountain Band of Chippewa Indians filed its Petition to Intervene for Special Appearance to Object to Jurisdiction.

On April 27, 2012, Rjay Brunkow, Tribal Attorney filed a Notice of Appearance of Counsel for the Turtle Mountain Band of Chippewa Indians.

On April 30, 2012, North Central filed an Objection to Petition to Intervene for Special Appearance to Object to Jurisdiction by Turtle Mountain Band of Chippewa Indians asserting the Tribe's intervention was not necessary and it was not represented by a licensed attorney.

On May 1, 2012 Administrative Law Judge Alan Hoberg denied the Turtle Mountain Band of Chippewa Indian's intervention because of a failure to have a licensed attorney.

On May 1, 2012, Tracy Vigness Kolb entered an appearance on behalf of the Turtle Mountain Band of Chippewa Indians and filed a Petition to Intervene for Special Appearance to Object to Jurisdiction.

On May 2, 2012, North Central objected to Intervention by the Turtle Mountain Band of Chippewa Indians because the Tribe's intervention was not necessary and asserting that the Public Service Commission had jurisdiction over the matter.

On May 3, 2012, Administrative Law Judge Alan Hoberg granted the Turtle Mountain Band of Chippewa Indians intervention. Judge Hoberg indicated that no additional evidence would be presented at the May 7, 2012.

On May 4, 2012, Rjay Brunkow moved for Admission Pro Hac Vice. Administrative Law Judge Alan Hoberg granted this motion on May 7, 2012.

On May 4, 2012, the parties filed, and on May 7, 2012, Administrative Law Judge Alan Hoberg approved a Stipulation between North Central and Otter Tail, setting forth additional factual stipulations and exhibits as evidence as follows:

1. December 12, 2011 Affidavit of Wayne Martian (Docket #1), with the exception of Paragraph 10 to the extent that it calls for a legal conclusion;
2. Request to Locate (Docket #1 - Exhibit 1 to Wayne Martian's Affidavit);
3. Photographs of Otter Tail Staking (Docket #1 - Exhibit 2 to Wayne Martian's Affidavit);
4. Photographs of Otter Tail Construction (Docket #1 - Exhibit 3 to Wayne Martian's Affidavit);
5. Grant of Easement for Right of Way to NDDOT from BIA (Docket # 7 - Exhibit A to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
6. Right of Way Plat for NDDOT (Docket #7 – Exhibit A1 to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
7. Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota (Docket #7 - Exhibit B to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
8. October 29, 1975 Underground Easements to North Central Electric Cooperative, Inc. from Turtle Mountain Tribe;
9. Map Showing State Highway 5 Running Adjacent to Casino; and
10. Otter Tail Power Company's Distribution Lines Cross North Dakota Highway 5 and North Central's Distribution line and Central Power Electric Cooperative Inc.'s Transmission Lines, from which North Central purchases its electricity.

On May 7, 2012, North Central, Otter Tail, and the Turtle Mountain Band of Chippewa Indians presented oral arguments on the motion to dismiss and for summary disposition of the Complaint.

At the close of the hearing, the parties agreed to provide proposed findings of facts and conclusions of law for the Public Service Commission review on May 17, 2012.

On May 7, 2012, Larry Baer filed a Special Appearance Objecting to Jurisdiction on behalf of the Turtle Mountain Band of Chippewa Indians.

On May 8, 2012, North Central filed an Objection to the Turtle Mountain Band of Chippewa Indians May 7, 2012 Special Appearance, asserting that the scheduling order did not call for post-hearing briefs and the brief included evidence. North Central asked that the Turtle Mountain Band of Chippewa's May 7, 2012 Special Appearance Objecting to Jurisdiction be stricken from the record.

On May 9, 2012, Administrative Law Judge Alan Hoberg ordered that the Turtle Mountain Band of Chippewa Indians' May 7, 2012 Special Appearance Objecting to Jurisdiction be stricken from the record and not considered by the Public Service Commission in its deliberations of this matter.

On May 10, 2012, Otter Tail filed a Response Brief supporting the Turtle Mountain Band of Chippewa Indians' May 7, 2012 Special Appearance Objecting to Jurisdiction.

On May 10, 2012, Administrative Law Judge Alan Hoberg affirmed his May 9, 2012 opinion that the Turtle Mountain Band of Chippewa Indians' Special Appearance Objecting to Jurisdiction be stricken from the record.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered this matter, the Commission makes its:

Findings of Facts

1. North Central is a "rural electric cooperative" under N.D.C.C. § 49-03-01.5(6). North Central is an interested electric cooperative corporation under ND.C.C. § 49-03-05. Complaint, ¶ 1.
2. Otter Tail is an "electric public utility" under N.D.C.C. 49-03-01.5(2). Complaint, ¶ 2; Answer ¶ III.
3. Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system and of its transmission and distribution

lines to serve a customer in the SW ¼ of Section 34, Township 162N, Range 71W, Rolette 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 and service by Otter Tail. The customer at the place to be served is the Sky Dancer Hotel and Casino. Complaint, ¶ 3; Answer ¶ IV; Martian Affidavit, ¶¶ 6-9.

4. The place to be served is not located within the corporate limits of any municipality. Complaint ¶ 4; Answer ¶ V.
5. The place to be served is located in North Central's service area. Complaint ¶ 5.
6. The Sky Dancer Hotel and Casino is a Tribal owned facility. ALJ Stipulation, ¶ 1.
7. The Sky Dancer Hotel and Casino is located on Tribal trust property. ALJ Stipulation, ¶ 2.
8. The Tribe passed a resolution on November 23, 2011, stating that the Tribe wants Otter Tail Power Company to provide electric service to the Sky Dancer Casino facility. ALJ Stipulation, ¶ 3.
9. The Tribe has a long-standing tribal utility code. ALJ Stipulation, ¶ 4.
10. The Tribe filed a letter with the Commission through its tribal chairman on February 15, 2012, stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino pursuant to the legal precedent set forth in Devils Lake Sioux Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995)." ALJ Stipulation, ¶ 5.
11. The place to be served is presently served by North Central. Complaint ¶ 6; Answer ¶ V; Martian Affidavit ¶ 2.
12. North Central has provided electric service to Sky Dancer at the place to be served since December 2, 1998. Service is provided to separate hotel and casino buildings and other facilities on the Sky Dancer campus. North Central was requested to and has provided electric service for the construction of a new casino building and security lighting on the campus, since the fall of 2011. North Central serves a total of seven (7) separately metered service entrances on the Sky Dancer campus. The construction is serviced by a separate meter. Martian Affidavit, ¶ 3.

13. Otter Tail's pre-existing facilities nearest to the Sky Dancer campus is a transmission line approximately 1000 feet from the Sky Dancer campus. Otter Tail's nearest retail consumer is about 3 miles distant from the Sky Dancer campus. Martian Affidavit, ¶ 4.
14. On November 28, 2011, North Central was requested to provide 600 amp electric service for construction trailers to be located on the construction site on the Sky Dancer campus. This will be another metered service on the Sky Dancer campus. Martian Affidavit, ¶ 5.
15. In late November 2011, North Central's General Manager Wayne Martian (Martian) conversed by telephone with Mark Helland, Vice President of Customer Service; Scott Sigette, Energy Management Representative-Devils Lake, Langdon, Rugby; and Jeff Lemen, a representative of Otter Tail who informed Martian that Otter Tail had received a request for electric service to Sky Dancer's new building on the Sky Dancer campus, including temporary construction service. Martian also spoke with Dennis Ellefson, area manager of Rugby, Garrison, Jamestown, and Oakes who informed Martian that Otter Tail had received a request for electric service to Sky Dancer's new building on the Sky Dancer campus, including temporary construction service. Martian Affidavit, ¶ 6.
16. On December 1, 2011, North Central discussed this matter with the Turtle Mountain Tribal Chairman who confirmed the Tribe had requested electric service from Otter Tail. Martian Affidavit, ¶ 7
17. On December 7, 2011, North Central received a request to locate its electrical lines for Otter Tail via North Dakota One-Call. The request indicated that the work to be done is the installation of electric main/poles and anchors at a location staked to the construction of the new casino. Martian Affidavit, ¶ 8.
18. On December 9, 2011, Otter Tail began construction of an extension of its public utility plant and system and of its transmission and distribution lines for electrical service on the Sky Dancer campus. At the time of the Complaint, it appeared that Otter Tail would bore under Highway 5 and that Otter Tail will cross over two of North Central's main three phase underground feeders, one of which serves the Sky Dancer campus, with an overhead distribution line. Otter Tail will cross under Central Power Electric Cooperative, Inc.'s transmission, which provides electrical service to North Central's facilities. It is estimated that Otter Tail's construction will be complete by 12/13/2011. Martian Affidavit, ¶ 9.

19. Highway 5 runs adjacent to the Sky Dancer Casino property. The North Dakota Department of Transportation has a Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5. Docket # 7 -Exhibit A to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss.
20. There is an Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota, wherein the State of North Dakota retains its jurisdiction. Docket #7 - Exhibit B to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss.
21. North Central has October 29, 1975 Underground Easements from Turtle Mountain Band of Chippewa Indians.
22. Otter Tail Power Company's Distribution Lines Cross North Dakota Highway 5 and North Central's Distribution line and Central Power Electric Cooperative Inc.'s Transmission Lines, from which North Central purchases its electricity.

From the foregoing Findings of Facts, the Commission makes its:

Conclusions of Law

Legal Standard

1. Otter Tail submits its Motion to Dismiss pursuant to North Dakota Rule of Civil Procedure 12(b)(vi) and Devils Lake Sioux Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D 1995). Otter Tail's motion to dismiss under North Dakota Rules of Civil Procedure Rule 12(b) must be treated as a motion for summary judgment under Rule 56 as a result of Otter Tail's presenting materials outside the pleadings. N.D.R.CIV.PRO. 12(d). Under North Dakota Rule of Civil Procedure 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 any party is entitled to judgment as a matter of law...Summary judgment, when appropriate, may be entered against the moving party."
2. North Central asked for summary judgment against Otter Tail pursuant to North Dakota Rule of Civil Procedure 56(c). Under North Dakota Rule of Civil Procedure 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 any party is entitled to judgment as a matter of law...Summary judgment, when appropriate, may be entered against the moving party.”

3. The movant for summary judgment bears the burden to prove that there is no genuine issue of material fact. The opposing party will be given all favorable inferences which may reasonably be drawn from the evidence.
4. The complaint is construed 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.
5. 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).
6. The Turtle Mountain Band of Chippewa Indians bears the burden to prove that the Public Service Commission threatens its political integrity. In re Application of Otter Tail Power Co., 451 N.W.2d 95, 106 (ND 1990).

The Record

5. The following stipulations, subject to the right to argue the relevancy of the stipulated facts in oral argument, were agreed upon by the parties on April 23, 2012:
 - a. Sky Dancer Casino is a Tribal owned facility;
 - b. Sky Dancer Casino is located on Tribal trust property;
 - c. The Tribe passed a resolution on November 23, 2011, stating that the Tribe wants Otter Tail Power Company to provide electric service to the Sky Dancer Casino facility;
 - d. The Tribe has a long-standing tribal utility code;
 - e. The Tribe filed a letter with the Commission through its tribal chairman on February 15, 2012, stating that the Tribe is aware of this proceeding and the Tribe “confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino pursuant to the legal precedent set forth in Devils Lake Sioux Tribe v. North Dakota Public Service Comm’n, 896 F.Supp. 955 (D.N.D. 1995).”
6. On May 4, 2012, the parties filed and on May 7, 2012, Administrative Law Judge Alan Hoberg approved a Stipulation between North Central and Otter Tail, setting forth additional factual stipulations and exhibits as evidence as follows:

- a. December 12, 2011 Affidavit of Wayne Martian (Docket #1), with the exception of Paragraph 10 to the extent that it calls for a legal conclusion;
 - b. Request to Locate (Docket #1 - Exhibit 1 to Wayne Martian's Affidavit);
 - c. Photographs of Otter Tail Staking (Docket #1 - Exhibit 2 to Wayne Martian's Affidavit);
 - d. Photographs of Otter Tail Construction (Docket #1 - Exhibit 3 to Wayne Martian's Affidavit);
 - e. Grant of Easement for Right of Way to NDDOT from BIA (Docket # 7 -Exhibit A to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
 - f. Right of Way Plat for NDDOT (Docket #7 – Exhibit A1 to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
 - g. Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota (Docket #7 - Exhibit B to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
 - h. October 29, 1975 Underground Easements to North Central Electric Cooperative, Inc. from Turtle Mountain Tribe;
 - i. Map Showing State Highway 5 Running Adjacent to Casino; and
 - j. Otter Tail Power Company's Distribution Lines Cross North Dakota Highway 5 and North Central's Distribution line and Central Power Electric Cooperative Inc.'s Transmission Lines, from which North Central purchases its electricity.
7. These stipulated facts and exhibits are properly admissible in this matter.
 8. All pleadings on file with the Public Service Commission are properly admissible in this matter.
 9. Neither of the parties or the intervener requested an evidentiary in this matter.

Motion to Dismiss and Summary Disposition of the Complaint

10. The Commission has jurisdiction over the parties and the subject matter of this proceeding. The Commission has jurisdiction under the Territorial Integrity Act (TIA) to hear and determine the Complaint of North Central alleging Otter Tail's extension of its electric distribution lines to the Sky Dancer Casino. N.D.CENT.CODE § 49-03-01.4. The extension of Otter Tail's electric distribution lines to the Sky Dancer Casino is a violation of North Dakota Century Code Section 49-03-01. Section 49-03-01(1) states, in part:

49-03-01. Certificate of public convenience and necessity – Secured by electric public utility.

Any electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation...If any electric public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions.

11. Under North Dakota Century Code Section 49-03-01.3, the precedents of the Public Service Commission, and the precedents of the North Dakota Supreme Court, the Public Service Commission does not take a narrow view of its jurisdiction under the Territorial Integrity Act. It is presumed that the statutes under which the Public Service Commission acts are constitutional. 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, ¶ 28, 736 N.W.2d 788.
12. Otter Tail lacks standing to assert that the Public Service Commission lacks jurisdiction over electric service to the Sky Dancer Casino under tribal sovereignty concepts. Otter Tail has no sovereign status and has no standing to assert the Tribe's sovereignty to defeat the Public Service Commission's authority over Otter Tail's activities. In re Application of Otter Tail Power Co., 451 N.W.2d 95, 97 (ND 1990).

13. “[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). The Turtle Mountain Band of Chippewa Indians’ preference for Otter Tail to provide electric service does not override the public’s interest.
14. The Turtle Mountain Band of Chippewa Indians cannot regulate electric utilities through a utility regulation scheme as it is beyond its sovereign authority. Devils Lake Sioux Tribe v. North Dakota Public Service Comm’n, 896 F.Supp. 955, 962 (D.N.D. 1995).
15. The Tribe’s preference for Otter Tail to provide electric services does not override the Public Service Commission’s jurisdiction. Minimal burdens on tribal self-government are allowable. Application of Otter Tail Power Co., 451 N.W.2d 95, 107 (N.D. 1990); Washington v. Confederated Tribes, 447 U.S. 134, 151 (1980); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).
16. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) and Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) are good law, have not been overruled by the North Dakota Supreme Court and thus are the law of the State.
17. The contract between the Bureau of Indian Affairs and Otter Tail regarding the sale of the BIA-owned distribution system around Belcourt, within the reservation, to Otter Tail provided that Otter Tail would provide electrical service “in conformance with the rules and regulations of the Public Service Commission of the State of North Dakota.” Application of Otter Tail Power Co., 354 N.W.2d 701, 703 (1984).
18. Otter Tail’s electric system is not confined to the reservation and its activities have economic impact beyond the reservation. This effect on non-reservation consumers is a State interest that outweighs the minimal burden on tribal self-government Application of Otter Tail Power Co., 451 N.W.2d 95, 104-05, 107 (N.D. 1990).
19. The exercise of jurisdiction by the Public Service Commission does not infringe upon the rights of tribal self-government. Application of Otter Tail Power Co., 451 N.W.2d 95, 106-07 (N.D. 1990).
20. State law allocating electric services between competing utilities does not amount to regulation of the use or development of tribal property. In re Application of Otter Tail Power Co., 451 N.W.2d 95, 103 (ND 1990).

21. Section 17.2 of the Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota allows the State of North Dakota to retain its jurisdiction.
22. The Turtle Mountain Band of Chippewa Indians does not have inherent sovereign powers over the activities of nonmembers of the tribe. Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328 (2008).
23. *Montana v. United States* sets forth the standard of tribal authority over non-members. 450 U.S. 544, 101 S.Ct. 1245 (1981). *Montana v. United States* expresses the general rule that, in the absence of Congressional direction, Indian tribes lack civil authority over non-member conduct, except for: 1) consensual relationships between non-members and the tribe or members of the tribe; and 2) non-Indian activity which directly affects an Indian tribe's political integrity, economic security, health or welfare. Montana v. U.S., 450 U.S. 544, 565-66. The Turtle Mountain Band of Chippewa Indians does not have authority under the *Montana* factors to regulate utilities. Application of Otter Tail Power Co., 451 N.W.2d 95, 106 (N.D. 1990). The relationship between supplier and consumer, such as Otter Tail and the Turtle Mountain Band of Chippewa Indians is not a consensual relationship under the first *Montana* exception. Application of Otter Tail Power Co., 451 N.W.2d 95, 104-05 (N.D. 1990). The Turtle Mountain Band of Chippewa Indians failed to provide evidence regarding how the Public Service Commission's actions would affect its political integrity, economic security, or health and welfare. There is no demonstrated serious effect on the Tribe's economic security and thus there is no violation of the second *Montana* exception. Application of Otter Tail Power Co., 451 N.W.2d 95, 106 (N.D. 1990).
24. Otter Tail crossed North Dakota Highway 5, Central Power Electric Cooperative, Inc.'s and North Central's easements to expand its plants and facilities. The Turtle Mountain Band of Chippewa Indians lacks jurisdiction of non-Indian conduct on state highways or non-Indian land interests. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997).
25. In order for the Turtle Mountain Band of Chippewa Indians to regulate the non-Indian activity of the Public Service Commission, Otter Tail or North Central, the activity must imperil the Tribe. Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 341 (2008). Tribal sovereignty is limited to those matters that are necessary to protect tribal self-government or to control internal relations. Atkinson Trading Co., Inc. v. Hicks, 532 U.S. 645, 650-51 (2001). There is no evidence that the Turtle Mountain Band of Chippewa of Indians is imperiled by the exercise of jurisdiction by the Public Service Commission and that choice of an

electric service provider is necessary to protect tribal self-government or to control internal relations.

26. Under the general provisions of North Dakota Century Code Section 49-03-01 and 49-03-01.1, an electric utility must obtain from the Commission a certificate of public convenience and necessity authorizing construction or operation of a public utility plant or system.
27. The question of whether electric suppliers' facilities are wasteful duplication or unreasonably interferes with the plant or facilities of another electric service provider is for the determination of the Public Service Commission.
28. Otter Tail's extension of its electric distribution plant and facilities to the Sky Dancer Casino by crossing North Dakota Highway 5, crossing Central Power Electric Cooperative, Inc.'s transmission line, and North Central's facilities is wasteful duplication and an unreasonable duplication of investment and available services provided by North Central.
29. Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve Sky Dancer interferes with North Central's service and system and is wasteful duplication of facilities.
30. Otter Tail's extension of its electric distribution plant and facilities to the Sky Dancer Casino, which currently has seven (7) metered facilities served by North Central, is unreasonable interference with North Central's plant and facilities.
31. Under North Dakota Century Code Section 49-03, Otter Tail should cease and desist from providing electric services to the Sky Dancer Casino.
32. Under North Dakota Century Code Section 49-03-01.4, the Public Service Commission may prescribe reasonable terms and conditions in addition the restraint imposed. It is reasonable and proper to require Otter Tail to remove any service extension facilities already constructed to the Sky Dancer Casino.

From the foregoing Findings of Facts and Conclusions of Law, the Public Service Commission makes its:

Order

The Commission Orders:

1. Within 30 days after the date of this Order, Otter Tail shall cease and desist from providing electric service to the Sky Dancer Casino and from further extending its electric service in that area.
2. Otter Tail shall remove any service extension facilities already constructed to the Sky Dancer Casino.
3. Otter Tail's Motion to Dismiss North Central's Complaint is DENIED.
4. North Central's request for Summary Disposition on its Complaint is GRANTED.

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,)
)
Turtle Mountain Band of Chippewa Indians,)
)
Intervener.)

Case No. PU-11-701
OAH File No. 20120087

STATE OF NORTH DAKOTA)
) ss
COUNTY OF WARD)

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:

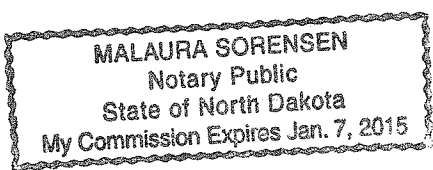
**North Central Electric Cooperative, Inc.'s
Proposed Findings of Facts, Conclusions of Law and Order**


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

- Paul R. Sanderson psanderson@zkslaw.com
- Bruce Gerhardson bgerhardson@otpc.com
- Judge Alan Hoberg ahoberg@nd.gov
- Rjay Brunkow rjaybru@hotmail.com
- Tracy Kolb tkolb@zkslaw.com
- Larry Baer imbaer@baerlodge.com


Jill Stanislawski

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




Notary Public, State of North Dakota