

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc.)

Appellant,)

v.)

North Dakota Public Service Commission,)
Otter Tail Power Company, and Turtle)
Mountain Band of Chippewa Indians,)

Appellees.)

Civil File No. 08-2012-CV-01464

Agency Case No. PU-11-701

OAH File No. 20120087

APPELLEE

NORTH DAKOTA PUBLIC SERVICE COMMISSION

RESPONSE BRIEF

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Statement of the Case, Statement of Facts and Background

In 1965 the North Dakota Legislature passed the Territorial Integrity Act (TIA), *N.D.C.C. Ch. 49-03*, requiring public utilities (excluding cooperatives) to acquire a certificate of public convenience of necessity (CPC&N) prior to any extension of their electric lines and facilities. The North Dakota Public Service Commission (Commission) is tasked with administration and enforcement of the TIA.

On December 12, 2011 North Central Electric Cooperative, Incorporated (North Central) filed a formal complaint against Otter Tail Power Company (Otter Tail), requesting a cease and desist order enjoining Otter Tail from extending plant within their (North Central's) service territory. This is an appeal of the Commission's decision denying North Central Electric Cooperative, Incorporated's (North Central) motion for summary disposition and granting Otter Tail Power Company's (Otter Tail) motion for summary judgment. North Central advocates that Otter Tail's extension of plant into their service territory violates the TIA. Otter Tail counters that the Commission is without jurisdiction, pursuant to inherent tribal sovereignty.

The stipulated facts are as follows. 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. Or. Granting OTP's Mot. S.J. 3 (June 14, 2012). As part of 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. *Id.* Otter Tail would 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). *Id.*

Highway 5 runs adjacent to the Sky Dancer Casino property. *Id.* 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. *Id.*

The Sky Dancer Casino is a tribal owned facility. *Id.* The Sky Dancer Casino is located on tribal trust property on the Turtle Mountain Reservation. *Id.* The Tribe is a federally recognized Indian tribe. *Id.* The Tribe has a long-standing tribal utility code. *Id.* The Tribe passed a resolution on November 23, 2011, determining that Otter Tail shall provide electric service to the Sky Dancer Casino. *Id.* The Sky Dancer Casino is located in North Central's service area. *Id.* North Central has provided electric service to Sky Dancer at the place to be served since December 2, 1998. *Id.*

Service is provided to separate hotel and casino buildings and other facilities on the Sky Dancer campus. *Id.* 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. *Id.* North Central serves a total of 7 separately metered service entrances on the Sky Dancer campus. *Id.* The construction is serviced by a separate meter. *Id.* Otter Tail's nearest pre-existing facility to the Sky Dancer campus is a transmission line approximately 1000 feet away. *Id.* at 4. Otter Tail's nearest retail consumer is approximately 3 miles distant from the Sky Dancer campus. *Id.* 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). *Id.* There is an Amended Gaming Compact between

the Tribe and the State of North Dakota, wherein the State of North Dakota retains its jurisdiction. *Id.* North Central has October 29, 1975 underground easements from the Tribe. *Id.*

Standard of Review

The standard of review to be applied by the court is set out in the North Dakota Administrative Agencies Practice Act, *N.D.C.C. Ch. 28-32*. Specifically, North Central bases their appeal on subsections (1), (3) and (5), which provide that the Commission's June 14, 2012 Order must be affirmed unless the court finds that the order: (1) "is not in accordance with the law"; ... (3) does not comply with *N.D.C.C. Ch. 28-32*; or (5) is not supported by a preponderance of the evidence. *Id.* "If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court." *Id.*

Summary of Argument

As indicated below there is no legal justification to overrule the Commission's June 14, 2012 decision. The Commission's recognition of the Turtle Mountain Band of Chippewa Indian's inherent sovereignty and its relation to this matter was entirely predicated upon relevant precedent. The Commission therefore respectfully requests that this Court affirm its June 14, 2012 Order.

Argument

I. The Order of the Commission Is in Accordance with the Law.

N.D.C.C. § 28-32-46(1) mandates that the appellate "court must affirm the order of the agency unless it finds that ... [t]he order is not in accordance with the law." *Id.* When determining this issue, the Appellate Court must "look to the law and its

application to the facts.” *Plante v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 195, 197 (N.D. 1990). Additionally, since this issue’s subject matter is of a “highly technical nature,” the Commission’s “expertise” is “entitled to appreciable deference.” *Montana-Dakota Utilities Co. v. Public Service Commission*, 413 N.W.2d 308, 312 (N.D. 1987).

A. *North Central's argument, that the Commission's Conclusion of Law No. 1 is inconsistent, is without merit.*

Conclusion of Law No. 1 of its June 14, 2012 Order states “[t]he Commission has jurisdiction over the parties and the subject matter of this proceeding.” To the Commission’s knowledge no argument exists which would refute the Commission’s primacy regarding TIA decisions. Conclusion of Law No. 1 simply reiterates this common knowledge. Simple analysis of the remaining portion of the Commission’s June 14, 2012 Order unambiguously indicates the Commission’s central, dispositive ruling in favor of Otter Tail’s summary judgment motion, along with its underlying logic for doing so.

B. *North Central's argument that the Commission based its Order on federal law, rather than state law, is without merit.*

To accept North Central’s position would be to agree with the proposition that federal pre-emption, and federal court decisions, have no authority over the North Dakota Public Service Commission. As can be imagined, absent definitive guidance to this effect, such reasoning defies common sense and is not something the Commission, in good faith, can follow.

To begin North Central’s brief cites *Application of Otter Tail Power Co.*, 354 N.W.2d 701 (N.D. 1984) (1984 decision). As so stated by the North Dakota Supreme

Court in *Application of Otter Tail Power Co*, 451 N.W.2d 95 (N.D. 1990) (1990 decision), “we did not there [the 1984 decision] consider whether the PSC’s exercise of jurisdiction infringed upon the tribal right of self-government ... [t]hat decision does not control this case (the 1990 decision)”. Since tribal self-government is as important to this matter as it was for the 1990 decision, any use of the 1984 decision is in error and should be disregarded.

Moving on, as to North Central’s contention that the Commission disregarded state law in its analysis, it is apparent from the Commission’s June 14, 2012 Order that it was significantly guided by *Application of Otter Tail Power Co*, 451 N.W.2d 95 (N.D. 1990) (1990 decision), a North Dakota State Supreme Court decision. In fact the Commission only deviated from the 1990 decision in its last Finding of Fact, recognizing that the 1990 decision was expanded by *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F. Supp. 955, 961 (D.N.D. 1995) (1995 decision) in determining 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”.

Federal 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). The issue of whether the Territorial Integrity Act is pre-empted is essentially dispositive regarding both parties' respective motions.

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.*

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 TIA jurisdiction over a Tribal business located on Tribal land.

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.*

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.*

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.

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.* "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.*

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.*

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.*

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.

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.

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.* 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.*

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 Court determined that the North Dakota Territorial Integrity 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.

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. Unlike the Turtle Mountain Band of Chippewa Indians, 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.* (emphasis added). "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 DTI area." *Id.*

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.*

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 be 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.* 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.*

After *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), the Devils Lake Sioux Tribe promulgated their own utility code. *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1470 (8th Cir. 1994). Several different lawsuits then ensued, ultimately resulting in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995), which only diverges with the North Dakota Supreme Court's analysis in *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (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). Predicated upon this authority, and after analysis of all evidence, the Commission determined that the Turtle Mountain Band of Chippewa possessed inherent sovereignty over the proposed extension of plant and service, and since this inherent sovereignty had not been divested by the Turtle Mountain Band of Chippewa, the Commission granted Otter Tail's motion for summary judgment.

C. *North Central's argument that the Commission's June 14, 2012 Order is not in accordance with judicial precedent and state law is without merit; the Commission's role as a state agency does not absolve it of the requirements of federal pre-emption if it so applies.*

Please see the Commission's legal analysis in I.B. above.

D. *North Central's argument that the Commission's June 14, 2012 Order is an unlawful delegation of authority, in light of the 1990 and 1995 decisions, ignores the final ruling of the 1995 decision, for which North Central has provided no justification for the Commission, or this Court, to disregard.*

For an analysis of the 1990 and 1995 decisions, please see I.B. above. The Commission reiterates the following from the 1995 decision: "The Court does feel however, that where the service is 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 (D.N.D. 1995).

E. *The Commission's determination that it did not have jurisdiction over this matter is in accordance with the law and long established precedent. The 1990 and 1995 decisions are the proper precedent; not Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). As this Court is well aware the 1990 decision is significantly guided by Montana v. United States, 450 U.S. 544 (1981). North Central's argument is therefore incorrect.*

For the Commission's analysis of the 1990 and 1995 decisions, please see paragraph I.A. above. It is unclear how North Central advocates *Oliphant* has authority in this matter, since *Montana, Brendale* and the 1990 and 1995 decisions were determined after its (*Oliphant*) issuance.

F. *North Central's argument, so promulgated in 1.f of their Notice of Appeal and Specifications of Error, demonstrates their fundamental misunderstanding of the concept of divestment as so articulated by the North Dakota Supreme Court in the 1990 decision.*

The relevance of the facts stated in North Central's argument relate to any purported divestment of inherent sovereignty by the Turtle Mountain Band of Chippewa regarding the limited right to regulate electric power to tribal owned property on tribal owned land. "[A]ny inherent regulatory power the Tribe may have to regulate non-Indian activities on the reservation may be voluntarily surrendered by the Tribe itself." *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 103 (1990). "White [in *Brendale*] also found that the tribe derived no authority to zone the fee lands from its inherent sovereignty because inherent sovereignty is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's external relations." *Id.* at 99 (emphasis added). The Commission's findings, in effect, determined that these "tribal external relations" did not amount to divestment of their inherent sovereignty.

G. *North Central's argument that the Order does not make a proper evaluation of the issues under the law and evidence is incorrect.*

Please see the Commission's legal analysis in I.B. above.

H. *North Central's argument that the Commission must ignore federal law is incorrect.*

North Central repeatedly indicates that the Commission was in error by following “federal law”. Whether North Central refers to Federal Statute or Common Law, it is an imprudent assertion. As this Court is well aware, our judicial system is part of an ever larger federalist system. North Central wishes for the Commission, and this Court, to ignore federal pre-emption and the 1995 decision entirely, yet provides no justification to do so. Acceptance of North Central’s reasoning would place in jeopardy the fundamental nature of jurisprudence; for example, would State Courts be required to follow *Miranda v. Arizona*, U.S. 436 (1966) between the time of its issuance by the United States Supreme Court and such time such decision would be heard by our own State Supreme Court? In North Central’s opinion they would not, since North Dakota agencies and District Courts are required only to follow the State Supreme Court in matters of common law. The Commission respectfully disagrees with such an assertion.

There is no question in the Commission’s mind that, for issues such as Constitutional construction (like *Miranda*) and federal pre-emption (like tribal sovereignty), the Commission and this Agency must abide by federal decisions. *Rooker-Feldman*, perhaps, could provide the means for the Commission and this Agency to ignore the 1995 decision. Yet *Verizon Maryland, Inc. v. Public Service Com’n of Maryland*, 535 U.S. 635, 644, n.3 (2002) exempts the doctrine’s applicability regarding State Agency decisions. For further discussion relating to the applicability of tribal sovereignty to this matter, please refer to I.B. above.

- II **Since the June 14, 2012 decision determined competing summary judgment motions, the issue of whether it is supported by its Findings of Fact is not an appealable issue.**

Nevertheless, if this matter were heard on its merits, Otter Tail would still prevail.

N.D.C.C. § 28-32-46(6) mandates that the “court must affirm the order of the agency unless it finds that ... [t]he conclusions of law and order of the agency are not supported by its findings of fact.” (emphasis added). As indicated in the preface of the Commission’s June 14, 2012 Order, “Judge Hoberg ... 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 [of] ... fact were agreed upon by North Central and Otter Tail.”

Since the Commission determined in favor of Otter Tail’s motion to dismiss under Rule 56 of the North Dakota Rules of Civil Procedure, the proper standard for the Commission’s June 14, 2012 Order is whether “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.” *Rule 56(c) of the North Dakota Rules of Civil Procedure*. This was so stated in paragraph 14 of the Commission’s June 14, 2012 Order, and Conclusion of Law No. 7 of same. *N.D.C.C. § 28-32-46(6)* is therefore inapplicable to this Order, as a full hearing, on the merits, did not take place.

Nevertheless, an analysis of the evidence, along with the Commission’s unanimous decision in favor of Otter Tail, supports a finding that, if held on the merits, Otter Tail would prevail by a preponderance of the evidence in this matter. An examination of Findings of Fact No.’s 1-13, and Conclusion of Law No. 6, indicates Commission consideration of the facts as so stipulated by the parties. The appropriate

facts in this matter lead to a determination of the ownership of the properties being served, the disposition of the plant proposed to be extended, and the extent, if any, that the tribe has divested themselves of their inherent sovereignty. By a preponderance of the evidence, when weighed in light of relevant law, leads to the conclusion that the Turtle Mountain Band of Chippewa had not divested themselves of their inherent sovereignty, which is the only issue of where the weight of evidence is applicable.

III North Central's claim that the provisions of N.D.C.C. Chapter 28-32 were not complied with is without merit.

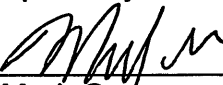
The Commission defers to its argument so articulated in I.B. above.

Conclusion

As indicated below there is no legal justification to overrule the Commission's June 14, 2012 decision. The Commission's recognition of the Turtle Mountain Band of Chippewa Indian's inherent sovereignty and its relation to this matter was entirely predicated upon relevant precedent. The Commission therefore respectfully requests that this Court affirm its June 14, 2012 Order.

Dated: November 1st, 2012

Respectfully submitted:

By: 
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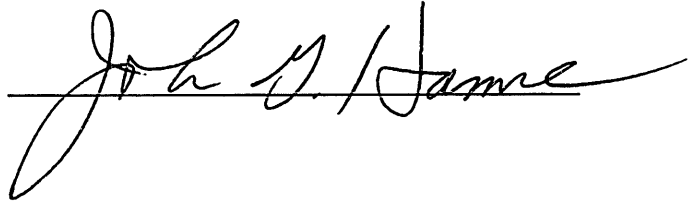
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John Hamre further states that on the **1st** day of **November 2012**, he hand delivered the original of the same to the following:

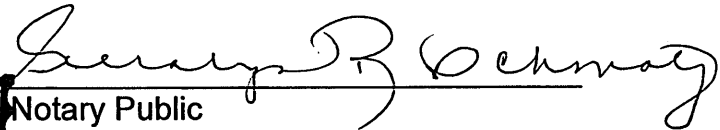
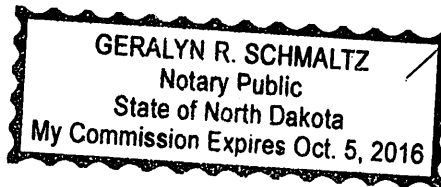
Ms. Debra Simenson, Clerk
Burleigh County District Court
P. O. Box 1055
Bismarck, ND 58502-1055

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



Subscribed and sworn to before me this **1st** day of **November 2012**.

SEAL


Notary Public