

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.)

Civil No. 08-2012-CV-1464

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**Brief of Appellant
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TABLE OF CONTENTS

	<u>Page No.</u>
Table of Contents.....	i
Introduction.....	1
Scope of Review.....	1
Issues on Appeal.....	2
Nature of Proceeding.....	2
Chronology of the Casino Dispute and Proceedings Below.....	3
Facts.....	8
Legal Background.....	8
I. The Territorial Integrity Act.....	8
II. Customer Preference.....	9
III. The Tribe's Intervention Does Not Strip the PSC of its Authority and the Order to Dismiss Because of Lack of Regulatory Authority is Not in Accordance With the Law.....	11
a. North Dakota Law Provides for PSC Regulatory Authority.....	12
b. Federal Law Dictates That the PSC Has Regulatory Authority.....	18
IV. There is No Federal Preemption of the PSC's Jurisdiction.....	23
V. The PSC's Conclusions of Law Based Upon Federal Law, Instead of North Dakota Law, are in Violation of Article VI, § 2 of the North Dakota Constitution.....	24
VI. The PSC Order Results in an Unlawful Delegation of Authority to the Turtle Mountain Band of Chippewa Indians.....	24
VII. The PSC's Findings of Fact Were Not Supported by a Preponderance of the Evidence and Does Not Sufficiently Address North Central's Evidence.....	26
Conclusion.....	28

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**APPELLANT NORTH CENTRAL
ELECTRIC COOPERATIVE,
INC.'S BRIEF**

Case No. 08-2012-CV-1464

INTRODUCTION

This is an appeal from an order of the North Dakota Public Service Commission (“PSC” or “Commission”) dismissing North Central Electric Cooperative, Inc.’s (“North Central”) Formal Complaint against Otter Tail Power Company (“Otter Tail”) for violating North Dakota’s Territorial Integrity Act (“TIA”) by serving the Sky Dancer Casino (“Casino” or “Sky Dancer”) near Belcourt, North Dakota. (Certificate of Record on Appeal (“COR”) #52). The PSC dismissed North Central’s Formal Complaint due to a lack of regulatory authority to hear the dispute regarding electric service facilities to the Casino because it is a tribal business located on tribal trust land. (COR #52, *Conclusions of Law No. 5, Order No. 2*).

SCOPE OF REVIEW

An administrative agency’s order should be reversed when: (1) the order is not in accordance with the law; (2) the agency’s conclusions of law and order are not supported by its findings of fact; (3) the agency’s findings of fact are not supported by a preponderance of the evidence; and (4) the agency’s findings of fact do not sufficiently

address the evidence presented by the appellant. N.D.CENT.CODE § 28-32-46.

Questions of law by an agency are fully reviewable on appeal.

ISSUES ON APPEAL

North Central raises the following issues for review in this appeal:

1. Was the PSC's dismissal of North Central's Complaint in accordance with the law?
2. Are the PSC's findings of fact supported by a preponderance of the evidence?
3. Did the PSC's findings sufficiently address the evidence provided by North Central?

NATURE OF PROCEEDING

This is a case of a territorial dispute between a rural electric cooperative and an electric public utility. North Central complained to the PSC under the TIA (N.D.C.C. Chapter 49-03) about Otter Tail's extension of service in a rural area. The disputed area is the Casino located near Belcourt, North Dakota.

The purpose of the TIA is "to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities" and "... the purposes of the Act to minimize conflicts between electric public utilities and rural electric cooperatives and to provide territorial protection for rural electric cooperatives." Capital Elec. Co-op., Inc. v. Public Service Comm'n of the State of North Dakota, 534 N.W.2d 587, 590, 592 (N.D. 1995). The Casino dispute is a typical situation in which an electric public utility seeks to serve a customer in a rural area, outside the corporate limits of a municipality.

In the Casino case, the PSC heard the evidence, considered the parties' arguments, and issued its Findings of Facts, Conclusions of Law, and Order ("PSC

Order"). (COR #52.) The PSC found and concluded that it did not have regulatory authority because the Casino is a tribal business located on tribal trust land. (COR #52, PSC Order, Conclusion of Law 5.)

Chronology of the Casino Dispute and Proceedings Below.

Both North Central and Otter Tail have provided service in the Belcourt area for many years before the Casino dispute erupted in the winter of 2011. North Central has an easement from the Turtle Mountain Band of Chippewa Indians for its facilities dated October 29, 1975. (COR #32, pp. 5-6; COR #52, PSC Order, Findings of Fact No. 13.) The North Dakota Department of Transportation has an easement for North Dakota Highway 5. (COR #7, pp. 17-19; COR #8; COR #32, p.7; COR #52, PSC Order, Findings of Fact No. 2.) The Tribe has entered into a Gaming Compact with the State of North Dakota regarding the casino, in which it has agreed to state regulation and waived its sovereign immunity. (COR #7, pp. 20-58; COR #52, PSC Order, Findings of Fact, No. 12.)

On December 2, 1998, North Central began serving the Casino. North Central's service involved service to separate hotel and casino buildings and other facilities on the Sky Dancer campus. In the fall of 2011, North Central began providing electric service for the construction of a new casino building and security lighting on the campus. At the time of its Complaint to the PSC, North Central was serving seven (7) separately metered service entrances on the Sky Dancer campus. The construction was serviced by a separate meter. (COR #1, Affidavit of Wayne Martian, ¶ 3; COR #52, PSC Order, Findings of Fact No. 9.)

The Casino dispute began in November 2011.

On November 28, 2011, the Casino requested a 600-amp electric service for construction trailers to be located on the construction site on the Sky Dancer campus from North Central. (*COR #1, Affidavit of Wayne Martian, ¶ 5.*) This would have been an additional service line at the Casino. Shortly thereafter, Otter Tail contacted North Central regarding Otter Tail's provision of electric service to the Casino. (*COR #1, Affidavit of Wayne Martian, ¶ 6.*)

On December 1, 2011, Tribal Chairman Merle St. Claire confirmed that service had been requested from Otter Tail for the Casino on November 23, 2011 by a resolution of the Tribal Council. (*COR #1, Affidavit of Wayne Martian, ¶ 7; COR #52, PSC Order, Findings of Fact No. 7.*) On December 7, 2011, North Central received a request to locate its electrical lines for Otter Tail via North Dakota One-Call. The request indicated that the work was for the installation of electric main/poles and anchors at a location staked to the construction of the new casino. (*COR #1, Affidavit of Wayne Martian, ¶ 8.*) The request to locate and photographs of Otter Tail's staking and construction are attached to North Central's Complaint at COR #1, pp. 7-20.

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. (*COR #1, Affidavit of Wayne Martian, ¶ 9; COR #52, PSC Order, Findings of Fact No. 1.*) Otter Tail bored under North Dakota Highway 5 and crossed over two of North Central's main three phase underground feeders, one of which serves the Sky Dancer campus, with an overhead distribution line. (*COR #1, Affidavit of Wayne Martian, ¶ 9; COR #52, PSC Order, Findings of Fact Nos. 1, 11.*) Otter Tail also crossed under Central Power Electric Cooperative, Inc.'s transmission

line, which provides electrical service to North Central's facilities. (COR #1, Affidavit of Wayne Martian, ¶ 9; COR #52, PSC Order, Findings of Fact No. 1, 11.) Prior to construction, Otter Tail's nearest retail customer was three (3) miles from the Casino and its facilities were 1000 feet from the Casino. (COR #52, PSC Order, Findings of Fact No. 10.) It is important to note that prior to the construction, North Central had served the Casino for thirteen (13) years. Otter Tail's construction is now complete. Otter Tail did not receive a certificate of public convenience and necessity from the PSC for the extension of its plant and facilities. (COR #1, Affidavit of Wayne Martian, ¶ 11.)

On December 12, 2011, North Central filed a Complaint and Affidavit alleging that Otter Tail (1) threatened to and had begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve the Sky Dancer Casino, which is not located within the corporate limits of any municipality, without first obtaining from the Public Service Commission a certificate that public convenience and necessity requires or will require such construction and service in violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5; (2) that the place to be served was within North Central's service area; (3) that North Central was already providing service to the Sky Dancer Casino; (4) that such service would unreasonably interfere with the service or system of North Central; and (4) that such service was a wasteful duplication of facilities. (COR #1, Formal Complaint, ¶¶ 3-7.)

On January 17, 2012, Otter Tail filed an Answer. Otter Tail admitted (1) it had begun construction of its public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians ("Tribe") facility on the Turtle Mountain Reservation; and (2) that North Central was providing service to the facility. (COR #4,

¶¶ IV, V.) Otter Tail asserted that the Public Service Commission did not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally-owned facility on Tribal land on the Turtle Mountain Indian Reservation. (COR #4, ¶¶ IV, XI.) Otter Tail denied that a certificate of public convenience and necessity was required to expand its facilities and to serve the Casino. (COR #4, ¶¶ IV, XI.) Otter Tail's Answer also denied North Central's interference and wasteful duplication of facilities claims. (COR #4, ¶¶ IV, VI, and XI; COR #52, PSC Order, Preliminary Statement p. 2.)

On January 17, 2012, Otter Tail filed a Motion to Dismiss asserting that the Public Service Commission lacked regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail to supply electric service to the Tribally-owned Sky Dancer Casino located on tribal trust land within the exterior boundaries of the Turtle Mountain Reservation. Otter Tail also asserted that the Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with whomever it wishes for electric service to its lands and businesses. (COR #5).

On February 2, 2012, North Central filed a Response Brief to Otter Tail's Motion to Dismiss asserting that the Public Service Commission had jurisdiction and Otter Tail could not assert the rights of the Turtle Mountain Band of Chippewa Indians. North Central also requested summary judgment against Otter Tail, as Otter Tail had admitted to construction of its public utility plant and system without a certificate of public convenience and necessity. (COR #7).

On May 3, 2012, the Turtle Mountain Band of Chippewa Indians ("The Tribe") intervened in the matter. (COR #31; COR #52, PSC Order, Preliminary Statement p. 2.)

The Tribe asserted that it had the sovereign right to choose Otter Tail as its electrical provider. (COR #13, 18.)

The parties stipulated as to the evidence in the matter and a hearing was held on May 7, 2012. (COR#15; COR #32; COR #52, PSC Order, Preliminary Statement pp. 2-3.) The May 7, 2012 hearing was only oral arguments on the Otter Tail's Motion to Dismiss and North Central's Motion for Summary Disposition on the Complaint. (COR #31, p. 2; COR #52, PSC Order, Preliminary Statement p. 3.) The Tribe presented no evidence, no testimony, and no exhibits.

On June 12, 2012, the PSC issued its Findings of Facts, Conclusions of Law, and Order ("PSC Order"). The PSC found and concluded that it did not have jurisdiction because the Casino is a tribal business located on tribal trust land and ordered that Otter Tail's motion to dismiss be granted and North Central's motion for summary judgment be denied. (COR #52, PSC Order, Conclusion of Law 5, Order No. 2). The PSC's 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. (COR #52, PSC Order, Conclusions of Law, No. 5.) The PSC also determined that its jurisdiction is preempted by the federal supremacy clause. (COR #52, PSC Order, Conclusions of Law, Nos. 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). (COR #52, PSC Order, Findings of Fact, Nos. 22-38.)

North Central appeals from the PSC Order. (COR #57.)

FACTS

The detailed facts of this case are set forth above and in the stipulation of the parties made by the parties prior to the May 7, 2012, hearing (*COR #15, 32.*). The record compiled by the PSC comprises of the entire body of evidence to be considered on appeal. N.D.CENT.CODE §§ 28-32-44(5) and 28-32-46.

LEGAL BACKGROUND

". . . [T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Elec. Co-op. v. Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1976).

Typical cases begin with an electric public utility's application for a certificate of public convenience and necessity under N.D.C.C. § 49-03-01.1, et. seq. (the TIA), seeking authority to extend service to a place to be served in a rural area and a rural electric cooperative's objection to the application. This untypical case commenced with North Central's complaint under N.D.C.C. §§ 49-03-01.4 and 49-03-05 that Otter Tail began construction of an extension of its public utility plant and system without having first obtained a certificate of public convenience and necessity.

I. THE TERRITORIAL INTEGRITY ACT.

S.L. 1965, Ch. 319, codified as N.D.C.C. §§ 49-03-01 through 49-03-05 provides limitations on electric public utilities serving customers in designated areas. The designated areas are those areas "beyond or outside of the corporate limits of any

municipality." N.D.C.C. § 49-03-01.1. The "electric public utilities" limited by the 1965 law are privately owned suppliers of electricity, such as Otter Tail. N.D.C.C. § 49-03-01.5 (2). These statutes are commonly called the Territorial Integrity Act. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 418 (N.D. 1967).

The TIA provides two limitations on electric public utilities, a limitation on construction and a limitation on service. Under the Act, an electric public utility may not construct an extension of its plant, system, transmission or distribution lines and may not serve any customer outside the limits of any municipality without first obtaining from the Commission an order authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines to serve such customer. N.D.C.C §§ 49-03-01 and 49-03-01.1.

The PSC determined that a Certificate of Public Convenience and Necessity is required to extend Otter Tail's facilities to supply electric service to a customer in a rural area and that Otter Tail is immune from the PSC's jurisdiction under the Act, because it does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribal business on Trust land. (*COR #52, PSC Order, Findings of Fact No. 16 and Conclusions of Law Nos. 5, 8.*)

II. CUSTOMER PREFERENCE.

"Customer preference" is one factor to consider in cases under the TIA. Before adoption of the TIA, territorial disputes were usually settled by the customer's choice. See Capital Elec. Coop., 534 N.W.2d at 589; Cass County Elec. Co-op. v. Otter Tail Power Co., 93 N.W.2d 47, 50 (N.D. 1958) ("... since it is in the territory served by both, the customer could choose which service he wanted.").

After adoption of the TIA, customer choice or preference has a different status in cases where a customer requests an electric public utility, such as Otter Tail, to extend its service into a rural area served by a rural electric cooperative.

" . . . [C]ustomer preference does not govern the Commission in its decision but subjects the customer's preference for a regulated public utility service to an inquiry and decision by the Commission on the question of public convenience and necessity."

Application of Montana-Dakota Utilities Co., 219 N.W.2d 174, 181 (N.D. 1974).

In the electric public utilities' constitutional challenge to the TIA in 1963, they argued that the potential of customers' preference for regulated utilities' service in rural areas had status as a constitutional right. The Supreme Court's answer was:

" . . . the contention that the law disregards customer preference is without merit."

Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d at 423.

The claimed constitutional status of customer preference was also considered in 1974 in Application of Montana-Dakota Utilities Co., 219 N.W.2d 174. In that case, the customer took an active role as a party, claiming "a constitutional right to receive electric power from a regulated public utility when he so chooses." 219 N.W.2d at 179. The Court reiterated there is no such constitutional right. Id. at 181.

In another of the early cases under the then new TIA, Otter Tail argued the customer's preference to be served by it should determine that a certificate of public convenience and necessity should be granted. The Court said:

"While under circumstances as here presented customer preference should be considered, there are a number of other factors which also must be considered in determining whether the application of Otter Tail for a certificate of public convenience and necessity should be granted."

Application of Otter Tail Power Co., 169 N.W.2d 415, 418 (N.D. 1969). The status of

customer preference was further explained in another Otter Tail case:

"While we have previously said that customer preference should be considered, we never have held that it is controlling In rural areas, our decisions indicate, customer preference is a minor consideration Customer preference, therefore, invokes consideration by the Public Service Commission, but it is not to be a controlling factor It is the *Public* convenience and necessity, after all, with which the Commission is concerned, not private preference."

Tri-County Elect. Coop., Inc. v Elkin, 224 N.W.2d 785, 792 (N.D. 1974) (our emphasis).

The most recent Supreme Court case under the TIA involving Otter Tail, the Court reiterated and reinforced the PSC's prominent authority to control an electric public utility's construction of an extension of its plant and system and the minor status of customer preference.

"[T]he Territorial Integrity Act implicitly gives preference to the interests of the public in general over the preference of a particular electric customer to have a certain supplier furnish it with electricity."

Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (herein referred to as "Otter Tail 1990"). The Tribe's preference for Otter Tail is nothing more than one factor to consider under the TIA and is not controlling. It was error for the PSC to treat the Tribe's preference as controlling and dismiss North Central's Formal Complaint.

III. **THE TRIBE'S INTERVENTION DOES NOT STRIP THE PSC OF ITS AUTHORITY AND THE ORDER TO DISMISS BECAUSE OF A LACK OF REGULATORY AUTHORITY IS NOT IN ACCORDANCE WITH THE LAW.**

The PSC is a state agency obliged to follow North Dakota's laws, its statutes and the North Dakota Supreme Court precedents under The 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.

In Paragraph 1 of the Conclusions of Law, the PSC determined it had “jurisdiction over the parties and the subject matter of this proceeding.” (*COR #52, PSC Order, Conclusions of Law, ¶ 1.*) If the PSC has jurisdiction over the parties and subject matter of the proceeding, it should proceed to determine the matter on the merits. It should not allow the Tribe’s preference to overcome state law.

a. **North Dakota Law Provides for PSC Regulatory Authority.**

The North Dakota PSC has the jurisdiction to grant relief to North Central under the TIA. N.D.CENT.CODE §§ 49-03-01 through 49-03-01.5. The TIA requires that prior to commencing construction; a public owned utility must apply for and be granted a public convenience and necessity in rural areas. N.D.CENT.CODE § 49-03-01. The TIA’s intent is to minimize wasteful duplication of investment, facilities, and service. Cass County Elec. Co-op, Inc. v. Northern States Power, 419 N.W.2d 181, 188 (N.D. 1988).

The PSC determined that the Tribe has a controlling customer preference for electric service at the Sky Dancer Casino to be furnished by Otter Tail. This decision was not based upon the Tribe’s preference as a controlling factor in the context of public convenience and necessity under the TIA. Instead, the PSC’s decision was that Otter Tail is immunized from the PSC’s jurisdiction under the TIA because the PSC does not have regulatory authority over the Tribe’s determination of who will provide electric service to a tribal business located on trust land. (*COR #52, PSC Order, Conclusions of Law No. 5.*) This was error.

The Tribe intervened only to assert its sovereign rights to determine who provides electric service to the Sky Dancer Casino. The Tribe’s involvement, including

its reasoning for the decision to request power from OTP, is only relevant in this proceeding to the extent that it is the customer that requested service. This is not a deciding factor in this matter. Although the Tribe may want to receive service from Otter Tail, the PSC is the entity that has the regulatory authority to make that determination.

In 1984, the PSC heard the dispute between Otter Tail and Baker Electric regarding the BIA School on the Turtle Mountain Indian Reservation. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) (hereinafter referred to as "Otter Tail 1984"). This Otter Tail 1984 case involved the jurisdiction of the PSC on the Turtle Mountain Indian Reservation, just like the present case. In the Otter Tail 1984 case, the North Dakota Supreme Court found that Otter Tail purchased the BIA's system in 1968 and Otter Tail agreed that it would follow the rules of the PSC and the State of North Dakota as part of the agreement with the BIA. 354 N.W.2d at 703. The North Dakota Supreme Court determined that the PSC had jurisdiction and the exercise of that jurisdiction did not infringe upon the rights of tribal self-government. Id. at 705. The Court indicated that the PSC's action was consistent with the federal purpose of providing power to the school. Id. at 705. The Court also noted that Otter Tail conceded that Indian jurisdiction was not at issue in the case. Id. at 705-06. This decision was not appealed. This case involves the same reservation and one of the same parties, Otter Tail. Surely, if the PSC had jurisdiction over BIA's right to choose its power supplier, it has the same jurisdiction over the Tribe. Just like the Otter Tail 1984 case, the PSC has jurisdiction.

In 1990, the PSC again visited the issue regarding jurisdiction on an Indian reservation in Otter Tail 1990. Otter Tail argued sovereign immunity and it was rejected

by the North Dakota Supreme Court. In 1990, Otter Tail & Baker Electric had a dispute over serving a new manufacturing plant (DTI) on the Spirit Lake Reservation. Id. at 96-97. The manufacturing plant requested service from Baker Electric, while the Tribe requested power from Otter Tail. Id. at 96. Otter Tail filed a "Notice of Intent to Extend Service" to a customer on the Fort Totten Indian reservation. Id. at 96-97. In response, the PSC notified Otter Tail that the PSC had jurisdiction and Otter Tail should formally apply for a certificate of public convenience and necessity. Id. at 97. Otter Tail did apply for a certificate but before the PSC acted, Otter Tail extended service in defiance of the PSC's jurisdiction. Id. Otter Tail asserted the PSC did not have jurisdiction because assumption of jurisdiction would unlawfully interfere with the Indian Tribe's sovereign rights of self-government. Id. Otter Tail appealed the PSC's decision that it had jurisdiction. The North Dakota Supreme Court concluded that the PSC did have jurisdiction:

"Even assuming that Otter Tail had standing to assert the self-government interests of the Tribe, we nevertheless conclude that the PSC had jurisdiction in this case." Id., at 98.

The Court discussed the jurisdiction of the PSC over Otter Tail on the reservation in the context of the Spirit Lake Tribe's treaty and its inherent sovereignty. Id. at 101-07. The Court noted that state law allocating electric services between competing utilities did not amount to regulating the use or development of tribal property. Id. at 103. The Court also determined that the Tribe had failed to assert jurisdiction over electric utilities, which allowed substantial investments within the reservation which were probably not be recoverable if services were duplicated. Id. The North Dakota Supreme Court determined that the Tribe had no inherent sovereignty to regulate the

choice of electric suppliers. Id. The federal court agrees that the Tribe does not have the inherent sovereignty to regulate the utilities. Devils Lake Sioux, 896 F.Supp. at 961-62.

An important fact to the Court in the Otter Tail 1990 case was that the electric supply systems were not confined to the reservation and thus could impact non-reservation customers. Id. at 105, 107. The North Dakota Supreme Court viewed the Tribe's request for power from Otter Tail as "the Tribe reaching outside the reservation to regulate a public utility, rather than a 'reaching in' by a non-Indian business entity." 451 N.W.2d at 105.

As noted above, the North Dakota 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. 451 N.W.2d at 104-06. "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 (citations omitted). "Because there is no tradition of sovereignty by the Tribe over electric service, and because there is a potential economic impact on consumers beyond reservation boundaries," the Court found that it could "accord little if any weight to any asserted interest in tribal sovereignty." Id. (citation omitted). The North Dakota Supreme Court concluded "that the State's interest in regulating a public utility outweighed the minimal burden on tribal self-government." Id.

This is exactly the same case here. Here, the Tribe is trying to reach outside the reservation boundaries to regulate utilities. The PSC has extensive authority to regulate electric public utilities. The Tribe's preference for Otter Tail over North Central does not override the PSC's authority. The PSC's regulation of utilities does not regulate the use or development of tribal land. No matter who provides power, the Casino expansion can go forward and the Casino will continue to have electric service.

In the present case, the PSC concluded that the Otter Tail 1990 opinion was overruled by the subsequent appellate history and is no longer good law. (*COR #52, Conclusions of Law No. 5.*) This is not true. Otter Tail 1990 was decided by the highest court of North Dakota and was not appealed to the only court with appellate jurisdiction, the United States Supreme Court. Otter Tail 1990 was the subject of collateral attack litigation in Federal District Court. It was error for the PSC to not have followed the binding precedent of the Otter Tail 1990 case.

Even if the Otter Tail 1990 case is not good law (which North Central does not concede) the PSC still has the authority to regulate in this situation, despite the collateral attack of the Otter Tail 1990 case in federal court. After the Otter Tail 1990 decision, the Devils Lake Sioux Tribe enacted a Tribal Utilities Code purporting to install a comprehensive utility regulation regime on the reservation including the regulation of electric service areas and 4 related actions were commenced in federal district court. 1) Baker Electric Cooperative challenged the Devils Lake Sioux Tribe's jurisdiction to regulate electric service on the reservation and sought an injunction against enforcement of the Tribal Utilities Code; 2) Sheyenne Valley Electric Cooperative commenced a separate action like Baker's because Sheyenne had similar interests in

parts of the Fort Totten Reservation; 3) the Devils Lake Sioux Tribe sought an injunction against the PSC's interference with the Tribe's choice of electric suppliers; and 4) Otter Tail sought an injunction action against the PSC's interference with the Tribe's choice of electric suppliers. The district court's actions on the several cases are unpublished but were described in a subsequent published opinion, Devils Lake Sioux Indian Tribe v North Dakota Public Service Commission, 896 F.Supp 955, 956 (D.N.D. 1995). The four district court cases were consolidated and appealed. The 8th Circuit Court remanded "with instructions that the district court to make detailed factual determinations and set out its analysis in support of its legal determinations." Baker Electric Co-op., Inc. v. Chaske, 28 F.3d 1466, 1476 (8th Cir. 1994). This analysis was to consider the *Montana* factors. Id.

On remand, the district court decided "... 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..." and "The promulgation and enforcement of a reservation wide utility regulation scheme, without regard to land ownership, occupancy or use is beyond the sovereign authority of the tribe – under the fact specific situation present here." Devils Lake Sioux, 896 F.Supp. at 961-62. That decision was not appealed by any of the several parties. This collateral litigation in federal court did not "overrule" the North Dakota Supreme Court's decision quoted above. It was a decision based on the facts of the particular case and is not the law that applies to the case.

The Otter Tail 1984 and Otter Tail 1990 decisions are still the law of the state; neither was appealed to a higher authority. The federal court cannot overturn the

decisions of North Dakota's highest court system. It is the law of the state. The PSC should have followed the precedents of this State and its decision should be reversed.

b. Federal Law Dictates That the PSC Has Regulatory Authority.

Even with the Tribe's intervention, the PSC has jurisdiction over this matter. The Tribe bears the burden to prove there is a threat to its political integrity by the PSC's actions. Otter Tail 1990, 451 N.W.2d at 105. 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, 55 L.Ed.2d 209 (1978). The Tribe did not provide any evidence and did not meet its burden.

The court cases that have dealt with the issue presented in this case have done a review of the *Montana* analysis. Importantly, the North Dakota Supreme Court has already determined that Tribes do not have authority under the Montana factors to regulate utilities. Otter Tail 1984, 354 N.W.2d at 705; Otter Tail 1990, 415 N.W.2d at 107.

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; Strate v. A-1 Contractors, 520 U.S. 438, 446, 117 S.Ct. 1404 (1997). “To this day, the Supreme Court has ‘never held that a tribal court had jurisdiction over a nonmember Defendant.’” Rolling Frito-Lay Sales LP v. Stover, 2012 WL 252938, *2 (D.Ariz. 2012).

In *Montana*, the United States 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, 520 U.S. at 457. 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, Otter Tail and the Tribe, is not the type of consensual relationship described in *Montana*. Otter Tail 1990, 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, 128 S.Ct. 2709 (2008). This exception is narrowly construed so that the exception will not shrink the rule. Plains Commerce, 554 U.S. at 330; Strate, 520 U.S. at 458. 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. v. Shirley, 532 U.S. 645, 650-51, 121 S.Ct. 1825 (2001). *Montana* listed two cases as examples of what is acceptable under the second exception. Strate, 520 U.S. at 458. The types of cases listed included adoption proceedings where all parties were tribal members and a suit by a non-Indian merchant seeking payment from tribal members for goods bought on credit at an on-reservation store. Id.

The key to understanding and applying this second *Montana* exception is to look at the Court's introduction to the exception: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe the rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." Strate, 520 U.S. at 459 (citing Montana, 450 U.S. at 564). Importantly, where there is no federal grant of power providing for tribal governance over nonmembers, it is evident that the tribal court lacks adjudicatory authority over disputes regarding the conduct. Id., n. 14. In this case, there is no evidence that the regulation of an electric service provider will imperil the Tribe, affect the health of welfare of the Tribe in any manner, or affect tribal self-government or economic development.

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. (*COR #52, PSC Order, Conclusions of Law, No. 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. As a result, the Tribe has lost regulatory jurisdiction over the land. Id. (citing South Dakota v. Bourland, 508 U.S. 679, 689 (1993)). The highway right of way and the easements take away the Tribe’s gatekeeping rights and correspondingly, a loss of jurisdiction and sovereignty. Without utilization of that state right of way, North Central’s easement, and Central Power’s easement, electric service from Otter tail could not reach the Casino. The PSC has the jurisdiction to regulate under the circumstances and it was error for it to dismiss North Central’s Complaint due to a lack of authority. The PSC’s failure to recognize the limits on tribal authority was error.

The state and tribe can have concurrent jurisdiction over a matter. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333, 103 S.Ct. 2378 (1983). A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention. Id. at 336. There is no evidence to support that regulation of Otter Tail under the TIA causes any harm to the Tribe. The PSC has an interest in the off-reservation effects of the provision of electrical service that warrants action by the State agency. Id. The PSC even recognized the off-reservation effects of Otter Tail’s rates and kept authority over the rate matter. (*COR #52, PSC Order, Conclusions of Law No. 8.*) If the PSC has no authority to regulate under the

TIA, how does it have authority to address rates as a result of the facilities built on the Turtle Mountain Indian Reservation? The off-reservation effects of Otter Tail's activities are significant. These off-reservation effects allow for PSC authority over this matter.

The issue of state authority on tribal land is not new. In *Nevada v. Hicks*, the United States Supreme Court reviewed a claim against a Nevada state official for the execution of a state search warrant on reservation land. 533 U.S. 353, 356-57, 121 S.Ct. 2304 (2001). The United States Supreme Court used the *Montana* analysis in determining the scope of the Fallon Paiute-Shoshone Tribe's regulatory jurisdiction over a state game warden. Id. at 359-60. Tribal sovereignty does not prevent state regulatory authority on the reservation. Id. at 361. A reservation is part of the state's territory. Id. at 362. Where state interests "outside the reservation are implicated," the State can exercise its regulatory authority for activities on tribal land. Id. at 362. In *Hicks*, the United States Supreme Court ultimately determined that the service of state process by a state officer on tribal land did not affect the tribe's right to self-government. Id. at 364.

Tribal authority over nonmembers must be connected to the right of Indians to make their own laws and be ruled by them. Id., at 361. This right to self-government balances the interests between the Tribe, the Federal government, and the State. Id., at 361-62. In this case, the PSC has not been stripped of its regulatory authority, particularly where there will be off-reservation effects. It was error to not exercise its authority.

The PSC noted that the Tribe had a "long-standing tribal utility code." (*COR #52, PSC Order, Findings of Fact No. 6.*) The Tribe has no authority to regulate utilities.

Devils Lake Sioux, 896 F.Supp. at 961-62. Thus any conclusions or findings of facts based upon the Tribal Utilities Code is irrelevant and is not an appropriate basis for a determination that the PSC lacked authority over North Central's Complaint.

Otter Tail admitted the central fact alleged by North Central, that Otter Tail threatened to and constructed of an extension of its public utility plant and system at the place to be served without first obtaining from the PSC a certificate that public convenience and necessity require or will require such construction. (*COR #1, Complaint*, ¶ 3; *COR #4, Answer* ¶ IV, V.) That admission established that there was no genuine issue as to the central material fact and summary judgment should have been entered against Otter Tail under Rule 56 of the North Dakota Rules of Civil Procedure.

The Tribe's sovereign power to contract with whomever it will for the provision of electric service to its lands and businesses is "an illusory power as any supplier must cross non-reservation areas to get power to the reservation, and must therefore be under North Dakota Public Service Commission jurisdiction until either the reservation boundary or the actual facility is reached." Devils Lake Sioux, 896 F.Supp. at 957. The PSC's Order that it lacked regulatory authority is error and must be reversed.

IV. THERE IS NO FEDERAL PREEMPTION OF THE PSC'S JURISDICTION.

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. North Dakota v.

Swanson, 2012 WL 4479246, *4 (D.Minn. 2012). In this case, there has been no preemption of the PSC's authority. The PSC did not cite any statute or regulation from Congress that preempted its authority. As such, it was error to find preemption.

V. THE PSC'S CONCLUSIONS OF LAW BASED UPON FEDERAL LAW, INSTEAD OF NORTH DAKOTA LAW, ARE IN VIOLATION OF ARTICLE VI, § 2 OF THE NORTH DAKOTA CONSTITUTION.

The PSC is a state agency obliged to follow North Dakota's laws, its statutes and the ND Supreme Court precedents under the TIA. N.D.CENT.CODE §§ 49-03-01 through 49-03-05.

Section 2 of Article VI of the North Dakota Constitution states:

“The supreme court shall be the highest court of the state. It shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction...”

As discussed above, the PSC's decision based solely on federal law, in contravention of North Dakota Supreme Court precedent violates the North Dakota Constitution which is clear that the North Dakota Supreme Court is the ultimate decision-maker on North Dakota law. Applying federal law in this case was error.

VI. THE PSC ORDER RESULTS IN AN UNLAWFUL DELEGATION OF AUTHORITY TO THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS.

North Central has a right under N.D.C.C. Chapter 10-13 to provide electric service in rural areas and to have those areas protected under N.D.C.C. Chapter 49-03. Where there is a territorial dispute, North Central has the right to file a complaint with the PSC for determination. This is authority delegated to the PSC by the Legislature under the TIA. This is a constitutional delegation of administrative authority to the PSC. MDU v. Johanneson, 153 N.W.2d at 421.

“The powers and duties of the . . . public service commissioners . . . must be prescribed by law.” N.D. Const., Article V, § 2. The PSC’s Order allows the Tribe to step into its’ shoes and decide territorial disputes. This is not allowed by law. Allowing the Tribe, who entered no evidence, to be the final decision-maker in this matter is without support of law and is in violation of the PSC’s constitutional authority.

The Tribe does not have the inherent sovereignty to regulate the utilities. Devils Lake Sioux Tribe, 896 F.Supp. at 961-62. “[T]he self-governing powers of tribes ‘involve only the relations among members of a tribe’ and that divestiture of sovereignty has occurred with respect to ‘the relations between an Indian tribe and *nonmembers of the tribe.*’ “ Rolling Frito-Lay, 2012 WL 252938, *2. A Tribe’s regulatory authority cannot exceed its legislative authority. Id. at *3. The United States Supreme Court has been clear that *Montana* is not limited “to the activities on non-Indians on fee patented land. This is so because, as the Court noted, subjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. Government with the consent of the governed is everything in America.” Id. (citations omitted). Since the Tribe does not have authority to regulate utilities, its preference for Otter Tail cannot trump North Dakota law.

A Tribe cannot reach outside the reservation to regulate a public utility. Otter Tail 1990, 451 N.W.2d at 105. North Central did not lose its protections under state law simply by providing electric service on the Turtle Mountain Indian Reservation. North Central has no say in tribal laws and regulations and has no role in the tribal government. Any regulation by the Tribe must stem from its “inherent sovereign authority to set conditions on entry, preserve tribal government, or control internal

relations.” Rolling Frito-Lay, 2012 WL 252938, *4.

As discussed in detail above, in the Otter Tail 1990 Case, the North Dakota Supreme Court 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 and doing so was error.

VII. THE PSC’S FINDINGS OF FACT WERE NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND DOES NOT SUFFICIENTLY ADDRESS NORTH CENTRAL’S EVIDENCE.

The PSC’s order cannot be affirmed on appeal if the findings of fact underlying the order are not supported by a preponderance of the evidence. N.D.CENT.CODE § 28-32-46(5). The PSC order also should not be affirmed if its findings of fact do not adequately address the evidence offered by the appellant or adequately explain the inconsistency between the evidence the its findings of fact. N.D.CENT.CODE § 28-32-46(7).

The hearing on this matter was on whether the PSC had jurisdiction and whether Otter Tail should be retrained and enjoined from constructing or extending its lines into North Central’s service area without first receiving a Certificate of Public Convenience

and Necessity. North Central provided evidence and Otter Tail admitted that construction was ongoing without the Certificate of Public Convenience and Necessity. (COR #1, 4.) The PSC made a finding that Otter Tail had begun construction to the Casino. (COR #52, Findings of Fact No. 1.) North Central also provided evidence regarding the crossing of North Central facilities, use of North Central's easements, utilization of the state road right-of-way, and the State Gaming Compact authorization of state regulation. (COR #1; COR #7; COR #32; COR #52, Findings of Fact Nos. 11-13; Conclusions of Law No. 6.) The PSC failed to sufficiently address the evidence that clearly established Otter Tail's blatant disregard of the law.

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." (COR #52, PSC Order, Findings of Fact, No. 29) (PSC's emphasis). The PSC then discussed the *Brendale* and *Montana* factors. (COR #52, PSC Order, Findings of Fact, Nos. 22-38.) The PSC utilized the facts from Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) as a basis for its own Findings of Fact. (COR #52, PSC Order, Findings of Fact, Nos. 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 Otter Tail 1990 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. Without evidence relating to the harm of the Tribe, there can be no finding that there is harm to the Tribe. It was error to make the finding without evidentiary support.

Furthermore, the federal court cases involving Baker Electric and Otter Tail, there was no gaming compact recognizing the retention of state jurisdiction. The federal court cases also had additional evidence presented by the Tribe that allowed the Court to do fact finding on the jurisdictional issues such as treaty rights and alleged damages to the Tribe. We do not have that here. The PSC's reliance of facts in other cases is error and cannot stand.

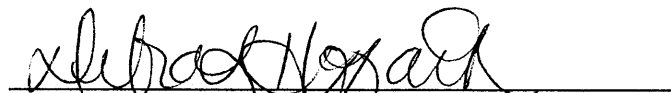
The undisputed facts show a blatant case of wasteful duplication such that Otter Tail should be ordered to remove its extension of service, were it not for the tribal authority issue. (*COR #52, PSC Order, Conclusions of Law No. 8.*) Otter Tail cannot support its action and it lacks standing to assert the Tribe's interests. The tribal authority issue can save Otter Tail's extension of service only if the Tribe shows facts to support its claim. The Tribe failed to show facts to support its claim, so the entire record of facts does not support the PSC's decision.

CONCLUSION

The PSC failed to follow North Dakota law by dismissing North Central's Complaint because it lacks regulatory power over Otter Tail's activities. The PSC's order should be reversed and the matter remanded to the PSC for summary disposition in favor of North Central.

Dated this 5th day of October, 2012.

PRINGLE & HERIGSTAD, PC



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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.)

Civil No. 08-2012-CV-1464

**AFFIDAVIT OF SERVICE
BY MAIL**

Jill Stanislawski, 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 5th day of October, 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:

Brief of Appellant North Central Electric Cooperative, Inc.

Said envelopes were addressed to the following persons:

Mark E. Gruman Special Assistant Attorney General 600 E. Boulevard Avenue Department #408 Bismarck ND 58505	Paul Sanderson Attorney at Law 316 North 5 th Street PO Box 1695 Bismarck ND 58502
Rjay Brunknow Tribal Attorney for Turtle Mountain Band of Chippewa Indians PO Box 900 Belcourt ND 58316	

Jill Stanislawski
 Jill Stanislawski

Subscribed and sworn to before me this 5th day of October, 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: _____