

ZUGER KIRMIS & SMITH

Lyle W. Kirmis
Lance D. Schreiner, P.C.
James S. Hill, P.C.^
Patrick J. Ward
Rebecca S. Thiem, P.C.
Jerry W. Evenson, P.C.^
Lawrence A. Dopson
Lawrence E. King, P.C.
Tracy Vigness Kolb, P.C.
Shawnda R. Ereth
Constance N. Hofland
Paul R. Sanderson, P.C.^

COUNSELORS AND ATTORNEYS AT LAW

316 North Fifth Street
Provident Building
P.O. Box 1695
Bismarck, ND 58502-1695
(701) 223-2711
fax (701) 223-7387
zkslaw@zkslaw.com
www.zkslaw.com

Kara J. Johnson
Claire J. Holloway
Erica J. Shively
Rebecca L. Binstock
Kelsey A. Krapp

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PUBLIC SERVICE COMMISSION

John A. Zuger
1940-2006
Thomas O. Smith
1944-2001

^Certified Civil Trial Specialist
National Board of Trial Advocacy

Writer's direct e-mail: psanderson@zkslaw.com

November 2, 2012

Debra Simenson
Clerk of District Court
PO Box 1055
Bismarck, ND 58502

Re: North Central Electric Cooperative, Inc. v. North Dakota Public Service
Commission, et al., Civil No. 08-2012-C-1464

Dear Ms. Simenson:

Enclosed for filing in the above matter is Otter Tail Power Company's Appellee Brief.

Sincerely,



Brenda Vitek, Secretary to
Paul Sanderson

Enclosure

cc: Debra Lynn Hoffarth (w/enc.)
Mark E. Gruman (w/enc.)
Rjay Brunknow (w/enc.)

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2012-C-1464

North Central Electric Cooperative, Inc.,)
)
Appellant,)

vs.)

**OTTER TAIL POWER COMPANY'S
APPELLEE BRIEF**

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

INTRODUCTION AND FACTUAL BACKGROUND

This case arises from Appellant North Central Electric Cooperative, Inc.'s ("North Central") appeal from the North Dakota Public Service Commission's ("Commission") Order granting Otter Tail Power Company's ("OTP") Motion to Dismiss North Central's Complaint.

North Central brought a Complaint against OTP seeking to enjoin OTP from providing electric service to the Sky Dancer Casino under North Dakota's Territorial Integrity Act ("TIA"), N.D.C.C. Ch. 49-03. Docket Entry ("DE") 1. OTP moved the Commission for an Order dismissing North Central's Complaint because the Commission had no regulatory jurisdiction over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting OTP 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. DE 5. The Commission ordered North Central's Complaint be dismissed finding it had no regulatory authority over electric service to the Sky Dancer Casino. DE 52. OTP submits the following brief in support of its position requesting this Court affirm the Commission's

Order granting OTP's Motion to Dismiss North Central's Complaint.

There are no material facts in dispute in this case. The parties stipulated to the admissible evidence prior to the hearing before the Commission. DE 15 and 32. OTP has no objection to the Commission's Findings of Fact as outlined in its Order. However, for purposes of background on appeal, OTP will briefly summarize the key facts.

OTP is a public utility engaged, among other things, in the generation, transmission, and distribution of electric energy as an electric utility. OTP sells electric energy at retail in the states of Minnesota, North Dakota, and South Dakota. OTP is currently a non-exclusive supplier of electric energy on the Turtle Mountain Reservation.

The Turtle Mountain Band of Chippewa Indians ("the Tribe") is a federally-recognized Indian tribe. DE 15. The Tribe is located on the Turtle Mountain Reservation in Rollette County, North Dakota. The Turtle Mountain Reservation was created by Executive Orders of December 21, 1882 and March 29, 1884. The Tribe is operating under a Constitution and By-Laws approved by the Secretary of the Interior on June 16, 1959.

The Tribe promulgated the Turtle Mountain Tribal Code, which includes the Turtle Mountain Tribal Utility Code. DE 15. As part of the Findings, the Tribal Utility Code states "the power to regulate all public utilities is an inherent and essential part of the authority of any American Indian Reservation tribal government. This power is an aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, an American Indian Tribe, limited only to the extent that such power has been specifically limited or withdrawn by federal law." The Tribal Utility Code was enacted pursuant to the sovereign tribal powers delegated to the Tribal Council under the Tribal Constitution.

The Sky Dancer Casino is a gaming casino owned and operated by the Tribe and located on Tribally-owned Trust land on the Turtle Mountain Reservation. DE 15. On November 23, 2011, the Tribe passed Resolution Number TMBC598-11-11 authorizing the Tribe to enter into a contract with OTP to provide electric service to the Sky Dancer Casino. Id.

Following North Central's filing of its Complaint with the Commission, the Tribe, through its Tribal Chairman, filed a letter with the Commission stating it was aware of the proceeding and that the Tribe confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino pursuant to the legal precedent set forth in Devils Lake Sioux Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). DE 13. On May 1, 2012, the Tribe served a Petition to Intervene for Special Appearance to Object to Jurisdiction in the underlying action. DE 25. On May 4, 2012, the Administrative Law Judge granted the Tribe's Petition to Intervene for Special Appearance to Object to Jurisdiction. DE 31. The Tribe appeared at the May 7th hearing to contest the Commission's jurisdiction over their determination of which utility would provide service to the Casino. DE 34.

ISSUE

Whether the Public Service Commission has regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company 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.

STANDARD OF REVIEW

An appeal from a decision by the PSC is governed by the Administrative Agencies Practice Act in N.D.C.C. ch. 28-32. Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 30-31, 736 N.W.2d 788. Under N.D.C.C. § 28-32-46, a district court must affirm an administrative agency order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

In reviewing an agency's findings of fact, the district court may not substitute its judgment for that of the agency or make independent findings. Id. When an appeal from an administrative agency involves a legal question, as is the case here, the district court must affirm the agency's decision unless it is not in accordance with the law. Kreuger v. Richland County Social Servs., 526 N.W.2d 456, 457 (N.D. 1994).

LAW AND ARGUMENT

OTP requests this Court affirm the Commission's Order granting its Motion to Dismiss North Central's Complaint because the Commission's decision to dismiss North Central's Complaint was in accordance with the law. The Commission does not have

regulatory authority over the Tribe's determination to permit OTP to provide electric service for the tribal-owned Sky Dancer Casino located on tribal trust land within the exterior boundaries of the Turtle Mountain Reservation.

I. The Turtle Mountain Band of Chippewa Indians may determine who is to supply electrical service to a Tribally-owned business located on Tribal land without regard to the regulations of the North Dakota Public Service Commission.

The current law in North Dakota provides that the Commission has no regulatory authority over an Indian Tribe's resolution determining who will provide electric service to a Tribally-owned facility located on tribal trust land within the exterior boundaries of the Reservation.

This issue was the subject of years of litigation between OTP and the Commission, arising from a dispute with a different electric cooperative over electric service to a Tribal-owned business on the Spirit Lake Reservation.¹ The dispute culminated in a decision by 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), which carved out a narrow exception to the rule holding that a Tribe may determine who is to supply electrical service to Tribal owned businesses located upon Indian trust lands, without regard to the regulations of the North Dakota Public Service Commission.

For purposes of assisting the Court in understanding the development of the current law, it is important to analyze the facts and holdings of these cases.

A. The Otter Tail (1990) Case

North Central's arguments largely rely on the decision in Application of Otter Tail

¹ This series of cases are the only reported decisions in the country addressing the issue of Indian sovereignty versus State regulatory control as it relates to electric service.

Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as "Otter Tail (1990)"). The Otter Tail 1990 case began over a dispute between OTP and Baker Electric Cooperative ("Baker Electric") regarding who had the right to provide electric service to a Tribal-owned manufacturing business on the Spirit Lake Reservation. 451 N.W.2d 95. In 1988, the Devils Lake Sioux Tribe adopted a resolution designating OTP as the provider of electric service to a tribal facility. Id. at 97. The Devils Lake Sioux Tribe asserted it had the power to regulate all electric service, wherever located, on the reservation. Id. at 96. OTP then filed a "Notice of Intent to Extend Service" to the tribal facility with the Commission. Id. at 97. The Commission responded that it had jurisdiction over the service and OTP should formally apply for a certificate of public convenience and necessity. Id. OTP then petitioned the district court for a writ of prohibition on the grounds that the Commission lacked jurisdiction over electric service on the Spirit Lake Reservation. Id. The district court granted OTP's writ and set a hearing. Id. At that time, Baker Electric sought an application for supervisory writ from the North Dakota Supreme Court. Id.

The North Dakota Supreme Court granted the supervisory writ and issued the Otter Tail (1990) opinion. 451 N.W.2d 95. Part of the Supreme Court's opinion involved the issue of standing. Id. at 97-98. Standing was an issue because the Devils Lake Sioux Tribe did not intervene in the dispute between OTP and Baker Electric. Id. The Court determined OTP lacked standing to assert the Devils Lake Sioux Tribe's self-government interests. Id. at 98.

However, the Court also determined the Tribe did not have exclusive authority to regulate electric service throughout the reservation, as it had asserted. Id. In reaching this

conclusion, the court examined the leading U.S. Supreme Court cases governing state regulation and Indian sovereignty, Brendale v. Confederated Tribes and Bands of Yakima Indian Nations, 492 U.S. 408 (1989) and Montana v. United States, 450 U.S. 544 (1981). Specifically, the Otter Tail (1990) Court analyzed the two Montana exceptions to the general rule that Indian Tribes do not have regulatory control over non-members on the reservation:

First, 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. Second, 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. at 99 (citations omitted). The court determined the Devils Lake Sioux Tribe did not derive the power to regulate an electric service on the reservation from either of the two Montana exceptions. Id. at 105-06.

In reaching its decision in light of the Brendale and Montana precedent, the court repeatedly recognized that this was the first instance when the Devils Lake Sioux Tribe had attempted any regulation of electric utilities. 451 N.W.2d at 101. The court further explained the significance of this position:

The 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. There is no tribal regulation of rates, service and safety standards or service territory generally. The tribe does not employ engineers, accountants and other professionals or technicians to regulate utilities.

Id. at 103. The court found that the Devils Lake Sioux Tribe “has traditionally accommodated, if not acquiesced in, the State’s exclusive and long-standing regulation of

electric power suppliers.” Id. The court also found that the Commission had traditionally exercised jurisdiction over electric suppliers on the reservation. Id. at 105. Based upon these facts, the Otter Tail (1990) Court concluded the Tribe did not possess the inherent sovereignty to regulate the provision of electric service on the reservation. Id. at 104.

The Court remanded the case back to the district court with instructions to vacate the writ of prohibition and proceed with contempt proceedings against OTP. Id. at 107.

B. The Federal Court Cases

Following the Otter Tail (1990) opinion, the parties continued litigating the scope of the Commission’s authority over the Tribe’s electric service in a series of cases in federal court. See Baker Electric Coop v. Otter Tail Power Co., 116 F.3d 1207 (8th Cir. 1997); Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n, 896 F.Supp. 955 (D.N.D. 1995); and Baker Electric Coop v. Chaske, 28 F.3d 1466 (8th Cir. 1994).

In July 1990, shortly after the North Dakota Supreme Court’s decision, the Devils Lake Sioux Tribe enacted a Tribal Utilities Code which asserted extensive regulatory authority over electric service within the boundaries of the reservation. Chaske, 28 F.3d 1466 at 1470. Baker Electric commenced an action against the Devils Lake Sioux Tribe arguing it lacked regulatory jurisdiction over electric utilities doing business within the exterior boundaries of the reservation. Id.

In August 1990, the Commission ordered OTP to discontinue service to the tribal facility, which was the subject of the Otter Tail 1990 opinion. Id. The Devils Lake Sioux Tribe then commenced an action against the Commission alleging the Tribe had the right to purchase electric service from the supplier of its choice. Id. The Tribe also requested

and was granted an injunction that prevented the Commission from interfering with its choice of electric service provider. Id. (noting the injunction prohibiting the Commission's interference with the Tribe's contract was in place for thirty months while the litigation was ongoing).

OTP also commenced an action against the Commission seeking to prevent it from interfering with OTP's contract with the Devils Lake Sioux Tribe to provide electric service to a separate tribal facility located on tribal trust land. 28 F.3d at 1470.

The federal district court dismissed Baker Electric's case against the Tribe on the grounds of Tribal sovereign immunity. Id. The district court also rescinded the injunction prohibiting the Commission from interfering with the Tribe's regulation of electric service on the reservation. Id. In addition, the district court dismissed OTP's case against the Commission on the grounds of res judicata. Id. The district court determined the Tribe had the inherent sovereign power to decide which utility provider to patronize and could do so without regard to the North Dakota TIA. Id. All parties appealed the adverse decisions to the Eighth Circuit Court of Appeals. Id.

The Eighth Circuit issued its opinion in Chaske on the consolidated appeal of all four cases. 28 F.3d 1466. With respect to the Devils Lake Sioux Tribe's case against the Commission, the Eighth Circuit Court determined that the district court abused its discretion in rescinding the Tribe's injunction against the Commission because the Tribe faced the threat of irreparable harm if the Commission was permitted to interfere with the Tribe's regulation of electric service providers on the reservation. Id. at 1474 (remanding with instructions to reinstate the injunction). The Eighth Circuit Court also reversed the district

court's dismissal of OTP's case against the Commission concluding the case was not barred by res judicata. Id. at 1476. The Eighth Circuit Court remanded all cases back to the district court with instructions to make detailed findings as to whether the Tribe has the authority to regulate electric service on the reservation and whether that authority preempts the regulatory authority of the Commission. Id.

On remand, the district court made extensive findings of fact regarding the issues in dispute between the OTP, the Commission, and Baker Electric and concluded no material facts were in dispute which would preclude deciding the issue of whether the Devils Lake Sioux Tribe and OTP could contract for electric service to a Tribal facility. Devils Lake Sioux Indian Tribe, 896 F.Supp. 955. Of particular importance to the court was its finding that the Tribe had recently adopted a comprehensive electric regulatory code governing the rates and service within the exterior boundaries of the reservation. Id. at 958-59. The district court determined that the Tribe has the inherent sovereignty to contract with whomever it will for the provisions of electric service to tribal businesses located on tribal trust lands and such sovereignty takes precedence over power of the State of North Dakota and the Commission acting pursuant to the TIA. Id. at 961.

In reaching its conclusion on Indian sovereignty, the district court also analyzed the Brendale and Montana opinions. The district court determined that no showing has been made that the Tribe should be permitted to exercise regulatory authority over all electric service within the exterior boundaries of the reservation. Id. at 961. However, the district court carved out a narrow, but important, exception to the State's authority to regulate electric service. Id. The North Dakota District Court held that:

the Tribe may by resolution or contract determine who is to supply electrical

service to Tribal owned businesses located upon Indian owned or trust lands, without regard to the rate structure or other regulations of the North Dakota Public Service Commission, and the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service.

896 F.Supp. at 961. This narrow exception protects the Tribes sovereignty and authority to regulate consensual relationships between the Tribe and the utilities, while protecting the political integrity, economic security, and health and welfare of the Tribe. See id. (citing Montana v. United States, 450 U.S. 544 (1981)).

The district court limited the Tribe's regulatory authority exclusively to Tribal facilities located on Tribal land. Id. The State of North Dakota, acting through the Commission, maintains regulatory authority over electric service provided to all other individuals, businesses, and locations within the exterior boundaries of the reservation. Id.

The holding of the Devils Lake Sioux Indian Tribe case is the current status of the law in North Dakota regarding the Commission's regulatory authority over Tribal resolutions for electric service to Tribal facilities located on the reservation. Since 1995, the Commission, OTP, the various Indian Tribes, and the numerous electric cooperatives in the State have all been operating under the decision set forth by the federal court with respect to electric service on the reservations.

C. Application of the current law to this case

In the present case, the Sky Dancer Casino is owned and operated by the Turtle Mountain Tribe on Tribal Trust land located on the Turtle Mountain Reservation. The Tribe also passed a Resolution authorizing OTP to provide electric service to the Sky Dancer Casino. In addition, the Tribe promulgated the Turtle Mountain Tribal Code, which includes

the Turtle Mountain Tribal Utility Code.

Pursuant to the holding of the Devils Lake Sioux Indian Tribe case, the Tribe has the inherent sovereignty to determine which electric service provider will provide service to its Tribal-owned facilities located on its land. 896 F.Supp. at 957. Under the narrow exception set forth in that case, the Commission has no regulatory authority over the Tribe's determination of who provides electric service to the Sky Dancer Casino. Id. at 961.

The Commission properly analyzed the legal issues, including the Otter Tail 1990 case and the subsequent federal court cases, in reaching its conclusion that the Commission does not have regulatory power over the Tribe's determination that OTP will provide electric service to the Sky Dancer Casino. OTP respectfully requests the Court affirm the Commission's order granting OTP's Motion to Dismiss North Central's Complaint.

II. The Otter Tail 1990 case is factually distinguishable from the present case.

North Central's chief argument on appeal is based solely on the precedent of the Otter Tail (1990) case. However, North Central fails to acknowledge the critical factual distinctions between the Otter Tail (1990) opinion, the subsequent federal opinions, and the critical factual distinctions present in this case. First and foremost, the Otter Tail (1990) opinion addresses a different legal question from the Devils Lake Sioux Indian Tribe opinion – the former case addresses whether the tribe had the inherent sovereignty over electric service to all locations within the reservation boundaries (*decided*: the Tribe does not); the latter case addressed the narrower issue of whether the Tribe has the inherent

sovereignty over electric service to tribally-owned businesses located on tribal trust land (decided: the Tribe does). The Otter Tail (1990) case is also distinguishable on several other important facts. In light of the fact the Tribe has adopted a comprehensive utility code and has intervened in this case to assert its inherent sovereignty, the Otter Tail 1990 case is distinguishable and does not control the determination of the issue of whether the Commission has regulatory authority over the Tribe's determination permitting OTP to supply electric service to the Sky Dancer Casino.

North Central erroneously relies upon the Otter Tail (1990) case as support for its argument that the Commission has regulatory authority over the Tribe's determination over which electric utility will supply electric service to the Sky Dancer Casino. As described above, the critical fact distinguishing the Otter Tail (1990) case from the subsequent federal cases is that the cases answer two different questions. In the 1990 case, OTP and the Devils Lake Sioux Tribe argued the Tribe had complete authority to regulate all electric service on the reservation. The North Dakota Supreme Court determined the Commission had regulatory authority over electric service on the reservation. Years later, the federal district court agreed with the North Dakota Supreme Court, with the exception of one narrow circumstance, that when the electric service is to a tribal facility on tribal land, tribal inherent sovereignty is present and the Commission has no regulatory authority.

In the present case, neither OTP nor the Tribe is challenging the general holding that the Commission has the power to regulate electric service on any part of the Reservation. However, the specific facts presented in this case fall within the narrow exception created in the Devils Lake Sioux Tribe case. Because the electric service is to

be provided to the Sky Dancer Casino located on tribal land, the Commission has no regulatory authority over the Tribe's determination to have OTP supply electric service. See Devils Lake Sioux Tribe, 896 F.Supp. at 961.

The two cases are also distinguishable on other critical facts. One of those distinctions is that when Otter Tail (1990) was decided the Devils Lake Sioux Tribe had not adopted any regulatory control over electric utilities on the reservation. The North Dakota Supreme Court repeatedly relied upon the fact that the Devils Lake Sioux Tribe had no system for regulation of electric utilities on the reservation and this was the first instance where the Tribe attempted any type of electric utility regulation. 451 N.W.2d at 101, 103. The Court recognized the Tribe had not developed any regulations regarding rates, service, safety standards, or service territory. Id. at 103. The Court also determined that the Tribe had traditionally acquiesced to "the State's exclusive and long-standing regulation of electric power suppliers." Id. The Tribe's failure to assert any jurisdiction over regulating electric utilities in the past and its acquiescence to State regulatory authority was the significant consideration in the North Dakota Supreme Court's holding that the Tribe did not have the inherent sovereignty to regulate the choice of electric providers to its tribal facility. Id. at 103-04.

However, within months of the Otter Tail 1990 decision, the Devils Lake Sioux Tribe adopted a comprehensive set of regulations governing the rates and provisions of service to all customers within the exterior boundaries of the reservation. Devils Lake Sioux Tribe, 896 F.Supp. at 958-59. By adopting regulations to govern electric service on the reservation, the Devils Lake Sioux Tribe manifested an intent and authority to regulate the

activities of non-Indians supplying electric service on the reservation that threatens the political integrity, economic security, and health and welfare of the Tribe. Devils Lake Sioux Tribe, 896 F.Supp. at 961 (citing Montana exception factors). This was a critical distinction from the Otter Tail 1990 case. The United States District Court for the District of North Dakota concluded that based upon the Tribe's actions in developing a regulatory system, it carved out a narrow exception to the general rule of state regulatory control over non-Indians on the reservation, that when electric service is sought to be provided to a tribal business located on tribal land, the necessary nexus between tribal interests and inherent sovereignty is present. Id. Because of this nexus, the court concluded the Devils Lake Sioux Tribe had a right to determine which utility provided electric service to its facilities and "the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service" to the Tribe. Id.

In the present case, the Turtle Mountain Band of Chippewa Indians has adopted a comprehensive set of regulations governing the rates and provisions of service to all customers within the exterior boundaries of the Turtle Mountain Reservation. By adopting regulations governing electric service on the reservation, the Tribe has manifested an intent and authority to regulate the activities of non-Indians supplying electric service on the Reservation that threatens the political integrity, economic security, and health and welfare of the Tribe. See Devils Lake Sioux Tribe, 896 F.Supp. at 961. The Tribe's conduct in enacting regulations to govern electric service on the Reservation demonstrates an inherent sovereignty to regulate such activities that affect the Tribe's interests, which is analogous to the actions of the Devils Lake Sioux Tribe in adopting similar regulations. Id.

Due to the Tribe's inherent authority to regulate electric service to its businesses located on Tribal land under this narrow exception, the Commission is restrained from any regulatory authority over electric service to the Tribal-owned facilities on Tribal land. Id.

Finally, the Otter Tail 1990 decision is distinguishable because in that case the Devils Lake Sioux Tribe did not intervene to assert its inherent sovereignty in the case. See 451 N.W.2d at 97. The court held that OTP lacked standing to assert the Devils Lake Sioux Tribe's self-government interests. Id. However, in the present case, the Tribe has intervened for the limited purpose of asserting its inherent sovereignty over the determination of which utility will provide service to its Casino. Accordingly, the issue of Tribal sovereignty is at issue on this appeal.

North Central's reliance on the Otter Tail 1990 case as controlling precedent in the present dispute is erroneous. The Otter Tail 1990 case is factually distinguishable from the present case due to the comprehensive set of regulations adopted by the Tribe governing the rates and provisions of service to all customers within the exterior boundaries of the Turtle Mountain Reservation. The present case is analogous to the factual scenario in the subsequent federal cases which were decided in light of the factual background that the Devils Lake Sioux Tribe had adopted a comprehensive electric regulatory scheme and the Tribe was a party to the case asserting its Tribal sovereignty. Accordingly, the Otter Tail 1990 case provides no support for North Central's position on appeal.

III. North Central's remaining claims are without merit.

In its brief, North Central raises a number of additional issues in support of its

position that the Commission has regulatory authority over the Tribe's determination that OTP will supply electric service to the Sky Dancer Casino. None of these additional issues have any merit. OTP will briefly address these issues.

North Central asserts the Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) supports its argument that the Commission has regulatory authority over the Tribe. The Otter Tail (1984) case dealt with a dispute over electric service to the federal government building, not the Tribe, and is completely irrelevant to the issue in this case. In fact, the North Dakota Supreme Court specifically stated in the 1984 case that "Otter Tail argues (consistent with the trial court's ruling) that this case does not involve 'a question of Indian persons, Indian tribes or non-Indian self-government'". Id. at 703. The Otter Tail (1984) case involved different legal issues and has no relevance to the present action.

North Central argues the Commission's findings of fact were not supported by the evidence. There are no material facts in dispute in the present case. OTP and North Central stipulated to all the evidence before the Commission. It is undisputed that the Tribe is a federally-recognized Indian tribe that owns and operates the Sky Dancer Casino, which is located on Tribal-trust land within the Turtle Mountain Reservation. The Commission used these undisputed facts to conclude that the Tribe has sovereign jurisdiction to determine who is to supply electrical service to Tribal-owned businesses located upon Tribal-trust lands, without regard to its regulations. Accordingly, North Central's argument that the Commission's findings of fact are not supported by the evidence is without merit.

North Central also argues that the Commission has jurisdiction in this case because

part of OTP's electric system crosses State Highway 5. North Central erroneously argues that Highway 5 is State property subject to the jurisdiction of the Commission. North Central's argument is in error for two reasons. First, it amounts to a request for the Commission to indirectly interfere with the Tribe's clear sovereign right to contract as it chooses for service to its facility. Secondly, contrary to North Central's argument, Highway 5 is not property of the State of North Dakota. Rather, the land is owned by the Tribe and the State has been given an easement. Winer, 2004 ND 21, at ¶ 20. Highways within an Indian reservation are considered Indian country as defined by Federal law. Id. at ¶ 12 (citing Gorneau v. Smith, 207 N.W.2d 256 (N.D. 1973)). North Central's attempt to confer jurisdiction to the Commission based upon the ownership of Highway 5 is misplaced.

Likewise, North Central's argument that the Gaming Compact between the Tribe and the State of North Dakota somehow is relevant to the jurisdictional determination at issue is equally misplaced. Contrary to North Central's argument, the Gaming Compact specifically provides that, "Nothing in this Compact shall be interpreted as extending the civil jurisdiction of the State of North Dakota or the Tribe." See North Central's Exhibit B, § 17.2. The Gaming Compact has no relevance over the Commission's lack of jurisdiction over OTP's contract with the Tribe to provide electric service to the Sky Dancer Casino. If anything, it further solidifies the Tribe's intent to assert its sovereignty over the facility.

None of the additional issues raised by North Central have any merit.

CONCLUSION

Pursuant to the narrow exception enunciated in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995), the Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with OTP to provide electric service to the Tribal-owned Sky Dancer Casino located on Tribal land. This is the current state of the law in North Dakota. The North Dakota Public Service Commission properly analyzed the facts and law in concluding that OTP's providing electric service to the Sky Dancer Casino fits within the narrow exception over which it had no regulatory authority. For these reasons, Otter Tail Power Company respectfully requests the Court affirm the order of the Commission dismissing North Central's Complaint.

Dated this 2nd day of November, 2012.

By: 
Paul R. Sanderson (ID# 05830)
ZUGER KIRMIS & SMITH
Attorneys for Otter Tail Power Company
P.O. Box 1695
Bismarck, ND 58502
Telephone (701) 223-2711

By: /s/ Bruce Gerhardson
Bruce Gerhardson
Associate General Counsel
Otter Tail Power Company
215 S Cascade St.
Fergus Falls, MN 56538-0496
Telephone: 218-739-8475

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2012-CV-01464

North Central Electric Cooperative, Inc.,)

Appellant,)

vs.)

AFFIDAVIT OF MAILING

North Dakota Public Service)

Commission, Otter Tail Power)

Company, and Turtle Mountain Band)

of Chippewa Indians,)

Appellees.)

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that: I am a United States citizen, over 18 years of age, and on November 2, 2012, I served a copy of the attached:

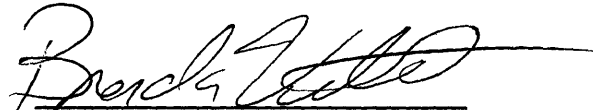
Otter Tail Power Company's Appellee Brief

by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.


Debra Lynn Hoffarth
Pringle & Herigstad, P.C.
2525 Elk Dr.
P.O. Box 1000
Minot, ND 58702-1000

Mark E. Gruman
Special Assistant Attorney General
North Dakota Public Service Commission
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505

Rjay Brunknow
Attorney at Law
PO Box 900
Belcourt, ND 58316


Brenda Vitek

Subscribed and sworn to before me, today, November 2, 2012.


Notary Public

GAIL DESCHAMP
Notary Public
State of North Dakota
My Commission Expires July 10, 2014