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PUBLIC SERVICE COMMISSION

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July 9, 2012

HAND DELIVERED

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

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

Enclosed for filing in the above matter is an original and seven copies of a Response of Otter Tail Power Company to Request for Reconsideration.

Sincerely,



Brenda Vitek, Secretary to
Paul Sanderson

Enclosure
By electronic filing and hand-delivery

c: Debra L. Hoffarth (e-mail only)
Judge Allen Hoberg (e-mail only)
Mark Gruman (e-mail only)
Larry Baer (e-mail only)
Rjay Brunkow (e-mail only)
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Response of Otter Tail Power Company to Request
for Reconsideration

Otter Tail Power Company

Paul Sanderson, Zuger Kirmis and Smith

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)	
)	
Complainant,)	RESPONSE OF OTTER TAIL
)	POWER COMPANY TO REQUEST
vs.)	FOR RECONSIDERATION
)	
Otter Tail Power Company,)	
)	
Respondent.)	Case No. PU – 11 - 701

Pursuant to N.D.Admin.Code § 69-02-06-02(4), Otter Tail Power Company (“OTP”) submits the following Response to North Central Electric Cooperative, Inc.’s (“North Central”) Request for Reconsideration. North Central’s Request for Reconsideration fails to provide any new facts, legal authority or other grounds which would justify the North Dakota Public Service Commission (“Commission”) withdrawing its June 14th Findings of Fact, Conclusions of Law, and Order and, therefore, it should be denied.

STANDARD OF REVIEW

The North Dakota Supreme Court has stated that motions for reconsideration are to be treated as motions to alter or amend judgments under N.D.R.Civ.P. 60(b). Dvorak v. Dvorak, 2001 ND 178, ¶ 9, 635 N.W.2d 135. Under N.D.R.Civ.P. 60(b), relief from a final judgment or order may be granted for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud, misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief

from the operation of the judgment. Citibank (S.D.), N.A. v. Peterson, 2011 ND 86, ¶ 6, 797 N.W.2d 312. Motions for reconsideration are not vehicles for relitigating old issues. Dvorak, 2001 ND 178, at ¶ 8 (citing Steven Baicker-McKee, William M. Janssen, and John B. Corr, Federal Civil Rules Handbook 800 (2001)). Motions for reconsideration should be denied when the moving party fails to present issues entitling it to relief from the judgment under Rule 60(b), N.D.R.Civ.P. Citibank, 2011 ND 86, at ¶ P15.

LAW AND ARGUMENT

The Commission issued detailed Findings of Fact, Conclusions of Law, and Order (“Order”) in this matter on June 14, 2012. The Commission’s Order explains thoroughly the factual and legal basis for the Commission’s ruling. North Central’s Request for Reconsideration does not identify any factual or legal error in the Commission’s Order, nor does it provide any other justification for withdrawal or reversal of the Order.

I. North Central has failed to identify any new facts which would justify reconsideration and reversal of the Commission’s Order.

There are no new facts which would justify reconsideration or withdrawal of the Commission’s Order. The Commission made extensive and detailed Findings of Fact in its Order based upon the stipulated facts. North Central failed to identify any erroneous factual determinations made by the Commission in its Order. Likewise, North Central also failed to identify any newly discovered evidence that would justify the Commission reversing its Order. North Central’s Request for Reconsideration should be denied because it has failed to justify any factual basis to reconsider or reverse the Commission’s Order. See Citibank, 2011 ND 86, at ¶ P15.

II. North Central has failed to identify any new legal authority which would justify reconsideration and reversal of the Commission's Order.

North Central's Request for Reconsideration should be denied because North Central has failed to cite any new legal authority which would justify reversal of the Commission's Order.

In its Request for Reconsideration, North Central simply reiterates the same legal argument that it relied on in its briefs in opposition to OTP's Motion to Dismiss. North Central spends the majority of its Request claiming the Commission should be guided by the North Dakota Supreme Court decision of In re Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990). This is the same argument North Central relied on throughout the course of this case.

In its Order, the Commission outlines its detailed analysis of the Otter Tail 1990 case. The Commission also provides a thorough examination of the United States Supreme Court cases of Montana v. United States, 450 U.S. 544 (1981) and Brendale v. Confederated Tribes & Band of Yakima Indian Nation, 492 U.S. 408 (1989), which examine the interplay between the interests of state regulation and tribal inherent sovereignty. The Commission's Order clearly and thoroughly addresses and analyzes the legal precedent upon which North Central relies for its Request for Reconsideration.

In addition to analyzing the cases relied upon by North Central, the Commission also examined the North Dakota Federal District Court case in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). The Commission identified the divergence between the Otter Tail 1990 case and the Devils Lake Sioux case, in that "where the service sought is to a Tribal business located upon

Trust land, the necessary nexus between Tribal interests and inherent sovereignty is present.” See Order (Finding # 38). The Commission concluded that because the Sky Dancer Casino is a Tribal business located on Trust land, the execution of the Territorial Integrity Act would be a violation of the Tribe’s inherent sovereignty and, therefore, the Commission possesses no regulatory powers as it relates to Otter Tail’s activities. See Order (Conclusion # 5).

The Commission’s Order analyzed the current law regarding state regulatory control over Indian land and properly concluded it possesses no regulatory powers as it relates to OTP’s service of the Sky Dancer Casino. The Devils Lake Sioux case is the controlling legal precedent. It explains that the Tribe has the inherent sovereignty to determine who should provide electric service to its lands and businesses and that, if regulatory structures from outside the Tribe were imposed, including the State’s Territorial Integrity Act, it would violate such sovereignty:

“the Tribe may by resolution or contract determine who is to supply electrical service to Tribal owned businesses located upon Indian owned or trust lands, without regard to the rate structure or other regulations of the North Dakota Public Service Commission, and the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service.”

Devils Lake Sioux, 896 F.Supp. at 961. In the present case, the Tribe, by resolution, determined OTP is to supply electrical service to the Tribal-owned Sky Dancer Casino located on Trust land. Under these circumstances, the Commission may not prohibit the Tribe from obtaining such service or issue sanctions against OTP for providing such service. As explained by the Devils Lake Sioux Court court, this narrow exception to State regulatory jurisdiction protects the Tribe’s sovereignty and authority to regulate consensual

relationships between the Tribe and utilities, while protecting the political integrity, economic security, and health and welfare of the Tribe. See id. (citing Montana v. United States, 450 U.S. 544 (1981)).

North Central has failed to cite any new legal authority to support its assertion that the Commission incorrectly applied the law in the present case. Rather, North Central's Request for Reconsideration is a recapitulation of the arguments it has already made in this case. As the North Dakota Supreme Court has explained, motions for reconsideration are not vehicles for relitigating old issues. Dvorak, 2001 ND 178, at ¶ 8. Having failed to provide the Commission with any new legal authority which would justify reversal of its Order, North Central's Request for Reconsideration should be denied. See Citibank, 2011 ND 86, at ¶ P15.

III. No other grounds exist which would justify reconsideration and reversal of the Commission's Order.

There are no other grounds that exist which would justify reconsideration and reversal of the Commission's Order. North Central attempts to identify other grounds supporting its Request for Reconsideration. However, none of these other grounds would support reconsideration and reversal of the Commission's Order.

North Central asserts the Commission's citation of the Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984), as identifying the legal standard in which state law can be pre-empted by federal law is misplaced. Contrary to North Central's assertion, the Commission's citation of the United States Supreme Court's Silkwood opinion for the explanation of how state law is pre-empted by federal law is an accurate recitation of the current state of the law on federal preemption of state law. To argue that the Silkwood

opinion has no precedential value because it does not specifically involve Tribal inherent sovereignty issues is illogical. The Silkwood precedent outlining federal preemption of state law was properly cited and does not support reconsideration or reversal of the Commission's Order.

Likewise, North Central's reliance upon the Rooker-Feldman doctrine as a basis for supporting its Request for Reconsideration is erroneous. North Central argues the Commission's Order should be reversed because the Rooker-Feldman doctrine does not apply to this case. In analyzing the issue of federal preemption and whether state or federal law was the controlling legal precedent, the Commission discussed the Rooker-Feldman doctrine and its requirements as cited in the United States Supreme Court case of Lance v. Dennis, 546 U.S. 459 (2006). However, the Commission ultimately concluded that the Rooker-Feldman doctrine is not applicable to the present action because it has no application to judicial review of determinations made by state administrative agencies. See Order (Finding #21, citing Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 644, n.3 (2002)). North Central clearly misinterpreted the Commission's Order with respect to the Rooker-Feldman doctrine. The Commission found the Rooker-Feldman doctrine was not applicable in this case. Accordingly, North Central's argument that the Order should be reversed on the basis of the Commission's application of the Rooker-Feldman doctrine is erroneous.

North Central again raises the argument that both the fact that OTP's extension of service crosses Highway 5 and the State Gaming Compact between the State of North Dakota and the Tribe supports the Commission's assumption of regulatory jurisdiction over OTP providing service to the Sky Dancer Casino. The Commission properly concluded

that “neither 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 constitute as sufficient ‘divestment’ to change the Commission’s ‘inherent sovereignty’ conclusion so stated above.” See Order (Conclusion # 6). North Central has repeatedly raised the same argument to no avail. Highways within an Indian reservation are considered Indian country as defined by Federal law. Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 20, 674 N.W.2d 9. As has been previously explained, motions for reconsideration are not vehicles for relitigating old issues. Dvorak, 2001 ND 178, at ¶ 8. The Commission properly concluded none of the additional arguments raised by North Central support assumption of jurisdiction over OTP’s service to the Sky Dancer Casino. Accordingly, there is no basis for reconsideration or reversal of the Commission’s Order.

CONCLUSION

Otter Tail Power Company respectfully requests the North Dakota Public Service Commission deny North Central’s Request for Reconsideration, as there are no new facts or legal authority which would justify reconsideration or reversal of the Findings of Fact, Conclusions of Law, and Order.

Dated this 9th day of July, 2012.

By: /s/ Bruce Gerhardson
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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)
)
Complainant,)
)
vs.)
)
Otter Tail Power Company,)
)
Respondent.)

AFFIDAVIT OF ELECTRONIC SERVICE

Case No. PU – 11 - 701

STATE OF NORTH DAKOTA)
: ss.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that: I am a United States citizen, over 18 years of age, and on July 9, 2012, I served a copy of the attached:


Response of Otter Tail Power Company to Request for Reconsideration

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

- Debra L. Hoffarth dhoffarth@srt.com
- Judge Allen Hoberg ahoberg@nd.gov
- Mark Gruman mgruman@nd.gov
- Paul Sanderson psanderson@zkslaw.com
- Larry Baer imbaer@baerlodge.com
- Bruce Gerhardson bgerhardson@otpc.com


Brenda Vitek

Subscribed and sworn to before me, today, July 9, 2012.


Notary Public, State of North Dakota

