

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

North Central Electric Cooperative, :  
Inc. vs. Otter Tail Power Company : Case No.  
Complaint : PU-11-701

TRANSCRIPT OF  
HEARING

Taken At  
State Capitol  
600 East Boulevard Avenue  
Bismarck, North Dakota  
May 7, 2012

BEFORE ALLEN C. HOBERG  
-- ADMINISTRATIVE LAW JUDGE --

A P P E A R A N C E S

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COMMISSIONERS PRESENT:

COMMISSIONER TONY CLARK, Chairman  
COMMISSIONER KEVIN CRAMER  
COMMISSIONER BRIAN KALK

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A P P E A R A N C E S (Cont'd)

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1           (The following proceedings were had and  
2 made of record herein, commencing at 9:58 a.m.,  
3 Monday, the 7th day of May, 2012:)

4           JUDGE HOBERG: All right. Let's go on the  
5 record. It's May 7, 2012, approximately 10 a.m.  
6 here in the Public Service Commission hearing room  
7 in the State Capitol in Bismarck, North Dakota, for  
8 the administrative hearing In the Matter of the  
9 Complaint of North Central Electric Cooperative  
10 against Otter Tail Power Company, Case No.  
11 PU-11-701.

12           My name is Allen Hoberg. I'm the  
13 designated procedural hearing officer in this  
14 matter, administrative law judge with the Office of  
15 Administrative Hearings.

16           We'll take appearances at this time with  
17 counsel, and we'll start with the complainant and  
18 then the respondent and then the intervenor and  
19 then counsel for the Commission. Ms. Hoffarth,  
20 please.

21           MS. HOFFARTH: Thank you, Your Honor. Deb  
22 Hoffarth with the Pringle & Herigstad law firm on  
23 behalf of North Central Electric.

24           JUDGE HOBERG: Thank you. Who's at the  
25 table with you, Ms. Hoffarth?

1 MS. HOFFARTH: Yes. Don Negaard is also  
2 with the Pringle & Herigstad law firm and Wayne  
3 Martian is the manager of North Central Electric.

4 JUDGE HOBERG: I'm sorry, Wayne --

5 MS. HOFFARTH: Martian, M-a-r-t-i-a-n.

6 JUDGE HOBERG: Thank you.

7 Mr. Sanderson, please.

8 MR. SANDERSON: Paul Sanderson, Zuger  
9 Kirmis & Smith on behalf of Otter Tail. Co-counsel  
10 is Bruce Gerhardson from Otter Tail. Bruce will be  
11 handling the argument here today.

12 JUDGE HOBERG: Oh, okay. Thank you.

13 Yes, Mr. Brunkow, am I pronouncing that  
14 right?

15 MR. BRUNKOW: You are. My name is Rjay  
16 Brunkow. I'm counsel for the intervenor, the  
17 Turtle Mountain Band of Chippewa Indians.

18 JUDGE HOBERG: Thank you.

19 And I should note that pursuant to a late  
20 request on Friday, I did issue an order granting  
21 admission pro hac vice for Mr. Brunkow pursuant to  
22 Ms. Vigness Kolb's motion, and so he's authorized  
23 to practice before the Commission.

24 I should also note that on April 26 and  
25 May 1 the Tribe did petition to intervene in this

1 matter. I issued an order first denying that -- or  
2 declaring it void, I guess, and then pursuant to a  
3 second petition I did grant the intervention in  
4 this matter.

5 PSC, please.

6 MR. GRUMAN: Mark Gruman on behalf of the  
7 Public Service Commission. To my right is Jerry  
8 Lein, Commission advisor.

9 JUDGE HOBERG: Thank you.

10 And, of course, to my left are members of  
11 the Public Service Commission, Commissioner Kevin  
12 Cramer, Commission Chairman Tony Clark and  
13 Commissioner Brian Kalk.

14 And I'm going to give a brief summary.  
15 This is a little complicated matter. I'm going to  
16 give a brief summary and talk about the procedure  
17 today before asking for your opening comments, if  
18 that's okay.

19 COMMISSIONER CRAMER: That would be --  
20 yes.

21 JUDGE HOBERG: Okay. Just how we have got  
22 here -- oh, I should say our court reporter is  
23 Stephanie Smith too.

24 COMMISSIONER KALK: So talk slowly today.

25 JUDGE HOBERG: Yeah.

1           Okay. On December 12, 2011, North Central  
2 filed a complaint with the Commission against Otter  
3 Tail. The Commission did find the complaint to  
4 show a prima facie case. The complaint alleges  
5 violations of North Dakota Century Code Sections  
6 49-03-01 through 49-03-01.5.

7           Otter Tail did file an answer and also --  
8 on January 17, 2012. On that same day Otter Tail  
9 also filed a motion to dismiss with supporting  
10 brief.

11           On February 2 of this year North Central  
12 filed a response brief. On February 13 of this  
13 year Otter Tail filed a reply brief. And on  
14 February 14, North Central filed a response to the  
15 reply brief.

16           We held a prehearing conference on  
17 April 23. As a result of that prehearing  
18 conference and the stipulations made in that  
19 prehearing conference based on the complaint and  
20 the answer and the briefs of the parties, it was  
21 determined that there are no facts in dispute and  
22 that only additional oral argument should be made  
23 in regard to this matter.

24           After the prehearing conference, I issued  
25 a document entitled Prehearing Conference Summary

1 and Stipulations that contain some stipulations of  
2 facts that were agreed upon at the prehearing  
3 conference. And then on May 4, North Central and  
4 Otter Tail filed an additional stipulation of facts  
5 for the record in this matter, and I did approve as  
6 of today that stipulation of facts. So, in other  
7 words, there are no facts to be presented in this  
8 matter today, no additional evidence to be  
9 presented.

10 What the Commission has before it, at  
11 least as I understand it, is a motion to dismiss  
12 the complaint based on facts not in dispute, which  
13 is, in essence, summary disposition of this matter.  
14 And if the complaint is not dismissed, you still  
15 have essentially a motion for summary disposition  
16 of this matter based on facts not in dispute.

17 So today, as I understand it, the parties  
18 will give oral argument, will set forth the basis  
19 for the complaint and the facts and argue the  
20 results of filing that complaint, what the results  
21 ought to be in their opinion. It's likely that the  
22 parties will argue different interpretations of the  
23 facts based on their view of the law.

24 It's my understanding, counsel, that the  
25 facts necessary for a decision in this matter are

1 not found entirely in the stipulations, but are  
2 also to be gleaned from the complaint, the answers  
3 and the affidavits filed with regard to the briefs;  
4 would that be correct, Ms. Hoffarth?

5 MS. HOFFARTH: Yes, Your Honor.

6 JUDGE HOBERG: Mr. Gerhardson?

7 MR. GERHARDSON: That is not my  
8 understanding. In fact, I think actually one of  
9 the stipulations on what are the undisputed facts  
10 involves, in fact, an -- you know, at least one  
11 affidavit where at least one of the assertions in  
12 the affidavit is not a stipulated fact, for  
13 example. So it's our belief that the stipulated  
14 facts are all of the facts before this Commission  
15 for purposes of this disposition.

16 JUDGE HOBERG: So the stipulations agreed  
17 upon at the prehearing conference and then the  
18 subsequent stipulation contain all of the facts  
19 necessary? I thought there were some allegations  
20 in the complaint and then response in regard --  
21 responding answers that form the basis for some of  
22 the facts in this matter.

23 MR. GERHARDSON: If I may clarify, what I  
24 meant to say or what I was attempting to say is an  
25 example of an item, for example, argued in one --

1 or asserted in one of the affidavits is an item  
2 that the company at least doesn't agree with. We  
3 felt it was a conclusory statement and therefore we  
4 didn't want some implication that we've agreed to  
5 that conclusory statement. It was -- I think it  
6 was assertion number ten in the affidavit of one of  
7 the -- of the cooperative manager, for example.

8 So when we made our most recent agreement,  
9 the stipulation that I believe Your Honor signed  
10 just today, one of the assertions in that  
11 stipulation was that item number ten, for example,  
12 was not a stipulated fact --

13 JUDGE HOBERG: Okay.

14 MR. GERHARDSON: -- from that affidavit.  
15 I hope that clarifies with respect to what's  
16 asserted in the complaint and answer again. I  
17 guess I'd have to consider each of the assertions  
18 there, but I believe that the complete stipulated  
19 facts are those contained within those noted by the  
20 administrative law judge in the earlier order and  
21 then also those that the administrative law judge  
22 signed today.

23 JUDGE HOBERG: In any event, there won't  
24 be any presentation by either North Central,  
25 correct, Ms. Hoffarth?

1 MS. HOFFARTH: No. No presentation.

2 JUDGE HOBERG: Or Otter Tail or the  
3 intervenor today; correct?

4 MR. GERHARDSON: That's correct. There's  
5 no intention for evidence.

6 JUDGE HOBERG: And I'm sure that counsel  
7 in their oral arguments will set forth the facts  
8 and their view of the facts as they see them.

9 MR. GERHARDSON: Correct.

10 JUDGE HOBERG: The order for oral argument  
11 today, as I indicated earlier, will be North  
12 Central followed by Otter Tail followed by the  
13 intervenor, and then we'll conclude with North  
14 Central because they have the burden of proof in  
15 regard to the complaint.

16 And I should say that following each  
17 presentation by the attorneys in regard to their  
18 oral argument, I will allow questions by the  
19 commissioners and Commission staff counsel when  
20 they -- in other words, when they've made their  
21 presentation, I'll ask the commissioners and  
22 Commission counsel if they have any questions in  
23 regard to the argument that has just been made.

24 Anything else preliminarily before I ask  
25 the commissioners for their opening comments?

1 Ms. Hoffarth?

2 MS. HOFFARTH: No, Your Honor.

3 JUDGE HOBERG: Mr. Gerhardson?

4 MR. GERHARDSON: Nothing, Your Honor.

5 JUDGE HOBERG: Mr. Brunkow?

6 MR. BRUNKOW: Nothing, Your Honor.

7 JUDGE HOBERG: All right. Thank you.

8 Commissioner Clark, please.

9 COMMISSIONER CLARK: Just good morning and  
10 welcome. I enjoyed the opportunity to read through  
11 some of the prefiled information and look forward  
12 to a good hearing.

13 Thank you.

14 JUDGE HOBERG: Thank you.

15 Commissioner Cramer, please.

16 COMMISSIONER CRAMER: Thank you, Your  
17 Honor. Good morning, everybody, and welcome this  
18 morning. I too have found this case to be quite  
19 fascinating, frankly. I've read the 8th Circuit  
20 order a few times, mostly in preparation for other  
21 presentations or speeches, and so it was kind of  
22 interesting now to read it in the context of an  
23 actual case before us.

24 In terms of just direction, and I don't  
25 think this will shock anybody, I have a couple of

1 fundamental questions I would expect oral arguments  
2 will help clarify. One, of course, is the  
3 fundamental question of jurisdiction over the Tribe  
4 as it's, I guess, described in some of the case,  
5 but then beyond that, of course, setting that  
6 question aside for a moment or even assuming --  
7 well, I'm not assuming, but for the purpose of my  
8 direction -- that we do not have that jurisdiction,  
9 then my question is but what of our jurisdiction  
10 over an investor-owned utility such as Otter Tail  
11 Power. And if -- depending how that question is  
12 answered, of course, then my question would be and  
13 how will this, if it was allowed to continue,  
14 affect the rest of Otter Tail's North Dakota  
15 customers.

16 So for me those are -- that's as  
17 fundamental as it gets, and I look forward to -- to  
18 hearing the arguments.

19 Thank you.

20 JUDGE HOBERG: Thank you, Commissioner.

21 Commissioner Kalk, please.

22 COMMISSIONER KALK: Thank you, Your Honor.

23 It's interesting listening to Kevin's comments.

24 You know, we don't talk about these cases,

25 obviously, until we get to our work sessions, but

1 his points, laying it out, the jurisdiction  
2 question and the follow-on of Otter Tail is an  
3 investor-owned utility. And depending how this all  
4 plays out, how it could affect any future rate  
5 case, I'm very interested to see how that  
6 discussion might be brought up by you.

7 And also, too, there was the area of  
8 relationships. This is a -- you know, we want to  
9 build relationships throughout the state and  
10 that's -- I know that there's always the legal  
11 sides of the things, but at the end of the day  
12 we've got an investor owned and a co-op that share  
13 the same space that need to work together. So I'm  
14 hopeful that we can get through this and -- and  
15 keep those relationships intact.

16 JUDGE HOBERG: Thank you, Commissioner  
17 Kalk. Thank you, Commissioners.

18 Ms. Hoffarth, please.

19 MS. HOFFARTH: Thank you, Your Honor. Do  
20 you mind if I sit while I make my argument --

21 JUDGE HOBERG: I think --

22 MS. HOFFARTH: -- or should I stand?

23 JUDGE HOBERG: -- that's fine.

24 MS. HOFFARTH: Okay. Thank you.

25 As we know, this is a case about

1 interference and -- first of all, good morning to  
2 everyone. This is a case about interference and  
3 wasteful duplication of services by Otter Tail in  
4 its extension of its plants and facilities without  
5 a certificate of public convenience and necessity.

6 North Central believes, and we think that  
7 you'll find based upon the law, that the Public  
8 Service Commission does have the jurisdiction and  
9 that the motion to dismiss by Otter Tail Power  
10 should be denied and that judgment actually as a  
11 matter of law should be issued in favor of North  
12 Central.

13 I'm going to kind of start back a little  
14 with the TIA, go into just -- what I -- we think  
15 are kind of the critical facts and talk about the  
16 jurisdictional issues as well. So if you have a  
17 question at any time, feel free to stop me and I'll  
18 try to address it.

19 The North Dakota Public Service Commission  
20 has the authority and the jurisdiction to grant  
21 relief to North Central under the Territorial  
22 Integrity Act. The TIA requires that prior to  
23 commencing construction, the public-owned utility  
24 must apply for and be granted the PC&N, the public  
25 convenience and necessity, in rural areas, and the

1 TIA's intent is to min -- minimize wasteful --  
2 wasteful duplication of investment in facilities  
3 and services, and that -- that cite goes back to  
4 the Cass County cases from 1980. So that's really  
5 what one of the bases for the TIA is.

6 Now, Otter Tail contends that the TIA  
7 doesn't apply because the PC [sic] lacks  
8 jurisdiction. We don't believe that's true. In  
9 any event, the PAC [sic] does not take a narrow  
10 view under its jurisdiction, under the TIA. I mean  
11 the PSA [sic] takes a broad view of what its  
12 jurisdiction is given under the legislation.

13 Now, a quick background before we get too  
14 much in the jurisdictional argument, but in any  
15 jurisdictional argument, the facts are -- are  
16 critical to the determination.

17 North Central has been serving the Sky  
18 Dancer Casino since December 2 of 1998. It  
19 currently has seven different metered facilities on  
20 the Sky Dancer Casino.

21 JUDGE HOBERG: Are you getting that,  
22 Stephanie?

23 THE REPORTER: She's fast for a Monday  
24 morning.

25 COMMISSIONER CRAMER: I was going to

1 say --

2 MS. HOFFARTH: I'll slow down. Yeah, I am  
3 fast, so --

4 When the Tribe began the expansion of the  
5 casino, there was an initial call to North Central  
6 requesting service, and that's in paragraph, I  
7 believe, nine or ten of Mr. Martian's affidavit,  
8 and then later requested Otter Tail to provide  
9 power, and in front of the Commission is the  
10 resolution of the Tribe for that.

11 Now, North Central -- or Otter Tail did  
12 commence construction without the PC&N, and as they  
13 did that they crossed Central Power Electric  
14 Cooperative's transmission line. Now, North  
15 Central gets its power from -- from Central Power,  
16 so those lines that they crossed underneath would  
17 have been providing power to North Central.

18 Not only did they cross that, they crossed  
19 North Central's distribution line. They also were  
20 in the North Dakota Highway 5 right-of-way and  
21 crossed the highway. So this motion to dismiss is  
22 based upon tribal sovereignty, which, of course, we  
23 assert that Otter Tail does not have the standing  
24 to raise the Tribe sovereignty issues. In any  
25 event, even though the Tribe has intervened, we

1 don't believe that the Tribe's sovereignty will  
2 preclude jurisdiction in this case in any matter.

3           The Tribe intervened to assert its  
4 sovereign rights because they want to -- the  
5 reasoning to the -- to request power from OTP or  
6 Otter Tail Power. What we believe the Tribe's  
7 intervention is relevant to is customer preference  
8 which, of course, is one of the factors under  
9 the -- under the PC&N and the TIA. However, it's  
10 not a -- it's not a binding factor, it's not the  
11 number one factor for consideration by the  
12 Commission.

13           So we believe their participation is  
14 relevant to the extent that they're the customer  
15 that extended service. Although the Tribe may want  
16 to receive power from Otter Tail Power, the Public  
17 Service Commission is the entity that has the  
18 regulatory authority to make that determination.

19           Now, I'm going to kind of walk back  
20 through the North Dakota cases that we think are  
21 relevant and they're actually still good law.  
22 They've never been overruled by a court of  
23 jurisdiction that applies to the State of North  
24 Dakota.

25           In 1984 the PSC actually heard a decision

1 in a dispute -- or issued a decision which was  
2 appealed all the way to the North Dakota Supreme  
3 Court between Otter Tail and Baker Electric  
4 regarding a school, a Bureau of Indian Affairs  
5 school on the Turtle Mountain Indian Reservation.  
6 And we asked in our May 1 brief that you take  
7 judicial notice of that proceeding. The North  
8 Dakota Supreme Court cite is 354 Northwest Second  
9 701, which was issued in 1984. The PSC case  
10 number -- it started in 1981, 10,312, are some of  
11 the Public Service Commission numbers that I've  
12 seen.

13 So this case involved the jurisdiction of  
14 the Public Service Commission on the Turtle  
15 Mountain Indian Reservation, which is the same  
16 reservation that we're dealing with today. In that  
17 case -- I'm going to call it the 1984 case just for  
18 simplicity purposes -- the North Dakota Supreme  
19 Court found that Otter Tail had purchased the  
20 Bureau of Indian Affairs system in 1968, and at  
21 that time Otter Tail agreed that it would follow  
22 the rules of the Public Service Commission and the  
23 State of North Dakota as part of the agreement with  
24 the BIA, and that's at page 703 of that 1984 case.

25 The North Dakota Supreme Court also

1 determined that the Public Service Commission had  
2 the jurisdiction to proceed to regulate the matter  
3 and that the exercise of the jurisdiction did not  
4 infringe upon the rights of tribal self-government,  
5 and that's at page 705 of that brief as well -- or  
6 of that opinion as well.

7           The Court indicated that the PSC's action  
8 in regulating the utility was not -- or was  
9 consistent with the federal purpose of providing  
10 power to the school. And in that particular case  
11 the Court noted that Otter Tail had conceded that  
12 Indian jurisdiction was not at issue in that case,  
13 which is not exactly on point with this case  
14 because apparently that's a different issue that we  
15 have in this case.

16           That decision was not appealed beyond the  
17 North Dakota Supreme Court. It is still good law  
18 in the state of North Dakota. It's involving the  
19 same reservation and at least one of the same  
20 parties. Surely if the PSC had jurisdiction over  
21 the BIA's right -- Bureau of Indian Affairs' right  
22 to choose a power supplier, it would have the same  
23 jurisdiction in this case over a tribal -- the  
24 Tribe, the Turtle Mountain Band of Chippewa  
25 Indians. So based on the 1984 case, we believe the

1 PSC does have jurisdiction.

2 In 1990 the PSC again visited the issue  
3 regarding jurisdiction on Indian reservation. This  
4 time it was on the Spirit Lake Reservation or at  
5 that time it was the Fort Totten Reservation, and  
6 that's In the Application of Otter Tail Power  
7 Company. That's 451 Northwest Second 95. That's  
8 the 1990 case. I'm going to call it the 1990 case  
9 just for simplicity reasons.

10 That was a dispute over a new  
11 manufacturing plant on the Spirit Lake Reservation.  
12 The manufacturing plant had requested service from  
13 Baker Electric, but later on the Tribe went --  
14 requested power from Otter Tail. And so just like  
15 in this case, Otter Tail tried to assert the  
16 self-government interest of the Tribe and it was  
17 not allowed to do so because it lacked standing.

18 But beyond the standing issue, even after  
19 determining that they did not have standing, the  
20 Court went on to discuss the jurisdiction over the  
21 Public Service Commission over Otter Tail in the  
22 context of the Spirit Lake Tribe's treaty and  
23 inherit sovereignty.

24 The Court noted that the state law  
25 allocating electric services between competing

1 utilities did not amount to regulating the use of  
2 development of the tribal property. They also  
3 determined that the Tribe had failed to assert  
4 jurisdiction over electric utilities, which allowed  
5 substantial investments within the reservation  
6 which could not be recovered if services are  
7 duplicated. And what's kind of important about  
8 that, that goes back to duplication of services,  
9 interference, those sorts of claims, and that's  
10 what we have here.

11 Interestingly enough, the federal court  
12 did go on and say that the tribes cannot regulate  
13 the utilities through those -- through those  
14 utility codes, and that's the Devils Lake Sioux  
15 Tribe case versus the Public Service Commission,  
16 896 Fed. Supp. 955, and that was issued in 1995.

17 So the -- that -- they determined that the  
18 Tribe did not have the -- the inherent sovereignty  
19 to regulate utilities. In the 1990 case the North  
20 Dakota Supreme Court viewed the Tribe's request for  
21 power from Otter Tail as the Tribe reaching outside  
22 the reservation to regulate a public utility rather  
23 than it reaching in by a nonIndian entity.

24 And what that gets to is when we're  
25 dealing with the sovereignty of tribes, there is

1 reluctance for courts in some extents to allow a  
2 nonIndian to come onto the reservation and regulate  
3 what the Tribe's doing with their land or their  
4 businesses or their internal relations, which I'll  
5 talk about a little bit more in detail in a little  
6 bit.

7 But that's what we have going on here.  
8 Here the Tribe is trying to reach outside the  
9 reservation boundaries to regulate utilities. Now,  
10 these lines run -- the 1990 case talks about the  
11 fact that these -- the electrical supply lines run  
12 in and out of the reservation. They don't start  
13 there, they don't end there, and so there has to be  
14 a way to get that power supply to there. And under  
15 North Dakota law there has to be a way to regulate  
16 the utilities, which is what the TIA does.

17 The PSC has extensive authority to  
18 regulate the utilities. The Tribe's preference for  
19 Otter Tail over North Central does not override the  
20 Commission's jurisdiction. This -- the regulation  
21 of the utilities does not, in fact, regulate the  
22 use or development of the tribal land, because  
23 as -- as is noted in the record, North Central's  
24 already providing power to the casino in seven  
25 different metered facilities. So in that case you

1 already have someone who's providing power to the  
2 facility.

3           And there's kind of a long-range question  
4 as to what happens -- and I'm skipping ahead of  
5 myself here, but while I have it in my mind, I'm  
6 just going to spit it out. You know, you can't  
7 have these two utilities servicing one piece of  
8 property, and you have one casino that -- or the  
9 casino -- North Central has expended a lot of -- I  
10 guess it's not a fact in evidence, but they -- they  
11 have their plant and facilities to the -- to the  
12 casino campus already, and that's a wasteful  
13 duplication to have Otter Tail come in and then  
14 what do you do with those facilities of North  
15 Central that's already there?

16           In 1990 -- in the 1990 case the North  
17 Dakota Supreme Court did determine the PSC had  
18 jurisdiction over Otter Tail's actions. Now, some  
19 important facts to the Court in that case was that  
20 the electrical supply systems, of course, weren't  
21 confined to the reservation, and that can impact  
22 nonreservation customers or other residents of the  
23 state of North Dakota.

24           In addition to -- they discussed authority  
25 of the Tribe and found the Tribe didn't derive

1 their powers to regulate under either of the  
2 Montana exceptions. Now, the Montana exceptions  
3 deal with U.S. Supreme Court decisions about  
4 authorities of tribes over -- over nonIndians, and  
5 so infringement -- North Dakota Supreme Court found  
6 that infringement of the tribes to make their own  
7 laws and be ruled by them is difficult to  
8 comprehend because, as the PSC found, the Tribe has  
9 not developed a regimen for regulating electric  
10 suppliers. And even assuming -- and the North  
11 Dakota Supreme -- Sup Court -- or Supreme Court  
12 even assumed that there was -- that the tribal  
13 resolution was there, and that even assuming there  
14 could be some jurisdiction it said after the fact  
15 it unilaterally directed Otter Tail to be the  
16 supplier, that there would be a minimal burden on  
17 tribal self-government if the PSC went ahead with  
18 its orders.

19 The North Dakota Supreme Court concluded,  
20 "The state's interest in regulating the public  
21 utility outweighed the minimal burden on tribal  
22 self-government."

23 Now, if you look at that 8th Circuit case,  
24 which is Baker Electric versus Chaske, 28 Fed. 3rd  
25 1466, which is the 1994 8th Circuit case, the 8th

1 Circuit felt that the decision that was issued by  
2 the North Dakota Supreme Court was supported by its  
3 analysis that Otter Tail didn't have standing to  
4 assert the Tribe's sovereignty or as the Montana  
5 analysis. The 8th Circuit said North Dakota  
6 Supreme Court had analyzed those issues.

7 But these -- these -- the 1990 case and  
8 the 1984 state cases are still good law. Neither  
9 appealed to a higher authority. Otter Tail does  
10 argue they have been overruled, but that's not the  
11 case. The federal -- the district of North Dakota  
12 cannot overrule supreme court decisions on its own  
13 law.

14 So we believe -- North Central believes  
15 North -- the -- the Public Service Commission  
16 should follow the precedence of this state.

17 Furthermore, we believe that the gaming  
18 compact, which is part of the stipulated facts --  
19 those weren't involved in the other cases. The  
20 gaming compact recognizes the retention of state  
21 jurisdiction in paragraph 17.2. It also discusses  
22 that -- that neither -- that neither state or the  
23 tribes are going to expand their civil  
24 jurisdiction. So what we would argue that means is  
25 the Tribe can't expand its jurisdiction on its

1 gaming activities on regulating things within the  
2 state of North Dakota.

3 Additionally, those federal court cases  
4 had additional evidence presented by the Tribe that  
5 allowed the Court to do additional fact finding  
6 regarding jurisdictional. They had the treaty  
7 rights. They had alleged damages by the Tribe. We  
8 don't have any of that here in this case.

9 So even with the Tribe's intervention, the  
10 Commission has jurisdiction and it's the Tribe who  
11 has the burden to bear that there's some sort of  
12 threat to its political integrity by the PSC's  
13 actions. It's a long established -- in 1978 --  
14 Oliphant versus Suquamish Indian Tribes is one of  
15 the first cases regarding tribal jurisdiction.  
16 It's a long precedent that tribes have diminished  
17 sovereignty over nonIndians.

18 JUDGE HOBERG: What's the cite on that  
19 one?

20 MS. HOFFARTH: 435 U.S. 201. And that's a  
21 1978 U.S. Supreme Court decision.

22 The court cases that have dealt with this  
23 sort of issue that we have in this case, whether  
24 they be from the PSC in the state of North Dakota,  
25 and even the federal court cases, they talk about

1 the Montana analysis. The North Dakota Supreme  
2 Court has already determined that tribes do not  
3 have the authority under the Montana factors to  
4 regulate utilities, and that's that 1984 case.

5 I'm going to briefly touch on the Montana  
6 analysis for the Court to review. Montana versus  
7 United States, which is 450 U.S. -- and I'm citing  
8 page 565 and 566. It says, "In absence of  
9 Congressional direction, Indian tribes lack civil  
10 authority over nonmembers unless there's a  
11 consensual relationship between nonmembers of the  
12 Tribe or members of the Tribe and nonIndian  
13 activity which affects an Indian tribe's political  
14 integrity, economic security, health or welfare."  
15 So that's really -- when we talk about the Montana  
16 test, that's what that involves.

17 And so to exercise the power -- tribal  
18 power beyond what is necessary to protect tribal  
19 self-government or control in -- internal relations  
20 is inconsistent with what is called the dependent  
21 status of Indian tribes, and there must be  
22 expressed Congressional authority for that to  
23 occur.

24 The first exception deals with consent and  
25 there is -- the type of cases that that -- the

1 Montana court listed would be involved would be  
2 on-reservation sales transactions, taxes on  
3 nonmember-owned livestock within the boundaries of  
4 the reservation, taxes on businesses conducted by  
5 nonmembers and taxes on cigarette sales.

6 This is not the same type of activity.  
7 The concept of supplier and consumer, you know, if  
8 we put it that way, the Tribe's the consumer and  
9 the utility would be the supplier. That's not the  
10 kind that is thought of under the Montana  
11 exceptions, and that -- the 1990 case at page 104  
12 they discuss that first example.

13 The other things that we think are  
14 important under the Montana analysis -- and this  
15 gets into its Strate versus A-1 Contractors, which  
16 is 520 U.S. 438. That's a 1997 U.S. Supreme Court  
17 decision. That is -- there's a whole line of --  
18 kind of line of Montana cases. This would be the  
19 next one. That involved a car accident on a state  
20 highway near New Town on the Fort Berthold Indian  
21 Reservation.

22 And what the Strate case determined was  
23 that when you have a state highway, the Tribe has  
24 no regulatory juris -- or the Tribe has no  
25 regulatory authority over the highway.

1           So important facts from our -- from North  
2 Central's perspective are -- is that Otter Tail  
3 crossed Highway 5. Part of the record is Central  
4 Power's easement for within the -- or the North  
5 Dakota Department of Transportation's plat, that's  
6 part of the record. North Central's easements is  
7 part of the stipulations that we've entered into,  
8 and all of those were crossed when Otter Tail  
9 expanded its plants and facilities. All of these  
10 entities involve the rights of nonIndians, their  
11 property rights.

12           And Strate says that there's no authority  
13 over nonIndian conduct on state highways because  
14 when the -- when -- when the highways -- those  
15 sorts of transactions are made, the Tribe becomes a  
16 stranger to the property because it didn't retain  
17 it's gatekeeping rights, so they can't assert the  
18 right to exclude and occupy.

19           In this case, since they used -- utilized  
20 those -- the highway right-of-way, Central Power's  
21 crossing their rights and crossing North Central's  
22 easements, we believe that the Tribe's gatekeeping  
23 rights -- and, correspondingly, they -- they lost  
24 their jurisdiction and sovereignty over those  
25 particular parcels of land -- the Tribe doesn't

1 have the authority to regulate the state  
2 right-of-way. And without the utilization of that  
3 state right-of-way and without crossing both North  
4 Central's and Central Power's electric service  
5 lines, there would be no way for Otter Tail to  
6 reach the casino. So we believe under these sort  
7 of circumstances the Public Service Commission has  
8 the jurisdiction to regulate.

9 The second exception is concerned with  
10 effects on the Tribe's political integrity,  
11 economic security, health and welfare to the Tribe.  
12 The Plains Commerce case, which is 554 U.S., and  
13 I'm citing page 328, that case says that, "In order  
14 to be regulated by the Tribe, conduct must imperil  
15 the Tribe." And so in this exception -- the second  
16 Montana exception is to be narrowly construed.  
17 Tribal sovereignty is really narrow in those cases.

18 So under that exception tribes are  
19 allowed -- have inherent power to punish tribal  
20 offenders, determine tribal membership, regulate  
21 domestic relations and proscribe rules of  
22 inheritance for its members. But it's always tied  
23 to the tribal -- the Tribe's right to  
24 self-government and controlling internal relations.

25 Now, there is no -- where there is no

1 federal grant of power providing tribal governments  
2 over nonmembers, it is evident that tribal courts  
3 lack adjudicatory authority over disputes regarding  
4 conduct. That's the Strate case, footnote 14.

5 So in this case there is no evidence that  
6 the regulation of the electric service provider  
7 will actually imperil or have any sort of effect on  
8 the internal workings of the Tribe or the health  
9 and welfare of any tribal member, that it's going  
10 to affect self-government or somehow affect  
11 economic development opportunities of the Tribe.

12 On a side note as well, the state and  
13 tribe can have concurrent jurisdiction over a  
14 matter. That cite is New Mexico versus Mescalero,  
15 M-e-s-c-a-l-e-r [sic], at 462 U.S. 324. It's a  
16 1983 case. A state's regulatory interest can be  
17 substantial if the state can point to  
18 off-reservation effects that necessitate the  
19 state's intervention.

20 There is no evidence to support that the  
21 regulation of Otter Tail Power under the TIA causes  
22 any harm to the Tribe. The PSC has an interest in  
23 off-reservation effects of the provision of  
24 electric services that warrants actions by the  
25 state agency, which gets to the question about

1     what's the future rate case going to be? We don't  
2     have any evidence on that particular issue. But  
3     that just points to the fact that the PSC would  
4     have jurisdiction because of the off-reservation  
5     con -- conduct or issues that will arise as a  
6     result of this issue.

7             So for those reasons we think the motion  
8     to dismiss must be denied. We believe that Otter  
9     Tail is subject to the PSC's jurisdiction, no  
10    matter where it's located. And under all the  
11    analyses of the law we believe that even with the  
12    Tribe's request for service from Otter Tail Power  
13    and recognize that the Tribe does have some  
14    inherent sovereignty, in this case that doesn't  
15    overrule the Commission's authority because of the  
16    state's interest.

17            Since the PSC has jurisdiction, we believe  
18    Otter Tail should be restrained from constructing  
19    and extending its line without the PC&N, and as a  
20    matter of law we believe North Central will prevail  
21    on the merits. That we believe admissions -- Otter  
22    Tail has admitted all the elements of the case.  
23    It's constructed an extension of its public utility  
24    plant and system to the Sky Dancer Casino without  
25    first obtaining a PC&N. It crossed the lines of

1 North Central and Central Power Electric to do so.  
2 It crossed the state highway without doing so.  
3 And, most importantly -- I think we can't let this  
4 fact get lost in all of this -- is that North  
5 Central is already providing service to the casino  
6 and has done so since 1988 with seven -- with now  
7 up to seven metered facilities. And this is the  
8 definition of interference and can't be allowed by  
9 the PSC.

10 If this type of action is allowed, after  
11 every tribal election there would be lobbying to  
12 take loads from every tribal-owned entity and so  
13 that's going to lead to a checkerboard event,  
14 there's not going to be orderly development, you're  
15 going to have all kinds of duplication of services,  
16 wasted investment.

17 Even the 8th Circuit in that -- even the  
18 8th Circuit case that was issued in 1994, 28 Fed  
19 3rd 1466, indicated that the 8th Circuit was  
20 concerned about that case in -- in wasted  
21 investment. So it's -- it's not just the North  
22 Dakota courts that are worried about wasted  
23 investment. The federal courts are worried about  
24 wasted investment again.

25 Since Otter Tail expanded its facilities

1 without a PC&N, it's duplicating and interfering  
2 with North Central's current service to the casino.  
3 We believe the facilities must be removed. This is  
4 an egregious case of interference and can't be  
5 allowed under the -- under North Dakota law, and  
6 they should be required to remove their facilities.  
7 We don't believe that there's any harm to the Tribe  
8 as North Central is already providing power to the  
9 casino.

10 Does anyone have any questions?

11 JUDGE HOBERG: Thank you, Ms. Hoffarth. I  
12 think we'll go with Mr. Gruman first, if he has any  
13 questions.

14 MR. GRUMAN: I have no questions, Your  
15 Honor.

16 JUDGE HOBERG: Thank you.

17 Commissioner Clark.

18 COMMISSIONER CLARK: Maybe just a couple.  
19 Thanks for your argument. And from a public policy  
20 standpoint, I understand your concern and I may  
21 have some questions for Mr. Gerhardson when the  
22 time comes with regard to what it means -- might  
23 mean in the future for Otter Tail if -- if they  
24 were to serve the load. But I'd like for me, if  
25 you could, to describe a bit more -- perhaps put a

1 finer point on why you believe the '95 case, the  
2 Devils Lake versus North Dakota PSC case, isn't the  
3 most relevant case on point, I mean why that isn't  
4 the one that -- that is most closely identified  
5 with this particular case, as most closely on point  
6 and shouldn't hold precedent.

7 MS. HOFFARTH: Sure. In the 1995 case --  
8 in that case, first of all, we're dealing with a  
9 different -- different tribe. We're dealing --  
10 that case dealt with the Fort Totten Tribe or the  
11 Spirit -- the Spirit Lake Reservation as I believe  
12 it's now known as.

13 COMMISSIONER CLARK: If I may, why would  
14 that distinction make a --

15 MS. HOFFARTH: Well --

16 COMMISSIONER CLARK: -- difference?

17 MS. HOFFARTH: -- when you're looking  
18 at -- in that case they looked at treaties and all  
19 sorts of things that we don't actually have in  
20 front of us, and with any -- any tribe, without  
21 having reviewed the Spirit Lake's treaty in  
22 comparison to the Turtle Mountain Band of  
23 Chippewa's treaty with the United States, I mean  
24 there could be differences in those particular  
25 documents.

1           We don't -- the Court also looked at in  
2           that case the reservation location, the size, the  
3           percentage of fee land and census information. We  
4           also don't have that information here.

5           Regardless of that, the Court also  
6           concluded that the Tribe's regulations are not  
7           enforceable. And -- and what's different here, as  
8           well, is we're dealing with sovereign immunity  
9           issues. We have the gaming compact, which says  
10          that -- that North Dakota is going to retain its  
11          jurisdiction. We would -- we would argue, and  
12          perhaps the -- the Tribe would disagree, that the  
13          gaming compact would apply to any expansion of the  
14          casino.

15          And so when you have the jurisdiction  
16          of -- that the state is allowing to keep its  
17          regulatory inform -- you know, its regulatory  
18          authority right in the gaming compact, we think  
19          that's significant.

20          Also significant is since 1995 there has  
21          been other changes in Indian law. The Plains  
22          Commerce is a more recent case. That case went on  
23          to talk about that now the Montana case is probably  
24          a little more narrow than maybe perhaps it was at  
25          the time. They talk about there actually has to be

1 imperil to the tribal entity, and we don't believe  
2 that that has been shown in this particular case.

3 And as with every case, the facts of each  
4 case are important, and I don't know -- it doesn't  
5 seem to me that the Devils Lake Sioux Tribe case  
6 versus the PSC -- in that particular case I don't  
7 believe that Baker Electric was already -- or the  
8 utility -- or the rural electric was already  
9 serving that tribe at the time that all of this was  
10 occurring. I think Otter Tail served it from the  
11 start. I just wanted to look real quick here.

12 In that particular case the Otter Tail --  
13 Baker and Otter Tail -- Otter Tail took the -- and  
14 I'm just reading on page 957. Otter Tail took a  
15 customer away from Baker by virtue of a tribal  
16 resolution, and the PSC ultimately determined that  
17 Bake -- Baker should -- here had decided that Baker  
18 would apply, but I think in that particular case  
19 I'm not sure that there was service and I don't  
20 remember off the top of my head, so I'll let the  
21 case be the better -- better distinction of that.  
22 I don't think Baker was serving that particular  
23 facility.

24 And, further, if you look at the 8th  
25 Circuit decision, which followed that down the

1 line --

2 JUDGE HOBERG: Which one is that?

3 MS. HOFFARTH: That would be the 1994 case  
4 which would be Baker versus -- Baker Electric  
5 versus Chaske, 28 Fed 3rd 1466, the Court was  
6 concerned about wasted investment at that point,  
7 because Otter Tail had had investments in the  
8 facility for that time and Baker would have had to  
9 extend its line in order to serve.

10 So in that particular case, if you kind of  
11 just try to follow along with what's in the  
12 district court and what's in here, Baker would have  
13 had to extend its line. There would have been  
14 some -- it seems to me in the cases that there's  
15 inferences that there would have been downtime of  
16 some sorts between the changeover in the electrical  
17 service providers, which leads me to believe that  
18 Baker -- Baker never served this load from the  
19 start, that Otter Tail always had, even though that  
20 Baker for whatever reason -- even though Baker was  
21 ultimate at the PSC level. I think that's  
22 significant, that even the 8th Circuit is concerned  
23 about the duplication of services.

24 So that's why I think it's different. And  
25 particularly since 1995 there has been a narrowing

1 of the jurisdiction by the U.S. Supreme Court,  
2 and -- and what I think is really important in  
3 the -- the district court case, as well, in 1995 is  
4 that they -- the -- the district court did say the  
5 tribes do not have inherent sovereignty to regulate  
6 utilities.

7 COMMISSIONER CLARK: This might be  
8 thinking ahead a bit much, but --

9 MS. HOFFARTH: Mm-hmm.

10 COMMISSIONER CLARK: -- I'm curious.  
11 If -- I mean let's say that -- that ultimately it  
12 comes to bear that -- that Otter Tail is allowed to  
13 serve the casino. Would -- is a potential course  
14 of action for the cooperative in that case some  
15 sort of takings action where you have stranded  
16 investment, money has been put in to service a  
17 particular location and now for whatever reason the  
18 regulatory regime has changed so that someone else  
19 is serving that? Is that the remedy in a case like  
20 this?

21 MS. HOFFARTH: You know, it's hard to say  
22 what the remedy would be. I mean certainly there's  
23 stranding investment. I mean it gets to the  
24 question -- I mean there are provisions under the  
25 North Dakota law about how to deal with if one

1 utility is going to serve and how they buy out the  
2 other, but if you find that this doesn't -- you  
3 don't have jurisdiction here, you certainly would  
4 have jurisdiction there. So would it be a takings  
5 case? There could be a breach -- or, you know, an  
6 interference with contract sort of action. There's  
7 a multitude, I think -- those are just two that pop  
8 out of my head, but those are -- those are very  
9 significant. And how do you -- and what court  
10 would that be sued in? Would that be state court?  
11 Would that be federal court? I mean I think there  
12 would have to be a significant amount of research  
13 for that to be done. And how that gets to rates by  
14 Otter Tail for having to litigate over it, I don't  
15 know.

16 COMMISSIONER CLARK: Okay. Thank you.

17 MS. HOFFARTH: Thank you, Commissioner.  
18 Commissioner Cramer, please.

19 COMMISSIONER CRAMER: Yeah, I think -- I  
20 think I'm down to one now. In I think it was the  
21 first case, in the '84 supreme court case, you --  
22 you made a statement that -- something to the  
23 effect that if our jurisdiction didn't extend to  
24 the -- or if the BI -- you made, I guess, a  
25 comparison between the BIA and the Tribe.

1 MS. HOFFARTH: Correct.

2 COMMISSIONER CRAMER: Is the BIA sovereign  
3 just like the Tribe and therefore they're the same  
4 or is the Tribe an extension -- or BIA an extension  
5 of the Tribe or explain that argument a bit.

6 MS. HOFFARTH: I will. What the BIA --  
7 what the Bureau of Indian Affairs is is they're  
8 actually an entity of the federal government.  
9 Okay. So they would be cloaked with the same sort  
10 of sovereign immunity issues as the United States  
11 would be.

12 And in a similar way the Tribe has  
13 sovereign immunity in certain issues -- in certain  
14 circumstances, and we agree that's true, but we  
15 believe that the sovereign immunity of the Tribe is  
16 less than what the United States of America's  
17 sovereign immunity is.

18 So they're -- the Bureau of Indian Affairs  
19 has some entities within the Turtle -- Turtle  
20 Mountain Indian Reservation, okay, and then the  
21 Tribe has its own tribal trust -- you know, tribal  
22 land as well. And so -- but they're -- I'm just  
23 using it as an analysis. You know, the BIA would  
24 be cloaked with federal immune -- federal sovereign  
25 immunity and the Tribe, of course, has its own,

1 which is different, of course, but similar.

2 COMMISSIONER CRAMER: Okay.

3 MS. HOFFARTH: Does that help?

4 COMMISSIONER CRAMER: Well, yeah, I think  
5 it does actually. I don't think it is the same. I  
6 mean it's similar, but it's --

7 MS. HOFFARTH: It's similar.

8 COMMISSIONER CRAMER: -- I mean we're not  
9 talking about immunity. We're talking about  
10 governing.

11 MS. HOFFARTH: Right.

12 COMMISSIONER CRAMER: So anyway -- but  
13 thank you for the clarification. I -- I think the  
14 rest has been answered. Thank you.

15 JUDGE HOBERG: Thank you, Commissioner.

16 Commissioner Kalk, please.

17 COMMISSIONER KALK: Thank you. Thank you  
18 for your comments, Debra.

19 Just a couple questions. The -- when  
20 exactly did North Central find out that Otter Tail  
21 was moving into their area, per se? Was it the  
22 December filing or was it --

23 MS. HOFFARTH: It was --

24 COMMISSIONER KALK: -- long before that?

25 MS. HOFFARTH: Thank you. That's a good

1 question. It was shortly before that. If you look  
2 at Mr. Martian's affidavit, which was attached to  
3 our complaint, it would have been -- paragraph  
4 six -- and, of course, this was one of our  
5 stipulations -- is in late November he received a  
6 call from Otter Tail individuals, and their names  
7 are listed there, Mark Helland, Scott Sigette and  
8 Jeff Lemen, regarding a request for electric  
9 service to the new building on the Sky Dancer  
10 campus.

11 COMMISSIONER KALK: And when was the  
12 request? When -- when did North Central first  
13 talk -- not first talk -- talk to the tribes about  
14 potentially serving?

15 MS. HOFFARTH: North Central -- on  
16 paragraph five of Martian's affidavit, on  
17 November 28 North Central was requested to provide  
18 600-amp electric service to construction trailers.  
19 And what I believe that was -- I don't believe that  
20 was ever in writing. I think that was just a  
21 telephone call request.

22 COMMISSIONER KALK: Well, wasn't -- it  
23 would seem like there would have been a lot of  
24 discussion before November going back and forth  
25 between Otter Tail and North Central that wouldn't

1 be here today. I'm just curious if that was really  
2 the first time or that's --

3 MS. HOFFARTH: This is --

4 COMMISSIONER KALK: -- if it was --

5 MS. HOFFARTH: That's really the first  
6 time --

7 COMMISSIONER KALK: Okay.

8 MS. HOFFARTH: -- as we set out in  
9 Mr. Martian's affidavit, and it was on December 1  
10 that they got the request to locate. Yeah. The  
11 call to locate was on December 7 of 2011 and then  
12 shortly thereafter is when we filed our complaint.

13 COMMISSIONER KALK: The -- your discussion  
14 about Highway 5, I -- I think I know the answer. I  
15 want to make sure that -- the tribal land is on  
16 both sides of Highway 5 there, isn't it?

17 MS. HOFFARTH: Correct, Your Honor.

18 COMMISSIONER KALK: Okay. But take  
19 your -- what was your point you were trying to make  
20 exactly again about the Highway 5 discussion,  
21 because --

22 MS. HOFFARTH: Yes.

23 COMMISSIONER KALK: -- I was tracking most  
24 of it, but I want to make sure I understand exactly  
25 what your point was there.

1 MS. HOFFARTH: Yes. What my point is with  
2 that, if you -- the Strate versus A-1 Contractors  
3 case, what that case stands for is that when the  
4 Tribe allows state highways to be built, when that  
5 occurs, the Tribe lost its right to regulate  
6 nonIndian conduct on that land. And so when State  
7 Highway 5 was built -- and one of the exhibits is  
8 the plats and the actually NDD -- the North Dakota  
9 Department of Transportation easements for that --  
10 what happens when the Tribe loses regulatory  
11 authority over what occurs within the -- within  
12 that right-of-way, which is owned by the State of  
13 North Dakota, and so one of the bases we think for  
14 having jurisdiction that the Commission would have  
15 is because they crossed that, the North Dakota  
16 Public Service Commission has jurisdiction, or the  
17 State of North Dakota -- let's say a car accident  
18 happened on that particular stretch of highway.  
19 The tribal courts would not have jurisdiction over  
20 that personal injury action.

21 In the same way we believe that the  
22 Commission has jurisdiction because of the  
23 involvement of that state highway.

24 COMMISSIONER KALK: So you're -- the  
25 Central Power line would have been north of the

1 existing Otter Tail lines and so Otter Tail would  
2 have crossed over Central Power's lines in that  
3 right-of-way?

4 MS. HOFFARTH: Correct. And it crossed  
5 the state highway. It would have -- it went over  
6 the state highway is -- is my recollection. As  
7 their lines ran around the south side of the  
8 highway, they crossed the state highway over  
9 which -- which the Tribe would not have regulatory  
10 authority to get to the casino property.

11 COMMISSIONER KALK: Okay. And then the  
12 last question I guess for now is North Central's  
13 been serving this area since 1998, you said?

14 MS. HOFFARTH: Correct.

15 COMMISSIONER KALK: Has there been any --  
16 I'm sure there's always been questions about  
17 reliability here and there, but --

18 MS. HOFFARTH: Mm-hmm.

19 COMMISSIONER KALK: -- has there been  
20 any -- any significant questions of reliability  
21 that North Central has not provided the power to  
22 the tribal areas that they've requested and  
23 discussion about that?

24 MS. HOFFARTH: And, of course, this isn't  
25 part of the evidence, but since you asked I will

1 relay one -- there has been one instance that I can  
2 think of that there was -- there had been some  
3 brownouts that North -- that had occurred at the  
4 casino. And I don't remember exactly the time  
5 frame of that; do you remember?

6 MR. MARTIAN: It was last summer.

7 MS. HOFFARTH: Last summer. And what it  
8 came -- and sometime then this spring, this winter  
9 there happened to be a problem at the casino, and  
10 when they got to -- North Central was there and the  
11 casino personnel -- Sky Dancer Casino personnel  
12 were there, what was determined is there was a  
13 problem with the internal electric system, elec --  
14 you know, the elec -- the electrical of the own --  
15 of the casino that was causing the problem and it  
16 was not a problem with North Central's lines at  
17 all.

18 Not to mention the investment that Central  
19 Power has made in that area with their new  
20 transmission lines which provides more reliable  
21 power to North Central. But even without that  
22 investment, there was no reliability problems to  
23 our knowledge.

24 COMMISSIONER KALK: Okay. I believe that  
25 was it.

1 JUDGE HOBERG: Thank you, Commissioner.

2 Anything further? Thank you.

3 Thank you, Ms. Hoffarth.

4 Mr. Gerhardson, please.

5 MR. GERHARDSON: Okay. I think I have it.

6 Sorry. I had a little trouble with the microphone.

7 COMMISSIONER CRAMER: It's regulatory lag.

8 MR. GERHARDSON: It's regulatory lag.

9 Thank you, Your Honor, and Commissioners.

10 I'm going to have Mr. Sigette put up an exhibit. I

11 guess how I'll start is just to say that in the

12 cases I've been --

13 JUDGE HOBERG: This is just for

14 illustrative purposes so we can see it better;

15 correct?

16 MR. GERHARDSON: It's just a -- it's not

17 evidence. It's a statement of the law. It's an

18 excerpt from the 1995 case that was referenced in

19 Ms. Hoffarth's presentation.

20 And, you know, in the cases I've argued to

21 this Commission, I don't think we've ever had such

22 a clear direction on a legal issue from prior case

23 law as we do in this case. That's the 1995

24 district court ruling in the Devils Lake Tribe

25 versus North Dakota Public Service Commission.

1           I'll get to the actual contents of that  
2 ruling in a moment, but in that case the U.S.  
3 Federal District Court for the District of North  
4 Dakota considered whether the Devils Lake Tribe had  
5 exclusive jurisdiction to all electric service  
6 locations on the reservation; or if not, whether  
7 the Tribe had exclusive jurisdiction to some  
8 smaller subset of service locations.

9           The 1995 court, the federal district  
10 court, determined that the Tribe did not have  
11 jurisdiction to all service locations on the  
12 reservation, but the Court's ruling was patently  
13 clear on a subset of locations over which the Tribe  
14 did have exclusive jurisdiction.

15           And the ruling was as follows. I'll read  
16 it for the record. "The Court concludes that Otter  
17 Tail is entitled to summary judgment on the issues  
18 between it and the North Dakota Public Service  
19 Commission, to the effect that the Tribe may by  
20 resolution or contract determine who is to supply  
21 electrical service to tribal-owned businesses  
22 located upon Indian-owned or trust lands, without  
23 regards to the rate structure or other regulations  
24 of the North Dakota Public Service Commission."  
25 The ruling goes on to issue a restraint against the

1 Public Service Commission from sanctions against  
2 Otter Tail, or any future competitor, for providing  
3 that service.

4 It goes on also to reference a -- the  
5 extent to which the North Dakota Commission's  
6 powers are not limited, and I'll address those in a  
7 moment.

8 In this case before you there is  
9 absolutely no dispute on the following  
10 jurisdictional facts. The Sky Dancer Casino is a  
11 tribally owned business. The casino is on tribal  
12 trust land. And the Tribe has by resolution  
13 determined that Otter Tail will supply electric  
14 service to the casino.

15 Now, often when we bring case  
16 precedence -- precedence to use in our arguments,  
17 they involve rulings from distant places or they're  
18 from -- if they're from here, usually the distant  
19 past. They might involve other states or other  
20 state agencies. They almost always involve  
21 different parties and usually different issues.

22 And in the oral arguments I've been  
23 involved in, I and my opposing counsel attempt to  
24 argue that these old, distant and remote cases are  
25 somehow analogous to or distinct from the case

1 that's before you, and we do that to try and  
2 persuade you with those prior cases that you should  
3 rule similarly or differently from the case that  
4 we're -- that you have to resolve.

5 In this instance we have something very  
6 different. We have a specific directive for this  
7 Commission on how it is to handle the exact issue  
8 in controversy. It's not a resolution from another  
9 jurisdiction or involving another agency.

10 In the case directive we have, the  
11 Commission was actually a party to the litigation.  
12 And like I said, the Court's ruling gave the  
13 Commission specific direction on what it was to do  
14 in cases like this one. And I don't need to tell  
15 you, but those proceedings that resulted in this  
16 1995 decision had the benefit of an extremely  
17 voluminous record, accumulated in countless  
18 proceedings, over something like seven years. It  
19 involved proceedings in front of this Commission,  
20 involving -- it involved proceedings in state court  
21 and it involved proceedings in federal court.

22 Now, I have to say I don't remember ever,  
23 myself, litigating anything for as long as these  
24 proceedings lasted. Some of the people in this  
25 room, I believe, may have actually lived those

1 proceedings, and the rest of us have spent days, if  
2 not weeks, trying to familiarize ourselves with the  
3 lengthy narrative of those proceedings. And we can  
4 all agree, it is a circuitous and complex  
5 narrative, oftentimes confusing. And that's mostly  
6 because of the different outcomes in the different  
7 forums that the parties were litigating.

8 But despite these complexities in the  
9 narrative leading up to the conclusion of these  
10 proceedings, like I said earlier, I don't recall  
11 ever when the directive from a prior case was more  
12 clearly stated or more clearly applicable to this  
13 Commission and these parties, and I don't recall  
14 when the resolution was more clearly applicable to  
15 the very issue the Commission was being asked to  
16 resolve than this 1995 resolution.

17 Now, I want to reiterate, in this case  
18 there is absolutely no dispute on the following  
19 jurisdictional facts. They are stipulated. The  
20 Sky Dancer Casino is a tribally owned business.  
21 The casino is on tribal trust land. And the Tribe  
22 has by resolution determined that Otter Tail will  
23 supply electric service to the casino.

24 The question before you today is whether  
25 the relief requested in North Central's complaint

1 is something within this Commission's jurisdiction.

2 So let's look at what relief is requested.

3 The complaint requests a restraining order

4 forbidding Otter Tail from serving the Sky Dancer

5 Casino. Obviously, if such a restraining order were

6 issued, it would be in direct contradiction to the

7 Tribe's determination that Otter Tail should be the

8 electric supplier. And maybe more importantly,

9 certainly as importantly, is it would be in direct

10 contradiction of the very clear -- clear ruling in

11 this 1995 case. And any way they want to spin it,

12 North Central is requesting this Commission to make

13 a ruling that the Tribe is not by resolution --

14 pardon me -- that the Tribe may not by resolution

15 or contract determine who is to supply electric

16 service to the tribally owned business on tribal

17 trust land.

18 Now, there is an argument that

19 Ms. Hoffarth -- Hoffarth makes in several ways that

20 maybe the Commission doesn't need to affect the

21 Tribe's determination of who should serve this

22 location, but rather can issue an order that would

23 restrain Otter Tail somehow from extending its

24 service lines to provide that service.

25 Well, again, this is absolutely not

1 consistent with the 1995 case and what happened  
2 with the two service locations that were in  
3 controversy in those cases.

4 In that case Otter Tail extended service  
5 to tribally -- a tribally owned manufacturing plant  
6 and a Head Start office, and there is absolutely no  
7 indication in the Court proceedings that the Tribe  
8 had jurisdiction only to determine the provider but  
9 the ND -- but the Public Service Commission had  
10 jurisdiction over the extensions or their  
11 construction.

12 And certainly the Commission did not try  
13 to make -- take any actions that would have  
14 inhibited the construction or operation of those  
15 facilities or in any other way assumed control over  
16 those facilities after the 1995 case was issued.

17 This argument that the Commission can  
18 retain a concurrent jurisdiction is not consistent  
19 with the cases that led up to the 1995  
20 determination.

21 In 1993 this same district court issued a  
22 ruling on the temporary restraining order that was  
23 currently restraining the Commission from acting  
24 against Otter Tail in contravention of the Tribe's  
25 authority, and that decision was found in error.

1 And in that decision Judge Conmy mused about the  
2 possibility of a concurrent jurisdiction. And the  
3 judge removed the restraining order against the  
4 Commission and at the same time affirmed that the  
5 Tribe had authority, essentially creating a  
6 concurrent jurisdiction.

7 The 8th Circuit in 1994 -- the very  
8 determination made by the 8th Circuit on appeal was  
9 that that was in error and that that was not a  
10 permissible result from this district court, and so  
11 the matter was remanded back down resulting in the  
12 1995 determination. And in the 1995 determination  
13 it's very clear that the Commission does not retain  
14 a concurrent jurisdiction. It says, "Without  
15 regard to the rate structure or other regulations  
16 of the North Dakota Public Service Commission."

17 Now, before I leave this ruling, I do want  
18 to address the last statement so as not to leave  
19 you with any confusion about what is retained with  
20 this Commission. You may recall that in that  
21 decision the Court was also addressing the question  
22 of whether the Tribe had authority over the  
23 entirety of the reservation, not just this limited  
24 subset of locations. And the Court determined that  
25 in that case the Tribe didn't have that plenary

1 authority over all service locations within the  
2 reservation. And so what -- the power that was not  
3 limited was to except as to such service, tribally  
4 owned businesses on tribal trust land.

5 North Central's argument would require you  
6 to stretch an interpretation of concurrent  
7 jurisdiction any way it might be phrased in a way  
8 that it would deprive the Tribe of the very clearly  
9 stated authority coming out of the 1995 case, and  
10 that interpretation flies smack into the face of  
11 this interpretation and the directive that the  
12 Tribe has authority and that the Commission may not  
13 infringe on the Tribe's authority in these  
14 situations.

15 Effectively their arguments would suggest  
16 that despite this clear directive that somehow this  
17 Commission could island these parcels and  
18 effectively embargo the Tribe, embargo electric  
19 service to the locations and thereby impose its own  
20 will on the Tribe, despite the fact that the  
21 federal court clearly identified that it's the  
22 Tribe's will and the Tribe's determination as to  
23 who should provide electric service.

24 And these interpretations are simply not  
25 consistent with common sense. One cannot read this

1 absolutely clear ruling from the 1995 case that not  
2 only gave clear and singular authority to the Tribe  
3 but also restrained the Commission from sanctioning  
4 the provider attempting to -- to serve as  
5 permitting such an end-around approach to  
6 disenfranchising the Tribe of its clearly and  
7 precisely articulated authority.

8 Now I want to address some of the  
9 questions that you asked of us. Well, maybe I  
10 should address the 1990 North Dakota Supreme Court  
11 case and maybe before that the 1984 case.

12 The 1984 North Dakota Supreme Court case  
13 involves the BIA, which is a federal agency. There  
14 are such distinguishing facts -- I think it's  
15 articulated in our written presentation -- really  
16 are not analogous in any way to the present  
17 situation. There's no argument by any party, to my  
18 recollection, in that case that tribal sovereignty  
19 is even at issue.

20 Ms. Hoffarth raised sovereign immunity.  
21 That is a separate and distinct issue. It doesn't  
22 apply in that case, either, so I just don't see the  
23 1984 cases having any applicability to the current  
24 situation.

25 The 1990 case is the dispute that resulted

1 in the 1995 federal court determination. And,  
2 again, I told you it was a circuitous and lengthy  
3 piece of litigation. But, nevertheless, no party  
4 argued following the 1995 ruling that somehow the  
5 Commission didn't need to respond to this directive  
6 because the 1990 case was still good law.  
7 Essentially, she's asking you to do that now.

8 The effect of the highway and the gaming  
9 compact. Well, number one, again, I mentioned that  
10 her argument would essentially say the highway  
11 gives the Commission an opportunity to embargo  
12 electricity from the Tribe's -- from a location the  
13 Tribe clearly has authority. That certainly in my  
14 mind cannot be the outcome. The character of any  
15 of the property cannot result in the deprivation of  
16 this clearly articulated authority that the Tribe  
17 has to determine the electric service provider at  
18 the location.

19 It's also worth pointing out that the  
20 Highway 5 is not the property of the State of North  
21 Dakota. Rather, it is land held in trust for the  
22 Tribe over which there's an easement for roadway  
23 purposes. We cited in our written pleadings the  
24 *Gourneau*, I believe is how you say it -- *Gourneau*  
25 *v. Smith*, which ruled that there can be no doubt

1 that state highways within the boundary of the  
2 reservation are part of the reservation. That's a  
3 quote.

4 With respect to the gaming compact, there  
5 are clear articulations within the gaming compact  
6 that it affects nothing else. That it expands  
7 neither party's authorities. While I don't believe  
8 she raised it in her written -- or pardon me -- in  
9 her oral argument, there were comments with respect  
10 to the limited waiver of sovereign immunity with  
11 respect to civil suits in the gaming compact. That  
12 has a very precisely articulated, limited waiver of  
13 sovereign immunity, again a very clearly and  
14 distinct issue from sovereignty. The gaming  
15 compact just has no relevance to these proceedings.

16 I think the last thing I want to address  
17 before concluding is the effect on rates. The  
18 Commission is aware that Otter Tail serves several  
19 jurisdictions. It is not uncommon for public  
20 utilities to serve more than one jurisdiction. We  
21 use jurisdictional allocators to allocate the costs  
22 to those jurisdictions. Doesn't matter if they're  
23 big or small.

24 For example, Otter Tail serves a portion  
25 of South Dakota, less than 10 percent. Now, that's

1 larger than a single customer or several customers,  
2 but at the same time jurisdictional allocators are  
3 used to allocate costs to different jurisdictions.  
4 While it's not come up at a prior Otter Tail  
5 case -- to my recollection, no party has ever  
6 raised the question of whether we should use  
7 separate jurisdictional allocations for tribal  
8 jurisdictional loads, it is certainly conceivable  
9 that that would be an approach to allocating the  
10 costs of service to those specific jurisdictions.  
11 I expect that that may be an issue in Otter Tail's  
12 next rate case. And I believe I am perfectly  
13 prepared to respond to that issue.

14 I think what I'll conclude with is just  
15 turning back to the issues that were noticed for  
16 this hearing and walking through what I think is  
17 the proper resolution of each of those issues.

18 This was in a notice dated April 25.  
19 There's four issues that were noticed. Number one,  
20 whether the Public Service Commission has  
21 jurisdiction to award the relief requested by the  
22 complaint. Again, the relief requested by the  
23 complaint is that a restraining order be issued  
24 against Otter Tail forbidding it from providing  
25 service to the Sky Dancer Casino. As I laid out,

1 the Sky Dancer Casino, it's undisputed, is a  
2 tribally owned business on tribal trust land and  
3 that a resolution -- by resolution the Tribe has  
4 determined that Otter Tail should provide service  
5 to that location. The 1995 case is directly on  
6 point that a restraining order of that type would  
7 be prohibited -- a prohibited infringement on the  
8 Tribe's authority and therefore that question has  
9 to be answered no, the Public Service Commission  
10 does not have jurisdiction to issue such a  
11 restraining order.

12 Number two, whether the respondent's  
13 motion to be -- to dismiss should be granted. For  
14 the same reasons, yes.

15 Number three, whether respondent should be  
16 restrained and enjoined from conducting or  
17 extending lines, plant or system to the Sky Dancer  
18 Campus without first obtaining a certificate of  
19 public convenience and necessity from the  
20 Commission -- Commission. Again, that is no,  
21 because it would -- a restraining order would be in  
22 violation of this order and ruling that suggests  
23 that the Tribe may determine who is to supply  
24 electric service without regards to the rate  
25 structure or other regulations of the North Dakota

1 Public Service Commission.

2 And then, finally, number four, whether  
3 the respondent should be required to remove its  
4 service extension facilities already constructed.  
5 And, again, the answer is no, for the same reasons.

6 With that, I guess I'll make myself  
7 available for questions.

8 JUDGE HOBERG: Thank you, Mr. Gerhardson.

9 Mr. Gruman, do you have any questions of  
10 Mr. Gerhardson?

11 MR. GRUMAN: No, Your Honor.

12 JUDGE HOBERG: Thank you.

13 Commissioner Clark, please.

14 COMMISSIONER CLARK: Just a couple. While  
15 as a matter of law you may be right -- may -- I'd  
16 raise the specter of public policy outcomes, and I  
17 think you started getting to that towards the end  
18 of your presentation. That's what I want to focus  
19 a little bit on, because I can see some really bad  
20 public policy outcomes. From a scenario  
21 standpoint, if you start thinking of any one  
22 individual particular customer being able to simply  
23 choose what -- not even energy provider -- but  
24 distribution provider gets to serve it.

25 What -- what tariffs will be applied to

1 Sky Dancer's load if Otter Tail serves? Would it  
2 be the currently on-file North Dakota tariffs or  
3 would it be some other private contractual  
4 agreement that's reached between the Tribe and  
5 Otter Tail?

6 MR. GERHARDSON: The Tribe and Otter Tail,  
7 in my opinion, are entitled to contract as they see  
8 fit. I will say it has been Otter Tail's approach  
9 to these that standard rates apply.

10 COMMISSIONER CLARK: So standard rates for  
11 ongoing service line extension policy --

12 MR. GERHARDSON: Yes. Terms of service,  
13 there is no discriminate treatment of this customer  
14 vis-a-vis any others, but at the same time that is  
15 pursuant to contract and tribal regulation to the  
16 extent it applies.

17 COMMISSIONER CLARK: Are there steps this  
18 Commission should be taking on behalf of those  
19 ratepayers over whom clearly we do have  
20 jurisdiction, which would be all the other  
21 ratepayers of Otter Tail, to require Otter Tail to  
22 in some way at least from an accounting measure  
23 wall off these types of investments so if in the  
24 future the Tribe says, Well, we want to go back to  
25 North Central or maybe there's a Canadian company

1 or an independent power producer, maybe we want MDU  
2 to come in and serve, so that other ratepayers are  
3 protected and not asked to subsidize another  
4 customer, whoever it may be.

5 MR. GERHARDSON: Obviously that --  
6 Commissioner Clark, I'm sorry, and other  
7 commissioners, that's obviously a great question  
8 for a rate case and I expect we'll visit that  
9 question in a rate case. And, in fact, I should  
10 say we do visit those questions in current rate  
11 cases with respect to our other jurisdictions.

12 We do our best to allocate and assign the  
13 costs associated with responding to each  
14 jurisdiction so that the other jurisdictions are  
15 not inappropriately paying the cost of service for  
16 others outside this jurisdiction.

17 This is a -- you know, a lawyer's dream,  
18 of course, that -- how to allocate costs among  
19 several jurisdictions, and so we have spent a lot  
20 of time in our rate cases on that state to state.  
21 I can say in the last two rate cases in a  
22 neighboring jurisdiction I have spent at least half  
23 of each rate case time on the question of how to  
24 allocate transmission-related costs among our  
25 several jurisdictions.

1                   COMMISSIONER CLARK:   Okay.

2                   MR. GERHARDSON:   It's been an enjoyable,  
3 intellectual enterprise from some perspectives, but  
4 it's lengthy litigation.   With respect to  
5 distribution it's easier.   There tends to be  
6 assignable costs, but we -- we approach that in  
7 each case.

8                   COMMISSIONER CLARK:   Okay.   Does -- I'm  
9 reaching back into memory and I don't recall if  
10 this is a utility issue or something else I dealt  
11 with somewhere along the way, but is there anything  
12 in the '95 case or other cases that you're aware of  
13 that requires the Tribe to have adopted a  
14 comprehensive regulatory regime in order to  
15 exercise its control?   This -- for some reason,  
16 this argument sticks in my mind and I can't  
17 remember exactly why that is.

18                   MR. GERHARDSON:   Well, in this case there  
19 is a tribal code that's existed for -- I don't  
20 know, since 1990s, if I recall correctly.   I  
21 actually think -- you know, as I reviewed those  
22 cases, I don't know that given the final outcome of  
23 this, which doesn't suggest that for these limited  
24 service locations a comprehensive code is required,  
25 because the determination is that by contract or

1 resolution the Tribe can serve.

2 Through the course of these -- these  
3 proceedings, though, there's the collateral issue,  
4 which is eventually found to be negative, which is  
5 does the Tribe have authority over all service  
6 locations within its tribe, and I think it's that  
7 issue where the question of the tribal code --  
8 comprehensive tribal code is really being  
9 litigated.

10 Now, no one ever says -- and it's -- I  
11 hope it's not relevant in this case or I don't feel  
12 it is -- that one has to adopt a comprehensive  
13 tribal code in order to address the specific  
14 service locations because there are different  
15 issues at stake. So that's my view. But there is  
16 this discussion in the 1990 North Dakota Supreme  
17 Court case about comprehensive tribal regulation  
18 and there wasn't any in Devils Lake at the time and  
19 therefore that was one of the rationales upon which  
20 the 1990 North Dakota Supreme Court decided that  
21 the Tribe didn't have authority over the -- again,  
22 the entire reservation for purposes of providing  
23 electric service, so --

24 COMMISSIONER CLARK: Sure. To break  
25 down --

1           MR. GERHARDSON: -- I hope I've answered  
2 your question.

3           COMMISSIONER CLARK: Sure. And this may  
4 go a little bit beyond the bounds of this case, but  
5 I'm curious. The -- the Court seems to have spoken  
6 to tribally owned businesses located within the  
7 exterior boundaries of a reservation, the nontrust  
8 land. What would be the -- so that's sort of one  
9 side of the equation.

10           It sounds like other types of businesses  
11 on trust land or within the exterior borders of the  
12 reservation -- what regulatory regime applies to  
13 those, what -- as opposed to -- maybe tribal  
14 members living within the exterior boundaries as  
15 opposed to tribal members? Is -- can you run  
16 the -- kind of the gamut for me how the Court  
17 analyzed those?

18           MR. GERHARDSON: Well, it's a narrow  
19 exception. I mean this stated ruling in the 1995  
20 district court case is narrow and it -- I think it  
21 requires each of those factors to be satisfied. I  
22 think you've got to have a tribally owned business,  
23 you've got to have a tribal trust or Indian-owned  
24 land -- well, it's -- I've got to think of the  
25 status of that -- Indian-owned or trust land, and

1 you've got to have the Commission -- pardon me, the  
2 Tribe, you know, deciding the provider through  
3 resolution or contract should be the provider. I  
4 think that's what is satisfied in this case.

5           There are some discussions about tribal  
6 members -- my recollection from the lengthy,  
7 circuitous litigation is that there were  
8 determinations made that tribal membership alone is  
9 not adequate. So if you have a tribal trust land  
10 and a tribal member, not a tribal-owned business,  
11 I -- I don't recall specifically, but I don't  
12 believe it falls within this purview.

13           There is some litigation after this -- I  
14 believe there's an 8th Circuit opinion and I don't  
15 recall the outcome of that -- where there was some  
16 question as to tribally -- sort of governmental  
17 services provided by the Tribe that might not  
18 otherwise fit these definitions. And I have to say  
19 I don't recall the outcome of those and I'm not --  
20 I don't have a response for you on those.

21           COMMISSIONER CLARK: Okay. Thanks.

22           That's all I have.

23           JUDGE HOBERG: Thank you, Commissioner.  
24           Commissioner Cramer, please.

25           COMMISSIONER CRAMER: Thank you. It's

1 hard almost to ask you questions if I'm to conclude  
2 that your argument is accurate that all the  
3 questions are answered by what's underlined in that  
4 1995 case, but bear with me for just a little bit.

5 With regard to these jurisdictional  
6 allocators -- and we're all very familiar. As you  
7 know, I've -- if you've spent half of your time on  
8 these cases, determining my age, I certainly  
9 have -- with regard to other jurisdictions and  
10 relevance of costs -- costs assumed and their  
11 jurisdictions and allocated properly, but none of  
12 them -- none of their jurisdictions are within the  
13 footprint of our larger jurisdiction. That's  
14 clearly, in my mind, a distinction, is it not, or  
15 does the geography not matter?

16 MR. GERHARDSON: I have -- if I may,  
17 Commissioner, there are a few instances where that  
18 is not the case. Otter Tail does provide wholesale  
19 service to certain towns, for example. Boy, we get  
20 into some pretty deep ratemaking here, but my  
21 recollection is that in our jurisdictional  
22 allocators we take into consideration those  
23 federal -- they're served under grandfathered  
24 federal agreements --

25 COMMISSIONER CRAMER: Mm-hmm.

1           MR. GERHARDSON: Approved by the Federal  
2 Energy Regulatory Commission. My recollection, we  
3 do do an allocator -- a set of allocators to  
4 address those situations. So I can't -- now,  
5 that's different because we're providing a  
6 wholesale service rather than retail service. So I  
7 mean it is somewhat different, but there are --  
8 there are in a sense towns within the states we  
9 serve where jurisdictional allocations occur.

10           COMMISSIONER CRAMER: Okay. And currently  
11 costs on reservations aren't allocated solely or  
12 exclusively to the reservation's ratepayers; right?  
13 I mean you serve areas now on the reservation.

14           MR. GERHARDSON: Yes, Commissioner.  
15 The -- the -- to my knowledge, that all of the  
16 prior cases we have the reservation service has  
17 been included in the general cost of service within  
18 the states we have provided service. That's been  
19 my -- that's my recollection. It's never come up  
20 as an issue. The service to the two loads  
21 following the 1995 case, I don't believe it ever  
22 came up as an issue as to whether we should carve  
23 them out as a specific jurisdictional service in  
24 our last general rate case.

25           COMMISSIONER CRAMER: That's my

1 recollection as well.

2 This is one of those questions that, you  
3 know, I guess wouldn't -- again, depending how we  
4 conclude this one -- but what of those seven meters  
5 at Sky Dancer that are being currently -- should I  
6 be concerned about that? I guess the tribal  
7 government and the ratepayers -- the reservation  
8 maybe, but am I to be concerned about that and why  
9 not, if not?

10 MR. GERHARDSON: I don't think you're to  
11 be concerned about that. I don't think that those  
12 are issues within your jurisdiction. Now, what I  
13 would say to that is Otter Tail is certainly aware  
14 of the Tribe's discretion going forward. Otter  
15 Tail has by contract and other things taken that  
16 into consideration, taken the risks of a different  
17 tribal determination in the future into  
18 consideration.

19 My belief is we have a responsibility to  
20 the Tribe and the Tribe has a responsibility to us,  
21 and it is that relationship that's governed by us  
22 and the Tribe and -- because of these rulings, not  
23 by this Commission.

24 COMMISSIONER CRAMER: Well, then should I  
25 be concerned about potential public policy outcomes

1 as Commissioner Clark has talked about? What's my  
2 responsibility and concern relating to public  
3 policy outcomes?

4 MR. GERHARDSON: Well, we have seven years  
5 of litigation where I think if -- it's heavy going.  
6 I'm -- I'm quoting that from Judge Conmy. It's  
7 heavy going. But there are -- I mean there -- that  
8 entire litigation is about public policy, how to  
9 deal with indigenous peoples, how to deal with  
10 electric service, which is by its nature an  
11 integrated service.

12 It's a lengthy narrative, as I said, and  
13 complex, but with a very clear outcome that  
14 balances public policy issues that, you know, we  
15 don't get to touch on very often. You know, tribal  
16 sovereignty is a very interesting subject of public  
17 policy.

18 But in this case the U.S. Federal District  
19 Court for the District of North Dakota resolved the  
20 public policy issue with respect to these  
21 particular service locations.

22 COMMISSIONER CRAMER: Okay. I'm going to  
23 leave it at that for now. Thank you.

24 JUDGE HOBERG: Thank you, Commissioner.

25 Commissioner Kalk, please.

1           COMMISSIONER KALK: Thank you for your  
2 comments. I've got notes jotted all over here, so  
3 I'll jump around a little bit. The -- when was  
4 Otter Tail first approached by tribal authorities  
5 that they might want you to serve their new  
6 facility?

7           MR. GERHARDSON: I can't answer that  
8 question. I would assume it is in very similar  
9 time frame to what Ms. Hoffarth said.

10          COMMISSIONER KALK: Is there someone at  
11 Otter Tail that can answer that question?

12          MR. GERHARDSON: Yes. One moment please.

13          MR. SIGETTE: I believe it was about the  
14 end of July.

15          MR. GERHARDSON: About the end of July.

16          COMMISSIONER KALK: Of 2011, I would  
17 assume?

18          MR. GERHARDSON: Yes.

19          COMMISSIONER KALK: So the -- why?  
20 What -- what prompted the tribal authorities to  
21 contact Otter Tail? I mean there's -- the -- they  
22 hadn't done it before. What prompted it now?

23          MR. GERHARDSON: I'm not sure. I -- that  
24 may be a question for the Tribe. It --

25          COMMISSIONER KALK: Well, I guess, you

1 know, we have -- Kevin and Tony have talked a lot  
2 about the jurisdictional. I'm talking about  
3 investor-owned utilities decision-making process,  
4 which I think at some point does tie into some of  
5 this, but the -- you know, what if Otter Tail Power  
6 would have just said, You know what, no, thank you.  
7 We -- that's -- North Central has served that area  
8 for decades. Was there anything that could have  
9 happened to Otter Tail by just saying, no, thank  
10 you?

11 MR. GERHARDSON: We could -- one has to  
12 consider -- if I may, my assumption is that the  
13 question is would it be better if we all agreed not  
14 to compete for a load, in a sense voluntarily  
15 adopted the North Dakota regime as we approached  
16 these tribal loads.

17 COMMISSIONER KALK: But does that decision  
18 say you have to serve a tribal area fast or it just  
19 says you can? It doesn't say you have to in my  
20 read of it.

21 MR. GERHARDSON: I would have a hard time  
22 refusing service to a customer that has a right to  
23 choose our company as a service provider, unless  
24 there was an overwhelming need to do so. We -- so  
25 the answer, I think, that I like to give is I don't

1 think we were in a position where we would refuse  
2 service to a customer that was legitimately asking  
3 for it. In my opinion, this customer was  
4 legitimately asking whether we could provide  
5 service.

6 COMMISSIONER KALK: Fair enough. The --  
7 so has Otter Tail been tracking all the costs  
8 associated with this since the beginning for a  
9 future rate case, let's say? Have you been  
10 tracking all these costs somehow on your own or  
11 who's paying for all these costs now, the costs  
12 incurred up to this point?

13 MR. GERHARDSON: Commissioner Kalk, our  
14 rates haven't changed so our rate structure hasn't  
15 changed. These costs would be considered in a  
16 future rate case to the extent they are in a test  
17 year or in a rate base in that future -- in that  
18 future case. All of the investment that the  
19 company has made in terms of capitalized investment  
20 is tracked. Absolutely.

21 COMMISSIONER KALK: Fair enough. Just  
22 making sure I'm asking these questions, because --

23 MR. GERHARDSON: Yeah.

24 COMMISSIONER KALK: -- as you said, it  
25 will come up again, I'm sure.

1           The -- so walk me through another  
2 scenario. We -- what if leadership of the tribal  
3 authorities next week says, We changed our mind,  
4 then what do we do? How do we -- how do you move  
5 forward then as a company? Because do you have a  
6 contract that says you're to serve them for 5  
7 years, 10 years, 20 years?

8           MR. GERHARDSON: We have a contract of  
9 duration and my recollection is a ten-year  
10 contract.

11           COMMISSIONER KALK: So that's already been  
12 signed and already been executed?

13           MR. GERHARDSON: Yes.

14           COMMISSIONER KALK: So you're covered, if  
15 you will, for the ten-year period of time?

16           MR. GERHARDSON: Yes.

17           COMMISSIONER KALK: Okay. So back to the  
18 public policy, what if the tribal authorities asked  
19 you to build a wind farm on tribal grounds? If you  
20 build wind farms, it's -- you could sell the power.  
21 Would that be the next scope of something? I mean  
22 if --

23           MR. GERHARDSON: Commissioner Kalk, we  
24 certainly wouldn't -- I mean if there is a  
25 generating project that has an economic benefit to

1 our customers, we would consider it. I --

2 COMMISSIONER KALK: But I guess my point  
3 is that -- that Otter Tail felt it wasn't necessary  
4 to come ask for a PC&N to build this line, so would  
5 you feel the same way that if all of a sudden we  
6 found out Otter Tail is building a wind farm on  
7 tribal land?

8 MR. GERHARDSON: Commissioner Kalk, I  
9 understand your question now. So does the  
10 Commission have siting authority, for example,  
11 on --

12 COMMISSIONER KALK: I don't believe we  
13 have siting authority on tribal land, but that's  
14 what I'm saying is that the -- I'm taking this to  
15 the next evolution of where Otter Tail could all of  
16 a sudden just say you're going to build a wind farm  
17 on tribal land based on extension of this.

18 MR. GERHARDSON: I haven't considered  
19 whether one could extend this ruling to apply to  
20 the siting of generation, and I'm not sure if I'm  
21 answering your question or not, but right now I  
22 would say that I'm not --

23 COMMISSIONER KALK: I guess the question  
24 is at what point would Otter Tail ever come in  
25 front of this Commission to ask to do something on

1 tribal lands ahead of time? If -- if -- is it  
2 never or is it we would look at each case?

3 MR. GERHARDSON: Commissioner Kalk, I  
4 think depending upon the activity that we're  
5 contemplating, we'd have to consider what the law  
6 is with respect to that activity, and so I believe  
7 we'd have to consider that in each case.

8 COMMISSIONER KALK: So would you say the  
9 '95 decision is just tied into distribution  
10 services or all types of services?

11 MR. GERHARDSON: I believe it is --

12 COMMISSIONER KALK: Not the '95 law; the  
13 '95 ruling.

14 MR. GERHARDSON: I believe it ties into  
15 the provision of electric service on those -- in  
16 those particular instances. All of the service we  
17 provide is a comprehensive service that involves  
18 generation, transmission and distribution.

19 COMMISSIONER KALK: That was my point  
20 about the wind farm, though. Could that be  
21 extended to you have the right to build a wind farm  
22 on tribal land?

23 MR. GERHARDSON: I have to ask for a  
24 clarification, Commissioner Kalk. Do you mean  
25 build a wind farm with the idea of using it in our

1 integrated resource --

2 COMMISSIONER KALK: I don't know. I  
3 guess --

4 MR. GERHARDSON: -- or the provision --

5 COMMISSIONER KALK: -- I'm giving a lot of  
6 what-if questions here to where, as we move  
7 forward, does Otter Tail believe that anything they  
8 do on tribal land is not required to come to the  
9 Public Service Commission ahead of time?

10 MR. GERHARDSON: I'm not making that  
11 argument today. The argument I'm making is that --

12 COMMISSIONER KALK: Fair enough.

13 MR. GERHARDSON: -- we don't need a  
14 public --

15 COMMISSIONER KALK: I understand.

16 MR. GERHARDSON: -- a certificate of  
17 public convenience and necessity to serve a  
18 customer there in this particular context.

19 COMMISSIONER KALK: The -- I guess the  
20 last one I'll have because it's like -- well, I  
21 guess we're off the scope of what we're talking  
22 about today, but the -- who at Otter Tail made the  
23 final decision to extend these services? I mean  
24 was it a -- I know Denny very well. Was it -- was  
25 Denny able to make that decision? Was it -- did it

1 go all the way to leadership in Fergus Falls,  
2 because this seems like this is a pretty  
3 significant decision to do that.

4 MR. GERHARDSON: Yeah. I mean I -- I  
5 guess management is aware of it. Whether  
6 they're -- I can identify an individual, I couldn't  
7 say, but I certainly know that Mark Helland as the  
8 vice president would have been aware of this and --  
9 if you're asking who authorized us to enter into a  
10 contract?

11 COMMISSIONER KALK: Yeah. I guess I --

12 MR. GERHARDSON: I'm guessing that Mark  
13 would have been involved.

14 COMMISSIONER KALK: Okay. I think that's  
15 all I have for now. Thank you.

16 JUDGE HOBERG: Thank you.

17 Commissioner Clark.

18 COMMISSIONER CLARK: I do have one  
19 follow-up. I'm curious about your response to  
20 Commissioner Kalk's question regarding Otter Tail  
21 cannot say no to a customer legitimately requesting  
22 service, which I would agree under North Dakota law  
23 that's the case, but as I understand Otter Tail's  
24 position, it's that North Dakota doesn't apply to  
25 this particular circumstance. So under -- under

1 what law in this particular case is Otter Tail  
2 required to provide service to a legitimately  
3 requesting customer?

4 MR. GERHARDSON: I -- I was --  
5 Commissioner Clark, I -- I wasn't saying and I  
6 don't -- I hope I -- I'd have to read the record  
7 back -- I don't -- didn't mean to imply that it was  
8 under North Dakota law, sort of obligation to serve  
9 that I was saying we would not be in a position to  
10 refuse. I think that just principles of  
11 nondiscrimination and general commercial practice  
12 would suggest that if the Tribe is entitled to --

13 COMMISSIONER CLARK: But aren't principles  
14 of discrimination as they apply to utility  
15 companies -- I mean it is through state law that  
16 those are -- are burdens upon the company.

17 MR. GERHARDSON: Not -- not exclusively,  
18 Commissioner Clark. Obviously those are especially  
19 within our jurisdictions, and I'm using the term  
20 not in the narrow sense of monopoly service and,  
21 again, I'm just using the term more as a general  
22 term of art where I would say that I would be --  
23 I'm not saying we couldn't legally. I'm not saying  
24 that the Tribe could require us by law to do so.  
25 I'm saying that in this context I would have a

1       discomfort about any policy that would suggest we  
2       would refuse service to a legitimately requesting  
3       authority in this circumstance.

4               COMMISSIONER CLARK:   Okay.  Thanks.

5               MR. GERHARDSON:  I don't know.  If there's  
6       any better way for me to clarify my statement, I  
7       would be happy to do so.

8               COMMISSIONER CLARK:  I'm not sure that  
9       there is.  I -- we'll leave it at that.  Thanks.

10              JUDGE HOBERG:  Thank you, Commissioners.

11              We have another presentation by the  
12       intervenor and then we have rebuttal, but I think  
13       it might be a good idea to take a five-, ten-minute  
14       recess right here, so let's go off the record.

15              (Recessed at 11:35 a.m. to 11:44 a.m.)

16              JUDGE HOBERG:  Okay.  Let's go back on the  
17       record.

18              I should say for the record that  
19       Mr. Brunkow is making a special appearance today  
20       to -- at least that's what he asserts.  I know it's  
21       challenged by North Central -- making a special  
22       appearance to -- to contest the jurisdiction of the  
23       PSC in this matter and that's the only reason he's  
24       appearing.  And I should also state that  
25       Mr. Brunkow and the tribal chairman will be leaving

1 right after his presentation as they have a meeting  
2 back on the reservation today, apparently, so they  
3 need to leave right away. It's not any disrespect  
4 or anything like that, but -- but they do need to  
5 leave for another meeting.

6 So Mr. Brunkow, please.

7 MS. HOFFARTH: As -- as a -- just a  
8 preliminary matter, there will be no additional  
9 evidence that will be taken during this --

10 JUDGE HOBERG: Correct.

11 MS. HOFFARTH: -- portion; correct?

12 JUDGE HOBERG: Correct. No additional  
13 evidence. That's correct.

14 Mr. Brunkow, please.

15 MR. BRUNKOW: Yeah. I wanted to make it  
16 clear that the Tribe wasn't going to make its  
17 argument and storm out angrily. Not the case at  
18 all.

19 I'd like to start by noting for the  
20 Commission the attendance of the chairman of the  
21 Turtle Mountain Band of Chippewa Indians. It's  
22 Chairman Merle St. Claire behind me to my right.

23 This issue is very important to the Tribe  
24 and that is why we chose to intervene in the  
25 matter, and we're -- we are intervening solely for

1 the purpose of contesting jurisdiction.

2 The Tribe -- I don't think anyone can  
3 argue that the Tribe is a sovereign nation, and as  
4 a sovereign nation one of the inherent rights you  
5 have is to make and be governed by your own laws,  
6 and the Turtle Mountain Tribe has made a law. They  
7 passed a resolution last summer, it was signed into  
8 law by the chairman and a contract was entered into  
9 with Otter Tail Power. That is our inherent right  
10 as a sovereign nation. We get to choose who  
11 provides our power.

12 And I'm not going to quote the '95 case  
13 again, but it really looks pretty dispositive to  
14 me.

15 And the -- North Central's reliance on  
16 cases like Strate and Montana is misguided. Strate  
17 and Montana are cases that determined whether or  
18 not the tribal court had jurisdiction over an  
19 individual or a company. That's not the issue here  
20 today.

21 And so I'll just end with the Tribe has  
22 made its decision and we intend to live by it.

23 JUDGE HOBERG: Thank you, Mr. Brunkow.

24 Mr. Gruman, do you have any questions?

25 MR. GRUMAN: I do not, Your Honor.

1 JUDGE HOBERG: Thank you.

2 Commissioner Clark, please.

3 COMMISSIONER CLARK: My question might be  
4 given your knowledge of tribal sovereignty issues,  
5 a similar question to the one I asked  
6 Mr. Gerhardson about, although it's somewhat  
7 outside the scope of this case, do you have a sense  
8 for where the law is with regard to the provision  
9 of these types of services as it relates to other  
10 classes of customers? So we've got in this case  
11 tribally owned business on trust land. Do you have  
12 a sense for a tribal member on trust land versus  
13 other categories of customers that may be out  
14 there? And, again, this is more a curiosity  
15 question and not necessarily applicable to this  
16 case.

17 MR. BRUNKOW: A sense for a tribal member  
18 on trust land, that tribal member's ability to pick  
19 and choose who provides service?

20 COMMISSIONER CLARK: Well, either the  
21 tribal members or the -- the Tribe's ability to  
22 choose who the provider should be in those  
23 particular cases, or is it as limited as  
24 Mr. Gerhardson suggests, that really the case law  
25 that we have out there in his opinion, yours, would

1 be --

2 MR. BRUNKOW: From the Tribe's  
3 perspective --

4 COMMISSIONER CLARK: Right.

5 MR. BRUNKOW: -- as long as we're not  
6 doing anything in contravention of federal law or  
7 our own tribal law, my advice to the Tribe would be  
8 to go ahead as you wish.

9 COMMISSIONER CLARK: Okay. Very good.  
10 Thanks. That's all I have.

11 JUDGE HOBERG: Thank you, Commissioner.

12 COMMISSIONER CRAMER: Nothing --

13 JUDGE HOBERG: Commissioner Cramer,  
14 please.

15 COMMISSIONER CRAMER: Nothing further.  
16 Just thank you for being here and thank you,  
17 Mr. Chairman, for being with us as well.

18 JUDGE HOBERG: Thank you.

19 Commissioner Kalk, please.

20 COMMISSIONER KALK: Just a couple. Thank  
21 you for coming down as well. Thank you,  
22 Mr. Chairman.

23 The -- just for -- for knowledge, for  
24 background for the PSC, is there somewhere where  
25 the decision factors that the Tribe uses when

1 they -- they request services from someone, how do  
2 they get to the decision of North Central, Otter  
3 Tail, MDU?

4 MR. BRUNKOW: Right. And this goes back  
5 to your earlier question about how Otter Tail was  
6 selected. There was a -- I guess an informal or  
7 semi-formal --

8 MS. HOFFARTH: Your Honor --

9 MR. BRUNKOW: -- request for a proposal.

10 JUDGE HOBERG: Excuse me.

11 MS. HOFFARTH: -- we object because that  
12 is evidence. North Central would object to any  
13 evidence.

14 JUDGE HOBERG: Yeah. We do have a  
15 stipulation in regard to evidence and I haven't had  
16 any objections previously, but that would be  
17 evidence that's beyond -- I believe beyond the  
18 scope, so I'd have to sustain the objection.

19 COMMISSIONER KALK: Hmm. So if somewhere  
20 down the road I'm trying to get together a case  
21 about why decision A was good, I guess anything  
22 submitted from the Tribe since it's sovereign, that  
23 becomes the issue then?

24 JUDGE HOBERG: Well, it hasn't been --  
25 hasn't been -- it's not an evidentiary --

1 COMMISSIONER KALK: Yep.

2 JUDGE HOBERG: -- criteria in this matter.

3 COMMISSIONER KALK: Fair enough.

4 Henceforth, why we're here today.

5 I guess that would be it then. Thank you  
6 for coming.

7 JUDGE HOBERG: Thank you, Commissioner.  
8 Any further questions?

9 COMMISSIONER CLARK: No. Thank you.

10 JUDGE HOBERG: Thank you. And you're  
11 excused.

12 MR. BRUNKOW: Thank you.

13 JUDGE HOBERG: All right. Ms. Hoffarth,  
14 please.

15 MS. HOFFARTH: Thank you, Your Honor.  
16 I'll try to be brief. There's been a lot of  
17 discussion about this 1999 -- '95 case and how it's  
18 binding and a specific directive as to the policy  
19 and what the Commission should do in this case.  
20 That is --

21 JUDGE HOBERG: Ms. Hoffarth, I think you  
22 need --

23 MS. HOFFARTH: Oops, sorry.

24 JUDGE HOBERG: -- to face that way perhaps  
25 so she can --

1           MS. HOFFARTH: I was just kind of looking  
2 back at the --

3           JUDGE HOBERG: Oh, I'm sorry.

4           MS. HOFFARTH: No. Nope. I'll turn  
5 around. So I'll start again.

6           That Otter Tail argues that this directive  
7 is binding on Commission and how they should decide  
8 this case because the Public Service was a  
9 commission -- a party to that litigation.

10           We don't believe that's the case and  
11 here's why. When you read the last -- it would be  
12 the last sentence where it talks about Public  
13 Service Commission except as to such service,  
14 present or future. What that statement is talking  
15 about is that particular manufacturing plant, DTI  
16 on Fort Totten or the Spirit Lake Reservation.  
17 It's not talking about any and all services here  
18 and going forward regarding tribal entities. We  
19 don't believe that's what it stands for.

20           So we agree with Otter Tail that this is a  
21 narrow exception. We agree that that is true, but  
22 the fact is it's a narrow extension regarding a  
23 particular service on a particular reservation.  
24 That's not a case with this issue.

25           What's also important, we think, in

1 particular in those federal court cases, what was  
2 important to the 8th Circuit and important -- and  
3 important to the district court in that case as  
4 well is that the Tribe in an evidentiary proceeding  
5 demonstrated a threat of irreparable harm. There's  
6 been no evidence that there's any irreparable harm  
7 to the Tribe at all. They're -- they're  
8 intervening just simply to say we want to have  
9 Otter Tail Power, we've entered into a contract, we  
10 intend to live by it. It's not irreparable harm  
11 any -- in this matter.

12           There also has been very little -- we  
13 think the gaming compact is important, because the  
14 gaming compact does apply to gaming activities of  
15 the casino. Any extension of that casino expansion  
16 is important. And the -- North Dakota did not give  
17 up its rights for regulation under the casino and,  
18 in fact, there is a limited waiver of sovereign  
19 immunity regarding actions at the casino. So those  
20 are reasons.

21           Now, they say that the Strate case isn't  
22 important. What I want to point out is that the  
23 Strate case was in 1997. This litigation with --  
24 this protracted litigation which ended around 1995  
25 was prior to that Strate case. We don't know -- I

1 don't have the facts to say, you know, was DTI --  
2 was it abutting a state highway, was DTI -- you  
3 know, there's certain steps that go into all these  
4 analyses, and we don't have those facts here to  
5 make that same case.

6 We would argue that they have to cross and  
7 they are utilizing property which is under the  
8 regulatory jurisdiction of the Public Service  
9 Commission. The simple thing about tribal  
10 jurisdiction is they don't have legislative  
11 jurisdiction, they don't have regulatory authority.  
12 Regardless of whether who owns to 33 feet in on  
13 each side of that -- to that state highway, the  
14 fact is the United States Supreme Court has said  
15 tribes do not have jurisdiction over nonIndian  
16 conduct on a state highway, and that's exactly what  
17 we have here. And I think that can be extended  
18 easily to crossing easements which are owned by  
19 other nonpublic utilities.

20 DTI is a specific case about a specific  
21 reservation with a specific manufacturing plant,  
22 and as I reviewed the case -- those cases through,  
23 I don't believe that there was ever an instant in  
24 which Baker Electric was serving DTI; that Otter  
25 Tail had served that from the front. Perhaps

1 someone who was involved in that litigation would  
2 have a better memory of that than I would because I  
3 wasn't involved and I'm trying to glean the facts  
4 from those cases.

5 This case is different. North Central has  
6 been providing power since 1998. It has seven  
7 metered facilities. I don't think that can just be  
8 ignored. Even the 8th Circuit says, "We are  
9 concerned with wasteful duplication." We didn't  
10 have that issue -- that issue wasn't at case in the  
11 federal cases, so we think it's an anomaly. It's  
12 not the same type of case as you have here before  
13 you.

14 Here you have a case where North Central  
15 is already serving the tribal entity even though  
16 it's on tribal trust land. It is a complete waste  
17 of duplication. It's interference. There's --  
18 those sorts of things we think the Commission can  
19 still -- has the jurisdiction to decide.

20 This decision by a 1995 court makes it  
21 very clear they're limiting that order to that  
22 particular instant. And why they would say to this  
23 service, present or future, is because the district  
24 court had issued sanctions against Otter Tail -- or  
25 the PSC had issued sanctions and there was

1 injunctions and all kinds of different litigation  
2 about Otter Tail's refusal to follow the PSC's  
3 rulings in that matter. And that's where that  
4 language comes from. They're talking about you are  
5 not going to come in here to -- the PSC or Baker  
6 Electric or whomever and say Otter Tail can't serve  
7 this particular plant. That's what it's saying  
8 there.

9           And the decision about supplying electric  
10 service on the tribal lands owned by the Tribe,  
11 that had to do with the specific things that the  
12 Tribe had provided evidence in that matter. They  
13 had said -- proved that there was irreparable harm  
14 and we can see that would have been one of the  
15 things. The Tribe could have asked for an  
16 evidentiary hearing to put all that evidence in,  
17 but they did not do so. Simply saying that they  
18 want them to be served is not enough.

19           Another point I want to make is we --  
20 there was a lot of discussion about how the rates  
21 will be affected. If Otter Tail is somehow arguing  
22 that the PSC -- admittedly the PSC has jurisdiction  
23 over Otter Tail's rates. If they're arguing that  
24 somehow that there's going to be some sort of  
25 jurisdiction as to -- of the PSC over how it

1 handles the rates provided on this reservation,  
2 then if there's jurisdiction over how that a  
3 rate -- how the PSC governs the rates and how  
4 that's going to affect other ratepayers off the  
5 reservation, if there's jurisdiction to decide  
6 that, there's certainly jurisdiction for them to  
7 decide whether or not a PC&N is necessary in this  
8 case.

9           There's discussion about -- Otter Tail  
10 says it has the responsibility to the Tribe and the  
11 Tribe has the responsibility to North -- to Otter  
12 Tail. What's kind of got lost in that argument is  
13 that North Central is providing service to the  
14 Tribe, has seven metered services just at that  
15 particular facility. The Tribe has the  
16 responsibility to North Central as well because  
17 it's one of its members. The casino's one of its  
18 members.

19           We do not believe that Otter Tail does  
20 have the authority to go ahead and do what it  
21 wishes on -- on any land, regardless tribally  
22 owned, tribal trust land, fee land, Indian-owned  
23 fee land, nonIndian-owned fee land. There's all  
24 kinds of different ownership bases within the  
25 reservation.

1           We believe that this is just another  
2 stepping stone to extend that jurisdiction to all  
3 sorts of lands on the reservations, which is not at  
4 all what the law says. Even these 1995 cases  
5 recognize that the sovereignty of the Tribe is  
6 limited. There is a wealth of United States  
7 Supreme Court decisions talking about how tribal  
8 sovereignty is diminished.

9           Particularly the 8th Circuit and the  
10 district court -- and I'm going to press this one  
11 more time -- that they said they were limiting  
12 those cases to that particular issue, that  
13 particular site on a particular -- on that  
14 particular reservation. And as far as Montana and  
15 Strate not applying, you will note that the 8th  
16 Circuit ordered the district court to do the  
17 Montana analysis. I would note that it didn't  
18 appear that Judge Conmy did the 8th Circuit -- did  
19 Montana analysis in his decision, but he did note  
20 it in footnote five where he talks about -- he just  
21 sets forth what the Montana analysis is.

22           So we believe Montana -- the Montana case,  
23 which was issued in 1981; followed by the Strate  
24 case in 1997; Plains Commerce is in 2008; there's  
25 another case, there's Atkinson and Hicks, I believe

1 those are 2003 cases -- I call those the Montana  
2 progeny of cases. They kind of set forth how you  
3 analyze these cases. We think that no matter how  
4 you analyze it, that there is jurisdiction for the  
5 PSC to go ahead and act.

6 Does anyone have any other -- further  
7 questions?

8 JUDGE HOBERG: Thank you, Ms. Hoffarth.

9 Mr. Gruman, any further questions of North  
10 Central?

11 MR. GRUMAN: I do not, Your Honor.

12 JUDGE HOBERG: Commissioner Clark.

13 COMMISSIONER CLARK: No, Your Honor.

14 Thanks.

15 JUDGE HOBERG: Commissioner Cramer.

16 COMMISSIONER CRAMER: Just one, and it  
17 relates to the argument regarding Highway 5 and  
18 jurisdiction governing nonIndian people or  
19 nontribal members. So that I'm clear -- or is  
20 there -- is there some sort of cross-jurisdictional  
21 agreements or something that deal with traffic  
22 laws, for example? What if there's a drunk driver  
23 that's, you know, on his way to the casino, on his  
24 way home to Bismarck, does a tribal police officer  
25 or courts not have jurisdiction over that?

1 MS. HOFFARTH: Under the -- actually,  
2 tribe -- tribal police do not have jurisdiction  
3 over nonIndians or even non -- and some would argue  
4 nonmembers for criminal actions which occur on the  
5 reservation. So they would have to have a state  
6 police. I believe the practice is -- of course,  
7 this isn't part of the record, but the practice  
8 would be oftentimes tribal police departments are  
9 cross-deputized with the county.

10 And in far -- as far as a personal injury  
11 case dealing with nonIndians, those are sued in  
12 state court, typically, unless you have some basis  
13 for -- another basis for it to be -- if it's two  
14 tribal members or two members of the same tribe or  
15 even sometimes two members of different tribes, you  
16 may be able to bring that in tribal court, but  
17 those are very fact-specific cases.

18 COMMISSIONER CRAMER: I have nothing  
19 further. Thank you.

20 JUDGE HOBERG: Thank you.

21 Commissioner Kalk, please.

22 COMMISSIONER KALK: Just a couple once  
23 again. Thank you once again. The -- how long  
24 are -- you said -- we talked about 1998 is when  
25 North Central started serving this area.

1 MS. HOFFARTH: Mm-hmm.

2 COMMISSIONER KALK: How long are the  
3 current contracts in effect? How many years from  
4 now going forward?

5 MR. MARTIAN: There's no contract.

6 MS. HOFFARTH: There's no contract.

7 COMMISSIONER KALK: So it would appear  
8 Otter Tail has a ten-year contract, but North  
9 Central has no contract?

10 MS. HOFFARTH: Correct.

11 COMMISSIONER KALK: So they could notify  
12 you next week that all of the load that you have is  
13 gone, potentially?

14 MS. HOFFARTH: Potentially, but  
15 potentially you -- you have that investment there  
16 and it would be unusual. This is an unusual case  
17 where you would have someone say, "Now you can't  
18 serve this load," because normally you would rely  
19 on the -- the PC&N process, the TIA for protections  
20 of duplication -- wasteful duplication of services  
21 and interference.

22 COMMISSIONER KALK: Has North Central ever  
23 had contracts for service in this --

24 MS. HOFFARTH: No.

25 COMMISSIONER KALK: I might have a

1 follow-up back over here why they would get a  
2 contract and previous didn't have that, but --  
3 okay. The -- is there anywhere -- and I'm -- and I  
4 don't know the whole area there. I've been around  
5 a lot of it, but --

6 MS. HOFFARTH: Mm-hmm.

7 COMMISSIONER KALK: -- is there anywhere  
8 on the reservation that Otter Tail serves now?

9 MS. HOFFARTH: Yes. Yes. They have  
10 services. They would serve --

11 COMMISSIONER KALK: Are we talking, like,  
12 how many homes, how many -- just a percentage of  
13 load or just a -- just a ballpark figure.

14 MS. HOFFARTH: You know, I don't --

15 JUDGE HOBERG: If you know.

16 MS. HOFFARTH: I don't -- I don't know. I  
17 know their nearest service is two and a half, three  
18 miles from the casino. I would know that they  
19 did -- you know, that they did a build-out of two  
20 and a half, three miles of under-build to get to  
21 the casino.

22 COMMISSIONER KALK: Sure. Okay. That was  
23 all I had. Thank you.

24 JUDGE HOBERG: Thank you, Commissioner  
25 Kalk.

1 Any further questions, Commissioners?

2 COMMISSIONER CLARK: Nope.

3 JUDGE HOBERG: Thank you, Ms. Hoffarth.

4 All right. Anything else to bring to the  
5 attention of the Commission before we close this  
6 hearing? Mr. Gerhardson.

7 MR. GERHARDSON: Your Honor, if -- if you  
8 wouldn't mind, there was one question that  
9 Ms. Hoffarth asked and because she did make  
10 arguments on this point, she did make the statement  
11 that DTI -- there was no prior service. That's not  
12 the case. The record in those cases bears that  
13 out, that there was prior service by Baker Electric  
14 Coop. And I just thought that that would be worthy  
15 clarification. There are other issues I would  
16 address, but I understand this is the end of our  
17 presentation.

18 JUDGE HOBERG: Correct. Thank you.

19 All right. Of course following this  
20 hearing, the -- I won't say when, but sometime  
21 following this hearing the commissioners will be  
22 issuing findings of fact, conclusions of law and an  
23 order in regard to this matter, and the parties, of  
24 course, may have appeal rights or other rights  
25 under the Administrative Agency Practice Act,

1 Chapter 28-32 of the Century Code and under the  
2 Commission's rules, Article 69-02.

3 All right. At this time I'll ask for  
4 closing comments.

5 Commissioner Clark, please.

6 COMMISSIONER CLARK: Just thank you for  
7 all being here. Very interesting case. Look  
8 forward to taking the information we get and any  
9 other supplemental information between now and the  
10 decision time to have a work session and hopefully  
11 have an order in an expeditious manner.

12 Thank you.

13 JUDGE HOBERG: Thank you.

14 Commissioner Cramer, please.

15 COMMISSIONER KALK: Just the same. Thank  
16 you for a good -- good hearing, good oral  
17 arguments, sticking to the facts, allowing us a  
18 little leeway in satisfying some curiosity. I  
19 think it was all appropriate. I think the  
20 stipulations were appropriate, so I appreciate that  
21 as well in helping us narrow this down. It's --  
22 it's interesting to say the least. I look forward  
23 to it.

24 JUDGE HOBERG: Thank you.

25 Commissioner Kalk, please.

1 COMMISSIONER KALK: All these Cs and Ks up  
2 here.

3 JUDGE HOBERG: Yeah.

4 COMMISSIONER KALK: Just thank everyone  
5 for coming down today. Travel safe going home. I  
6 look forward to the work session because the --  
7 this case is very unique and I'm -- whatever we  
8 decide here I think will have a lot of  
9 ramifications going forward in a lot of different  
10 areas. So thank you all. Look forward to the work  
11 session and the order.

12 JUDGE HOBERG: Thank you, Commissioner.

13 All right. For the record, it's 12:05.

14 This hearing is closed. Thank you.

15 (Concluded at 12:05 p.m., the same day.)

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CERTIFICATE OF COURT REPORTER

I, Stephanie A. Smith, a Registered Professional Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 21st day of May, 2012.

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Stephanie A. Smith  
Registered Professional Reporter

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