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**RECEIVED**

**JUN 28 2012**

**PUBLIC SERVICE COMMISSION**

June 28, 2012

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

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

Dear Mr. Gruman:

Enclosed for filing in the above-named matter, please find an original and seven copies of North Central Electric Cooperative, Inc.'s, Request for Reconsideration.

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

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

Sincerely,

Debra L. Hoffarth  
DLH/js

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

**54 PU-11-701 Filed: 6/28/2012 Pages: 10**  
**Request for Reconsideration**

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

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

**REQUEST FOR RECONSIDERATION**

COMES NOW the Complainant North Central Electric Cooperative, Inc. ("North Central"), by and through its attorney, Debra L. Hoffarth, of Pringle & Herigstad, PC, Minot, North Dakota and requests Reconsideration of the Public Service Commission's "Findings of Fact, Conclusions of Law, and Order" dated June 14, 2012 and served June 20, 2012 pursuant to NDCC § 28-32-40. North Central does not request a rehearing.

**BACKGROUND**

The Public Service Commission ("PSC") determined that it did not have jurisdiction to hear the dispute regarding the Sky Dancer Casino because it is a tribal business located on tribal trust land. The Decision is based upon Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995), a federal court case. Conclusions of Law, ¶ 5. The PSC also

determined that its jurisdiction is preempted by the federal supremacy clause. Conclusions of, ¶¶ 5, 8. The PSC considered the *Brendale* and by extension the *Montana* factors by utilizing the same facts from Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990). Findings of Fact, ¶¶ 22-38. The PSC ultimately determined that it has no authority over Tribal owned property on the tribal trust land and ordered that Otter Tail's motion to dismiss be granted and North Central's motion for summary judgment be denied. Conclusions of Law, ¶ 5; Order, ¶¶ 1-2.

### **GROUND FOR RECONSIDERATION**

#### **A.**

North Central specifies that errors were made in that the June 14, 2012 Decision does not make a proper evaluation of the evidence before the PSC and the Findings of Fact are not supported by a preponderance of the evidence to support the Conclusions of Law.

#### **B.**

The PSC's reliance on Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615 (1984) for federal preemption is misplaced. Silkwood involved preemption of state law under the Atomic Energy Act and does not address the issue of inherent sovereignty of a Tribe. Even if it does apply, unless there is express preemption, there is a basic assumption that Congress does not displace state law. Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 725 F.Supp. 286, 305 (D.Minn. 1990).

C.

The PSC's reliance on Lance v. Dennis, 546 U.S. 459, 460 (2006) and the *Rooker-Feldman* Doctrine is misplaced. This doctrine applies only to those parties that actually participated in the state court proceeding. "The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by "state-court losers" challenging "state-court judgments rendered before the district court proceedings commenced." Id., at 462. In essence, *Rooker-Feldman* doctrine, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." Id., at 463. This is a narrow rule "confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 464 (quotations and citations omitted). This doctrine is limited and is not to be confused with preclusion. Id., at 466. "Incorporation of preclusion principles into *Rooker-Feldman* risks turning that limited doctrine into a uniform *federal* rule governing the preclusive effect of state-court judgments, contrary to the Full Faith and Credit Act." Id. North Central was not a party in the federal court litigation. The *Rooker-Feldman* doctrine does not apply.

D.

In Paragraph 1 of the Conclusions of Law, the PSC determined it had "jurisdiction over the parties and the subject matter of this proceeding." Conclusions of Law, ¶ 1. This conclusion is inconsistent with the remainder of

the PSC opinion where it specifically found that it did not have jurisdiction to regulate Otter Tail's activities. If the PSC has jurisdiction over the parties and subject matter of the proceeding, it should proceed to determine the matter on the merits.

E.

The PSC is a state agency obliged to follow North Dakota's laws, its statutes and the ND Supreme Court precedents under The Territorial Integrity Act (TIA). N.D.CENT.CODE § 49-03-01 through 49-03-01.5. The PSC does not take a narrow view of its jurisdiction under the TIA. Capital Electric. Coop. v. MDU, PSC PU-05-551.

The Tribe does not have the inherent sovereignty to regulate the utilities. Devils Lake Sioux Tribe v. PSC, 896 F.Supp. 955, 961-62 (DND 1995). A Tribe cannot reach outside the reservation to regulate a public utility. In re Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (ND 1990). In the 1990 Otter Tail Case, the ND Supreme Court discussed extensively the authority of the Tribe and found that the Tribe did not derive the power to regulate an electric service on the reservation under either of the *Montana* exceptions. "Infringement of the Tribe's right to make its own laws and be ruled by them is difficult to comprehend because, as the PSC found, the Tribe has not developed a regimen for regulating electric suppliers. Even assuming that the tribal resolution, which, after the fact and unilaterally, directed Otter Tail to be the supplier of electricity to DTI, was a valid governmental exercise, "minimal" burdens on tribal self-government are allowable." Id., at 107. This is the law of North Dakota. The PSC's June 14,

2012 Decision is based upon Federal law. The PSC should not presume to act as if it is a federal forum deciding issues of federal law.

F.

Even if federal law does apply, in Paragraph 29 of the Findings of Fact, the PSC noted “**the importance of the particular facts** in determining whether a state may regulate non-Indian activities within an Indian reservation.” Findings of Fact, ¶ 29 (PSC’s emphasis). The PSC discussed the *Brendale* and *Montana* factors in relation to this case. Findings of Fact, ¶¶ 22-38 The PSC utilized the facts from Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990). Findings of Fact, ¶¶ 22-38. No analysis of the particular facts in *this* case was done by the PSC. Since the analysis of the *Brendale* and *Montana* factors is particular to each factual situation, it was error to use the facts from the 1990 Otter Tail case and not utilize the facts from this particular case. In this case, there was no evidence presented to show that jurisdiction of the PSC will somehow harm or imperil the Turtle Mountain Band of Chippewa Indians.

Importantly, the North Dakota Supreme Court has already determined that Tribes do not have authority under the *Montana* factors to regulate utilities. In the Matter of the Application of Otter Tail Power Company 354 N.W.2d 701, 705 (ND 1984). It is a long established precedent that Tribes have diminished sovereignty and have no right to govern anyone “except themselves.” Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209, 98 S.Ct. 1011 (1978).

*Montana v. United States* expressed the general rule that, in the absence of Congressional direction, Indian tribes lack civil authority over non-members

except for: 1) consensual relationships between non-members and the tribe or members of the tribe; and 2) non-Indian activity which directly affects an Indian tribe's political integrity, economic security, health or welfare. Montana v. United States, 450 U.S. 544, 565-66, 101 S.Ct. 1245 (1981) (citations omitted). "The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status" of Indian tribes and cannot survive without express congressional authority. Montana, 450 U.S. at 564.

*Montana* Court listed, by as examples, cases which fit within this first exception to the rule. Id., at 565-66. The types of cases listed included on-reservation sales transactions, taxes on nonmember-owned livestock within the reservation boundaries, taxes on business conducted by nonmembers on the reservation, and taxes on cigarette sales to nonmembers. Strate v. A-1 Contractors, 520 U.S. 438, 457, 117 S.Ct. 1404 (1997). This is not the same type of activity as this case presents. This is regulation of electric utilities whose activities extend beyond the borders of the reservation. The relationship between supplier and consumer, as in this case, the Otter Tail and the Tribe is not the type of consensual relationship described in *Montana*. 1990 OTP, 451 N.W.2d at 104-05. The Tribe does not have jurisdiction or sovereignty under the first *Montana* exception.

*Montana's* second exception is concerned with non-Indian activity that directly affects a Tribe's political integrity, economic security, or health and welfare. Montana, 450 U.S. at 565-66. In order to be regulated by a Tribe, the

conduct must imperil the Tribe. Plains Commerce Bank v. Long Family Land and Cattle, Co., 554 U.S. 316, 341 (2008). Tribal sovereignty is limited to those matters that are “necessary to protect tribal self-government or to control internal relations” as is consistent with the tribe’s dependent status. Atkinson Trading Co., Inc., 532 U.S. 645, 650-51 (2001). In this case, there is no evidence that the regulation of an electric service provider will imperil the Tribe, affect the health or welfare of the Tribe in any manner, or affect tribal self-government or economic development.

G.

In its June 14, 2012 Order, the PSC erred when it determined “that the North Dakota Department of Transportation Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5, the requirement of Otter Tail plant crossing the property of North Central and Central Power Electric Cooperative, Inc., the Amended Gaming Compact between the Tribe and the State of North Dakota, nor the underground easements granted to North Central by the Tribe” did not divest the Tribe of its sovereignty. Conclusions of Law, ¶ 6. All of these entities or property rights involve non-Indians. The Tribe has no authority over non-Indian conduct on state highways because it is a stranger to the property and has “retained no gatekeeping right . . . [and] the Tribes cannot assert a landowner’s right to occupy and exclude.” Strate, 520 U.S. at 456. The Tribe has lost regulatory jurisdiction over the land. Id. The highway right of way and the easements take away the Tribe’s gatekeeping rights and correspondingly, a loss of jurisdiction and sovereignty. The Tribe has no authority


to regulate the state right-of-way. The PSC has the jurisdiction to regulate under the circumstances.

### CONCLUSION

North Central seeks an order withdrawing the June 14, 2012 Findings of Fact, Conclusions of Law, and Order for Judgment and granting of North Central's Motion for Summary Judgment.

Dated this 28<sup>th</sup> day of June, 2012.

PRINGLE & HERIGSTAD, PC



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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc., )  
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 Complainant, )  
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 vs. )  
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 Otter Tail Power Company, )  
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 Respondent, )  
 )  
 and )  
 )  
 Turtle Mountain Band of Chippewa Indians, )  
 )  
 Intervenor. )

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

STATE OF NORTH DAKOTA )  
 ) ss  
 COUNTY OF WARD )

The undersigned, being duly sworn, deposes and says that: I am a United States citizen, over 18 years of age, and on June 28, 2012, I served a copy of the attached:

**North Central Electric Cooperative, Inc.'s Request for Reconsideration**

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

Paul R. Sanderson [psanderson@zkslaw.com](mailto:psanderson@zkslaw.com)  
Bruce Gerhardson [bgerhardson@otpc.com](mailto:bgerhardson@otpc.com)  
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Jill Stanislawski

Subscribed and sworn to before me this 28<sup>th</sup> day of June, 2012.

RUTH HEADRICK  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 25, 2017

  
Notary Public, State of North Dakota  
My Commission Expires \_\_\_\_\_