

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
SCOTT M. KNUDSVIG
RYAN D. SANDBERG
MATTHEW H. OLSON

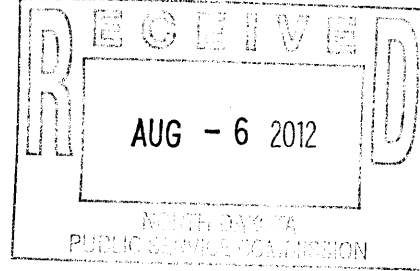
ATTORNEYS LICENSED IN
NORTH DAKOTA
MINNESOTA
MONTANA

PH
LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

2525 ELK DRIVE
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702-1000
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@srt.com

OF COUNSEL
HERBERT L. MESCHKE
RETIRED
THOMAS A. WENTZ
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)
MARK F. PURDY
(1927-2011)



August 2, 2012

Debra Simensen
Burleigh County Clerk of Court
PO Box 1055
Bismarck ND 58502-1055

Re: Appeal of Public Service Commission June 14, 2012 Order by North Central Electric Cooperative, Inc.

Dear Ms. Simensen:

Please find enclosed for filing the following:

1. Public Service Commission June 14, 2012 Findings of Fact, Conclusions of Law, and Order;
2. Notice of Appeal and Specifications of Error;
3. Undertaking on Appeal to District Court with check in the amount of \$250.00 payable to the State of North Dakota;
4. Filing fee of \$80.00; and
5. Affidavit of Service by Mail.

Personal Service documents will be filed when received from the process server. If you have any questions, please let me know.

Sincerely,


Debra L. Hoffarth

cc: Wayne Martin, North Central Electric Cooperative, Inc.
North Dakota Attorney General
Public Service Commission
Paul Sanderson, Attorney for Ottertail Power Company
Bruce Gerhadson, Associate General Counsel for Otter Tail Power Company
Rjay Brunknow, Tribal Attorney for Turtle Mountain Band of Chippewa Indians
Tracy Kolb, Tribal Attorney for Turtle Mountain Band of Chippewa Indians

57 PU-11-701 Filed: 8/6/2012 Pages: 20
APPEAL - Notice of Appeal and Specifications of Error, Undertaking on Appeal to District Court

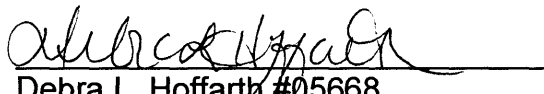
1. The Order is not in accordance with the law in at least the following respects:
 - a. In Paragraph 1 of the Conclusions of Law, the Commission determined it had "jurisdiction over the parties and the subject matter of this proceeding." Conclusions of Law, ¶ 1. This conclusion is inconsistent with the remainder of the Commission opinion where it concluded that it did not have jurisdiction to regulate Otter Tail's activities. If the Commission has jurisdiction over the parties and subject matter of the proceeding, it should proceed to determine the matter on the merits.
 - b. The Order is based upon the interpretation of federal case law, without recognition of State law that is binding on the Public Service Commission.
 - c. The Order is not in accordance with judicial precedent and state law that the Public Service Commission has jurisdiction under the Territorial Integrity Act. The Commission is a state agency obliged to follow North Dakota's laws, its statutes and the North Dakota Supreme Court precedents under The Territorial Integrity Act (TIA). N.D.CENT.CODE § 49-03-01 through 49-03-01.5.
 - d. The Order results in an unlawful delegation of authority to the Turtle Mountain Tribe based upon an interpretation of federal law, not State law. 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 and " 'minimal' burdens on tribal self-government are allowable." In re Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (ND 1990).
 - e. The Commission's determination that it did not have jurisdiction over the matter is not in accordance with the law and long established precedent under Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978) and Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981) and its progeny.
 - f. The Order errs in where it concluded "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,

over which the Turtle Mountain Tribe lacks authority and over which the Commission has the authority to regulate under the circumstances.

- g. The Order does not make a proper evaluation of the issues under the law and evidence.
 - h. The Order is not in accordance with N.D. Const. Art. VI, § 2 in that the Commission made a determination under federal law, when its jurisdiction is limited to state jurisdiction issues.
2. The Findings of Fact made by the Commission are not supported by a preponderance of the evidence in at least the following respects:
- a. The Commission's use of facts from another proceeding, instead of making findings based upon the evidence in the record is error.
 - b. The Findings of Fact in paragraphs 22-38, relating to any alleged harm to the Tribe are error as no evidence was presented to show that the authority of the Commission will somehow harm or imperil the Turtle Mountain Band of Chippewa Indians.
3. The provisions of N.D.C.C. Chapter 28-32 were not complied with in at least the following respects:
- a. The Order was not decided on the claims and facts presented in the North Central's Formal Complaint but based upon the facts from a federal court case.

Dated this 2nd day of August, 2012.

PRINGLE & HERIGSTAD, PC



Debra L. Hoffarth #05668
Attorneys for North Central Electric
Cooperative, Inc.
2525 Elk Drive, PO Box 1000
Minot ND 58702-1000
(701) 838-8752

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc.)

Appellant,)

vs.)

North Dakota Public Service Commission,)

Otter Tail Power Company, and)

Turtle Mountain Band of Chippewa Indians,)

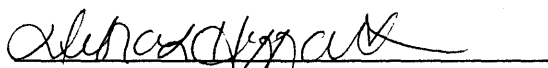
Appellees.)

**UNDERTAKING ON
APPEAL TO DISTRICT
COURT**

North Central Electric Cooperative, Inc. deposits with the Clerk of the above-named Court, pursuant to N.D.C.C. § 28-32-42, a check in the amount of Two Hundred Fifty and no/100 Dollars (\$250.00) as an undertaking in this proceeding to the State of North Dakota as obligee upon the conditions that North Central will prosecute the appeal herein without delay and pay all costs adjudged against North Central in the District Court.

Dated this 2nd day of August, 2012.

PRINGLE & HERIGSTAD, PC



Debra L. Hoffarth #05668
Attorneys for North Central Electric
Cooperative, Inc.
2525 Elk Drive, PO Box 1000
Minot ND 58702-1000
(701) 838-8752

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc.)
)
Appellant,)
)
vs.)
)
North Dakota Public Service Commission,)
Otter Tail Power Company, and)
Turtle Mountain Band of Chippewa Indians,)
)
Appellees.)

**AFFIDAVIT OF SERVICE
BY MAIL**

Debra L. Hoffarth, being first duly sworn, deposes and says:

She is a citizen of the United States of America, of legal age and not a party to nor interested in this matter; on the 2nd day of August, 2012, this affiant deposited in the mailing department of the United States Post Office of Minot, North Dakota, sealed envelopes with postage thereon, duly prepaid, containing true and correct copies of the following documents:

**Notice of Appeal and Specifications of Error
Undertaking on Appeal to District Court
June 14, 2012 Findings of Fact, Conclusions of Law, and Order**

Said envelope was addressed to the following persons:

George A. Koeck, Registered Agent
Otter Tail Power Company
PO Box 9156
Fargo ND 58106-9156
7010 1870 0002 7844 0403

Paul Sanderson
Zuger, Kirmis & Smith
PO Box 1695
Bismarck ND 58502-1695
7010 1870 0002 7844 0410

Bruce Gerhardson
Otter Tail Power Company
215 South Cascade Street
Fergus Falls MN 56538
7010 1870 0002 7844 0434

Rjay Brunkow
Tribal Attorney
PO Box 900
Belcourt ND 58316
7010 1870 0002 7844 0427

Tracy Vigness Kolb
Zuger, Kirmis & Smith
PO Box 1695
Bismarck ND 58502-1695
7010 1870 0002 7844 0397

Debra L. Hoffarth
Debra L. Hoffarth

Subscribed and sworn to before me this 2 day of August, 2012.

JUDITH A TOSSETT
Notary Public
State of North Dakota
My Commission Expires March 26, 2016

Judith A. Tossett
Notary Public
For the State of North Dakota
My Commission Expires: _____

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**North Central Electric Cooperative, Incorporated
Complainant**

Case No. PU-11-701

v.

**Otter Tail Power Company
Respondent**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 14, 2012

Appearances

Commissioners Tony Clark, Kevin Cramer and Brian P. Kalk.

Debra L. Hoffarth, Attorney at Law, P.O. Box 1000, Minot, ND, 58702, on behalf of Complainant North Central Electric Cooperative, Inc.

Bruce Gerhardson, Associate General Counsel, Otter Tail Power Company, 215 S. Cascade St., Fergus Falls, MN, 56538, and Paul R. Sanderson, P.O. Box 1695, Bismarck, ND 58501, on behalf of Respondent Otter Tail Power Company.

Rjay J. Brunkow, Attorney at Law, P.O. Box 900, Belcourt, ND 58316, and Tracy Vigness Kolb, P.O. Box 1695, Bismarck, ND 58501, on behalf of Intervenor Turtle Mountain Band of Chippewa Indians.

Mark Gruman, North Dakota Public Service Commission Counsel, State Capitol, 600 E Boulevard Ave., Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Bismarck, ND 58503, as Procedural Hearing Officer.

Preliminary Statement

On December 12, 2011 North Central Electric Cooperative, Inc. (North Central) filed a Complaint and Affidavit in Support of Complaint (Formal Complaint) with the North Dakota Public Service Commission (Commission), alleging that the Otter Tail Power Company (Otter Tail) had engaged in the construction of an extension of its public utility plant and system and of its transmission and distribution lines (activities)

into their (North Central's) service territory without first obtaining from the Commission a certificate of public convenience and necessity (CPC&N), as required under North Dakota Century Code Chapter 49-03 (Territorial Integrity Act). Specifically, North Central alleged that Otter Tail had begun construction on the extension of their public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians (Tribe). North Central requested that the Commission make its order restraining, enjoining and requiring Otter Tail to cease and desist from such activities.

On December 21, 2011 the Commission found that the Formal Complaint stated a prima facie case.

On January 16, 2012 Otter Tail filed an Answer with the Commission, admitting to such activities but denying that a CPC&N was required from the Commission before their initiation, citing *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) and its premise that the Commission is without regulatory authority over Tribal property located on the reservation. Contemporaneous with their Answer, Otter Tail filed a Notice of Motion and Motion to Dismiss the Formal Complaint.

On April 23, 2012 Administrative Law Judge Alan Hoberg (Judge Hoberg) held a Prehearing Conference, issuing a "Prehearing Conference Summary and Stipulations" setting forth a scheduling order and stipulations. Judge Hoberg also ordered that the Hearing (later set for May 7, 2012) was to be held only for the purpose of oral argument on Otter Tail's motion to dismiss and North Central's motion for summary disposition of their Formal Complaint. Various stipulations to fact were agreed upon by North Central and Otter Tail.

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

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

On May 3, 2012, Judge Hoberg granted the Turtle Mountain Band of Chippewa Indians Intervention.

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

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

On May 7, 2012 North Central, Otter Tail, and the Tribe presented oral arguments on the Motion to Dismiss and for Summary Disposition of the Formal Complaint.

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

Findings of Fact

1. On December 9, 2011 Otter Tail began construction of an extension of its public utility plant and system and of its transmission and distribution lines for electrical service on the Sky Dancer campus. Through these efforts Otter Tail will be required to bore under Highway 5 and cross over two of North Central's main three phase underground feeders (distribution lines), one which serves the Sky Dancer campus with an overhead distribution line. Otter Tail will also be required to cross under one of Central Power Electric Cooperative, Inc.'s transmission line (which provides electrical service to North Central's facilities).
2. Highway 5 runs adjacent to the Sky Dancer Casino property. The North Dakota Department of Transportation has a Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5.
3. The Sky Dancer Casino is a tribal owned facility.
4. The Sky Dancer Casino is located on tribal trust property on the Turtle Mountain Reservation.
5. The Tribe is a federally recognized Indian tribe.
6. The Tribe has a long-standing tribal utility code.
7. The Tribe passed a resolution on November 23, 2011, determining that Otter Tail shall provide electric service to the Sky Dancer Casino.
8. The Sky Dancer Casino is located in North Central's service area.
9. North Central has provided electric service to Sky Dancer at the place to be served since December 2, 1998. Service is provided to separate hotel and casino buildings and other facilities on the Sky Dancer campus. North Central was requested to and has provided electric service for the construction of a new casino building and security lighting on the campus since the fall of 2011. North Central serves a total of 7 separately metered service entrances on the Sky Dancer campus. The construction is serviced by a separate meter.

10. Otter Tail's nearest pre-existing facility to the Sky Dancer campus is a transmission line approximately 1000 feet away. Otter Tail's nearest retail consumer is approximately 3 miles distant from the Sky Dancer campus.

11. Otter Tail's distribution lines cross North Dakota Highway 5, North Central's distribution line and Central Power Electric Cooperative Inc.'s transmission lines (from which North Central purchases its electricity).

12. There is an Amended Gaming Compact between the Tribe and the State of North Dakota, wherein the State of North Dakota retains its jurisdiction.

13. North Central has October 29, 1975 Underground Easements from the Tribe.

14. Otter Tail submits their motion for dismissal pursuant to North Dakota Rule of Civil Procedure 12(b)(vi) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995). Otter Tail's motion to dismiss under North Dakota Rules of Civil Procedure Rule 12(b) must be treated as a motion to dismiss under North Dakota Rules of Civil Procedure 56 as a result of additional evidence presented outside of the pleadings and not excluded by the Court, pursuant to North Dakota Rule of Civil Procedure 12(d). Otter Tail's motion "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* North Central's motion for summary disposition is subject to the same standard.

15. Otter Tail, as the movant for summary judgment, bears the burden to prove that there is no genuine issue of material fact and North Central, as the party opposing the motion, will be given all favorable inferences which may reasonably be drawn from the evidence. *Wolff v. Light*, 156 N.W.2d 175 (N.D. 1968). North Central's motion for summary disposition is subject to the same standard.

16. "An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation. ... If any electric public utility is constructing or extending its line, plant or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions". N.D.C.C. § 49-03-01(01).

17. Pre-emption is a "principle (derived from the Supremacy Clause [of the United States Constitution] that a federal law can supersede or supplant any inconsistent state

law or regulation.” *Black’s Law Dictionary* 1197 (Bryan A. Garner ed., 7th ed, West 1999).

18. The issue of whether the Territorial Integrity Act is pre-empted, under these circumstances, is dispositive regarding both parties’ respective motions.

19. The Territorial Integrity Act can be pre-empted in either of two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). First, if “Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.” *Id.* Second, “[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law ... or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress” *Id.*

20. North Central asserts that the North Dakota Supreme Court decision of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) is mandatory authority concerning the pre-emption issue. Otter Tail disagrees, advocating that a Federal District Court decision issued approximately five years later, *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995), is proper precedent. Although both matters reviewed their pre-emption analysis utilizing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and *Montana v. United States*, 450 U.S. 544 (1981) as their primary, guiding precedent, their ultimate conclusions diverge as to whether the Commission possesses jurisdiction over a Tribal business located on Tribal land.

21. “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.” *Lance v. Dennis*, 546 U.S. 459, 460 (2006). *Rooker-Feldman* “includes three requirements: (1) The party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment or have been in privity with such a party; (2) the claim raised in the federal suit must have been actually raised or inextricably intertwined with the state-court judgment; and (3) the federal claim must not be parallel to the state-court claim (i.e. both the State and Federal action cannot run simultaneously).” Otter Tail was a party in the *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995). Both suits concerned the federal pre-emption of the Territorial Integrity Act, and neither of the decisions at issue ran simultaneously. Because the three requirements have been met, *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) would normally be deemed mandatory authority and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995) would constitute as only persuasive. However, *Verizon Maryland, Inc. v. Public Service Com’n of Maryland*, 535 U.S. 635, 644, n.3 (2002) determined that *Rooker-Feldman* “has no application to judicial review of executive action, including determinations made by a state administrative agency.” Therefore, *Devils Lake Sioux Indian Tribe v. North Dakota*

Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995) is the proper, mandatory precedent applicable to this proceeding. Nevertheless, because *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) is an excellent medium for the Commission's analysis of the issues before it, its central findings shall be reiterated below.

22. In *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), Otter Tail requested a CPC&N to extend its electric service to a manufacturing building of Dakota Tribal Industries (DTI), a business wholly owned by the Devils Lake Sioux Tribe (Devils Lake Sioux) and whose manufacturing building was located on Devils Lake Sioux land. *Id.* at 96. Baker Electric Cooperative, Inc., whose service territory not only included DTI but who was currently supplying power to the manufacturing building in question, objected. *Id.* Before a determination was made by the Commission concerning the CPC&N, Otter Tail began providing power to the manufacturing building. *Id.* at 97. The Commission initiated contempt proceedings against Otter Tail, which were stayed pursuant to a successful petition by Otter Tail for a writ of prohibition. *Id.* After further Court proceedings, the Commission ultimately was allowed to rule upon the CPC&N, finding in favor of Baker. *Id.* On appeal, the North Dakota Supreme Court reviewed whether the North Dakota Territorial Act was federally pre-empted. *Id.*

23. In its consideration of the claims before it, the North Dakota Supreme Court cited *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and, by extension, *Brendale's* interpretation of *Montana v. United States*, 450 U.S. 544 (1981), as mandatory authority. *Id.* "In *Brendale* the [United States Supreme] Court considered whether the Yakima Indian Nation or the county of Yakima in Washington had the authority to zone lands owned in fee by nonmembers of the tribe located within the boundaries of the Yakima Reservation." *Id.* at 99. In *Montana*, "the Court held that the Crow Tribe had no authority to regulate non-Indian hunting and fishing on fee land within the reservation." *Id.*

24. In *Brendale* "Justice White, joined by three other justices (White), began ... [their federal pre-emption analysis] by [first] examining ... whether the Yakima nation" had either been invested by Congress with express authority to zone lands within the reservation held in fee by non-Yakima nation members" or derived such powers pursuant to inherent sovereignty. *Id.* In construing the Yakima's treaty with the United States, White rejected "the land retained by the Yakima nation shall be set apart ... for the exclusive use and benefit of [the Yakima nation]" and "no [non-Yakima nation members], excepting those in the employment of the Indian Department, shall be permitted to reside upon the said reservation without permission of the [Yakima nation]" as evidence of such express, Congressional authority.

25. White likewise rejected the inherent sovereignty argument. "Such sovereignty generally extends only to what is necessary to protect tribal self-government or to control internal relations, and is divested to the extent it is inconsistent with a tribe's dependent status – *i.e.*, to the extent it involves the tribe's external relations with nonmembers – unless there has been an express congressional delegation of tribal

power to the contrary." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 409 (1989). *Id.* White then recognized the two exceptions to this rule as so formulated in *Montana*, namely: (1) Whether "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) whether "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990). The parties in *Brendale* agreed that the first exception was inapplicable regarding their circumstances. *Id.* at 100. Proceeding on to his analysis of the second factor, White concluded that the "tribe could not complain or obtain relief against every use of fee land that has some adverse effect on the tribe. *Id.* "The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe." *Id.*

26. "White concluded that the county's zoning of the open area of the reservation imperiled no interests of the tribe and therefore the tribe had no authority to zone fee land in that area. With regard to the closed area, [White] would have remanded to the lower court to determine if county zoning in that area imperiled any protectable tribal interests. ... White's opinion for the plurality gave wide sway to state regulatory authority, in the form of county zoning, on that reservation." *Id.*

27. Justice Stevens, joined by one other Justice, concluded that the tribe had authority to zone in the closed area of the reservation, "reasoning that ... [n]otwithstanding the transfer of a small percentage of allotted land the Tribe retains its legitimate interest in the preservation of the character of the reservation." *Id.* "The Tribe's power to control the use of discrete, fee parcels of the land is simply incidental to its power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the Tribe." *Id.* However, Justice Stevens "concluded that the tribe had no authority to zone fee land in the open area ... [w]here the Tribe's power to exclude had been diminished or surrendered, the state's regulatory power in the form of county zoning was sustained." *Id.*

28. Justice Blackmun, joined by two other justices, "concluded that the tribe had zoning authority over all the lands within its reservation." Blackmun also noted, however, that "a state can exercise concurrent jurisdiction over non-Indian activities on a reservation unless its authority is pre-empted by federal law or unless it infringes on the tribe's right to make their own laws and be ruled by them." *Id.*

29. The North Dakota Supreme Court noted that, "[a]lthough there was no majority consensus on the rationale to support the result reached in *Brendale*, the decision underscores the importance of particular facts in determining whether a state may regulate non-Indian activities within an Indian reservation." *Id.* at 101 (emphasis added).

30. In beginning their analysis of the Devil's Lake Sioux Tribe's claims, the North Dakota Supreme Court first analyzed the characterization of non-Indian ownership and activities on the reservation. *Id.* The North Dakota Supreme Court noted the disposition of acreage within the Fort Totten Reservation to be 473 acres owned by the Devil's Lake Sioux Tribe, 47,640 owned by individual tribal members and 192,794 acres owned by non-tribal members. *Id.* Applying the *Brendale* characterization, the North Dakota Supreme Court found that most of the reservation fell within the "open" category. *Id.* (The DTI building is located either on property owned by the Tribe, or property held in trust by the United States government on behalf of the Tribe). *Id.* (DTI is owned and operated by the Tribe). *Id.* at 96.

31. As in *Brendale* the North Dakota Supreme Court first determined the extent of the treaty powers bestowed upon the Tribe in relation to electric power regulation. *Id.* at 102. The Court noted that "[a]lthough the treaty granted the Tribe the authority to adopt rules and regulations for the general security of life and property, we do not view the treaty as granting the Tribe the right to regulate electric services on the reservation." *Id.*

32. Next, the North Dakota Supreme Court analyzed whether the "Tribe's power to regulate electric services derives from its inherent sovereignty." *Id.* The "inherent sovereignty" analysis by the North Dakota Supreme Court was split between the respective White and Steven's analysis in *Brendale*. *Id.*

33. Reiterating, Justice White in *Brendale* determined that "an Indian tribe's inherent sovereignty is generally divested as to all external relations with non-tribal members absent express congressional delegation." *Id.* The Supreme Court found no such "express congressional delegation." *Id.* Unlike in *Brennan* the Secretary of the Interior had not promulgated a rule which expressly denied State powers on "closed" property. *Id.* Please see 25 C.F.R. § 1.4(a) "[N]one of the laws rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." The North Dakota Supreme determined that the North Dakota Territorial Act's allocation of "electric services between competing utilities" does not constitute "a law governing, regulating, or controlling the use or development of trust property." *Id.* "State regulation of the electric suppliers to the property does not preclude the Tribe's use or development of this property." *Id.* "[S]tate regulation is not expressly pre-empted by federal law, and, more specifically, that there is no express congressional grant of authority for the Tribe to regulate in this manner." *Id.*

34. The North Dakota Supreme Court next applied the Justice Stevens analysis in *Brennan* concerning "inherent sovereignty", which proposed that a "tribe's inherent power to exclude nonmembers from the reservation includes the lesser power to regulate on the reservation and that any divestment of that power depends on whether it

has been either diminished by federal statute or voluntarily surrendered by the tribe itself." *Id.* at 103. The North Dakota Supreme Court noted that "[t]he Devils Lake Sioux Tribe has established no comprehensive system for the regulation of electric utilities on the reservation, and this is the only instance where the Tribe has attempted any type of electric utility regulation." *Id.* "There is no tribal regulation of rates, service and safety standards or service territory generally." *Id.* "The tribe does not employ engineers, accountants and other professionals or technicians to regulate utilities." *Id.* The North Dakota Supreme Court further noted that "[t]he Tribe has traditionally accommodated, if not acquiesced in, the State's exclusive and long-standing regulation of electric power suppliers." *Id.* "The Tribe's failure to assert jurisdiction over electric utility investment in the past has permitted, if not induced, substantial investments within the reservation which will probably not be recovered if services are duplicated." *Id.* The North Dakota Supreme Court further noted that, because of the "reduced amount of trust and tribal-owned lands, it is doubtful that the Tribe retains, in Justice Stevens' words in *Brennan*, the power to define the essential character of the territory." *Id.* at 104. The Supreme Court therefore concluded "that, under the circumstances, the Tribe does not derive power from its inherent sovereignty to regulate the choice of electric suppliers to the DIT area." *Id.*

35. The North Dakota Supreme Court next considered the two *Montana* exceptions to the general principle of federal pre-emption (as discussed by Justice White in *Brendale*), namely: (1) Whether "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) whether "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

36. Concerning the first exception, the North Dakota Supreme Court indicated that "[v]iewing the relationship between a supplier and consumer of electricity as merely a consensual relationship undifferentiated from other types of commercial transactions ignores the nature of the electric utility business." *Id.* The Supreme Court then reiterated the Commission's "broad" and "extensive" authority over electric utilities, including specifically those powers enumerated under the Territorial Integrity Act whose "primary purpose" ... is "to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity." *Id.* "[C]ustomer preference", although a factor for a CPC&N, was defined by the North Dakota Supreme Court as a "minor consideration which cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice." *Id.* "Construction of a supply line affects the entire system of an electric utility." *Id.* A typical electric supply system "is generally not confined to particular parcels of property, but spans across reservation boundaries as well as state borders." *Id.* The North Dakota Supreme Court therefore ruled that a consensual contractual relationship, for the purposes of the first *Montana* exception, does not exist. *Id.* at 105. "Because an individual has no organic, economic or political right to service by a particular utility

merely because he deems it advantageous to himself ... it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts." *Id.* The Supreme Court also reasoned that no "[i]mplicit consent" of a contractual relationship existed between Otter Tail and the Tribe, citing language within their contract indicating that electricity will provided by Otter Tail to the Tribe "in conformance with the rules and regulations of the Public Service Commission of the State of North Dakota", including electricity rates. *Id.*

37. As to the second exception, the North Dakota Supreme Court likewise ruled in the Commission's favor, rejecting electric service as a "quintessential act of the Tribe's right of self-government". *Id.* at 106. The Court noted Otter Tail's assertions that DTI's competitive position in the marketplace would be undercut by being forced to pay the cooperative's higher electric rates, but found the argument unpersuasive because "the rate structure for permanent electric service to DTI had not yet been established". *Id.* The North Dakota Supreme Court found no factors which would be deemed "demonstrably serious", as *Brennan* required. *Id.*

38. The Federal District Court in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) only diverges with the North Dakota Supreme Court's analysis in *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990) in one, yet material, finding. "The Court does feel however, 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." *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955, 961 (D.N.D. 1995).

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. Otter Tail is an "electric public utility" pursuant to N.D.C.C. § 49-03-01.5(2).
3. The Sky Dancer Casino is tribally owned, and located on tribal trust property. Although part of Otter Tail's proposed plant will be located on non-tribal land, the Commission classifies the relevant "area" as "closed", in light of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and *Montana v. United States*, 450 U.S. 544 (1981).
4. The Commission can find no evidence of Congress expressly bestowing upon the Tribe such exclusive powers to preclude the Commission from exercising regulatory authority over Tribal owned property located on the reservation.

5. However, because the Sky Dancer Casino is a Tribal business, located upon Trust land, and because the mandatory authority of *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) deems our execution of the Territorial Integrity Act, under these circumstances, a violation of the Tribe's "inherent sovereignty", the Commission concludes that it possesses no regulatory powers as it relates to Otter Tail's activities.

6. 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. *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990).

7. Because the Commission finds that it possesses no regulatory powers over Otter Tail's activities, and because such issue is dispositive regarding both parties' respective motions, the Commission concludes that there is no genuine issue of material fact remaining for determination. Otter Tail is therefore entitled to judgment as a matter of law.

8. The Commission recognizes the Supremacy Clause of the Constitution and, by extension, the interplay between States' rights and that of the Federal Government. The Commission is less concerned with this ruling's affect upon its own jurisdiction than that regarding the abrogation of the Territorial Integrity Act. North Central's assertions that Otter Tail's activities are a wasteful duplication of resources, and unreasonably interfere with their plant and facilities may be correct. Essentially, although limited to specific circumstances, North Dakota has been deregulated by compulsion rather than by action of its Legislature and Governor. The Commission may be without power to remedy such actions. However, the United States Congress is not. Additionally, it remains uncertain how these activities will be reflected in Otter Tail's rate base, a question which the Commission anticipates addressing at Otter Tail's next rate hearing. For the above-mentioned reasons, the Commission advises all parties to exhibit discretion.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission Orders:

1. Otter Tail's Motion to Dismiss North Central's Formal Complaint is GRANTED.

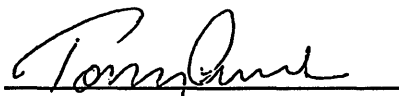
2. North Central's Motion for Summary Disposition of North Central's Formal Complaint is DENIED.

3. Otter Tail shall provide with its next rate application a comparison of cost of service and revenues received from this load.

PUBLIC SERVICE COMMISSION



**Kevin Cramer
Commissioner**



**Tony Clark
Chairman**



**Brian P. Kalk
Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

North Central Electric Cooperative, Incorporated
vs. Otter Tail Power Company
Complaint

Case No. PU-11-701

AFFIDAVIT OF SERVICE CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Cara DeSaye deposes and says that:

she is over the age of 18 years and not a party to this action and, on the 20th day of June, 2012, she deposited in the United States Mail, at Bismarck, North Dakota, three envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

Order

The envelopes were addressed as follows:

Debra Hoffarth
Pringle & Herigstad, P.C.
PO Box 1000
Minot ND 58702

Bruce Gerhardson
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls MN 56538

Cert. No. 7011 2000 0002 0363 3394

Cert. No. 7011 2000 0002 0363 3400

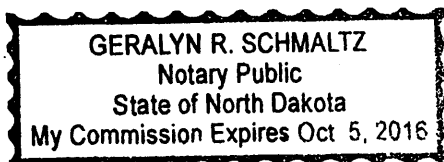
RJ Brunkow
PO Box 900
Highway 5 West
Belcourt ND 58316

Cert. No. 7011 2000 0002 0363 3417

Each address shown is the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me
this 20th day of June, 2012.

SEAL



Cara DeSaye

Gerald R. Schmaltz

Notary Public