

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

**RECEIVED**

SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc

NOV 20 2012

Appellant

**PUBLIC SERVICE COMMISSION**

vs.

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

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

Case No. 08-2012-CV-1464

Appellees.

**INTRODUCTION**

The Appellee Briefs of the Public Service Commission, Otter Tail Power Company, and the Turtle Mountain Tribe are all based upon the belief that the PSC lacks authority under the Territorial Integrity Act ("TIA") to regulate Otter Tail. They argue that case law requires this conclusion. North Central respectfully disagrees and asserts that the PSC has the authority to act under the TIA. There is no legal reason why Otter Tail should be allowed to disregard and blatantly violate the TIA. North Central incorporates by reference all arguments made in its October 5, 2012, Appellant Brief.

**I. THE PSC'S ORDER IS NOT IN ACCORDANCE WITH THE LAW**

The Appellees believe that one fact – that the Sky Dancer Casino is located on tribal trust land and is a tribally owned business - immunizes Otter Tail from the PSC's regulation of Otter Tail's actions under the TIA.

The PSC should not take a narrow view of its jurisdiction. The PSC is obligated to follow the TIA, which is the law regulating the construction by a public utility outside a

municipality in North Dakota. N.D.CENT.CODE §§ 49-03-01 through 49-03-01.5. The TIA requires that prior to commencing construction in a rural area; the public utility must apply for and be granted a certificate of public convenience and necessity. N.D.CENT.CODE §§ 49-03-01. This 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 Appellees argue that Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n, 896 F.Supp. 955 (D.N.D. 1995) is the current law regarding this matter in the State of North Dakota. This is not so. Otter Tail asserts that since 1995, the PSC, Otter Tail, the Indian Tribes and the cooperatives have been operating under this decision. There is no evidence of this assertion and it should be disregarded.

The Appellees gloss over the facts that Otter Tail and North Central are non-Indian entities and that Otter Tail utilizes the state highway right-of-way and North Central's easement rights to serve the Sky Dancer Casino. They also give little thought to the Amended Gaming Compact, which waives the Tribe's sovereign immunity and the fact that Otter Tail agreed to follow PSC regulation when it purchased the BIA's electric system in 1968.

Instead the PSC and Otter Tail treat this case as if it is exactly the same case as Devils Lake Sioux Tribe. It is not. In the Devils Lake Sioux Indian Tribe case, the Tribe entered evidence to show how the PSC's actions would affect its tribal sovereignty. 896 F.Supp. at 957-58. The Tribe presented evidence regarding its treaties with the United States, the reservation location, the reservation size, the percentage of fee land and census information. Id. The Court also had other evidence for it to determine the

impact of the PSC's regulation over the matter on the Spirit Lake Tribe's health and welfare. None of this is true in this case. The Devils Lake Sioux Indian Tribe case is a fact specific situation dealing with the Devils Lake Sioux Indian Tribe, not the Turtle Mountain Band of Chippewa Indians, and it should not be applied here.

In this case, the Tribe presented no evidence regarding the effects on its political integrity, health or welfare. No treaties or other information was provided to the PSC to make a proper determination of the evidence, which is critical in cases regarding tribal authority. This is fatal to the Appellees' arguments. Without the Tribe's evidence regarding the effects on the Tribe's political integrity or the health and welfare of its members, the PSC's authority is not abrogated. Despite having no evidence from the Tribe, the PSC relied on facts from the Otter Tail 1990<sup>1</sup> case instead of analyzing the facts of this case. (COR #52, *PSC Order, Findings of Fact Nos. 22-38.*) Utilizing the facts from other cases to make findings in this case is not in accordance with the law. Each case regarding tribal sovereignty or jurisdiction is fact and case specific. The failure of either the Tribe or Otter Tail to provide evidence on these issues, leads to regulatory authority by the PSC.

The PSC and Otter Tail also argue that the Tribe's utility code, makes this case distinguishable from Otter Tail 1990 and allows for the Tribe to assert its sovereign authority. The Tribal Utility Code was not a part of the record, although it does exist. Otter Tail argues that the failure of the Tribe to assert regulatory authority over electric utilities in the past was significant in determining whether the Tribe has inherent sovereignty to regulate the choice of electric providers. If that is the case, evidence

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<sup>1</sup> Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (herein referred to as "Otter Tail 1990").

should have been presented that the Tribe in this case has in fact regulated utilities. Nothing in the record shows that the Tribe or any of its governmental entities relied upon the Tribal Code in its actions vis-à-vis North Central or Otter Tail. Most importantly, the courts have ruled that the Tribe does not have the authority to regulate utilities. Otter Tail 1990, 451 N.W.2d at 104 (holding that an Indian Tribe does not have inherent authority to regulate choice of electric service providers); Devils Lake Sioux Indian Tribe, 896 F.Supp. at 961-62 (holding that an Indian Tribe does not have inherent authority to regulate electric utilities); Rolling Frito-Lay Sales LP v. Stover, 2012 SL 252938, \*3 (D. Ariz. 2012) (indicating that a Tribe's regulatory authority cannot exceed its legislative authority.)

The Appellees rely on cases from the Spirit Lake Reservation, instead of looking at a case affecting the Tribe involved in this case. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) (hereinafter referred to as "Otter Tail 1984"). In Otter Tail 1984, the North Dakota Supreme Court reviewed the jurisdiction of the PSC over service to the BIA School on the Turtle Mountain Indian Reservation. Otter Tail 1984, 354 N.W.2d 701. In that case, the North Dakota Supreme Court determined that Otter Tail had agreed to follow PSC regulations when it purchased the BIA's electrical system in 1968. Id. at 703. The North Dakota Supreme Court also determined that the PSC had jurisdiction and such jurisdiction did not infringe upon the rights of tribal self-government. Id. at 705. This is still good law in North Dakota and has not been overruled.

Even if the North Dakota Supreme Court decisions in 1984 and 1990 have been effectively overruled as the PSC and Otter Tail suggest (and North Central does not

concede), the PSC still has the authority to act in this case under the TIA. Tribal sovereignty does not prevent state regulatory authority because a reservation is part of the state's territory. Nevada v. Hicks, 533 U.S. 353, 361-62, 121 S.Ct. 2304 (2001). Where state interests "outside the reservation are implicated," the State can exercise its regulatory authority on tribal land. Id., at 362; see also Otter Tail 1990, 451 N.W.2d at 107 .

It was the Tribe who carried the burden to prove there was a threat to its political integrity. Otter Tail 1990, 451 N.W.2d at 105. It did not do so because it provided no evidence on that issue. Simply stating that the Tribe was asserting its inherent sovereignty is not enough. It must do more.

The PSC also failed to recognize that Indian Law jurisprudence has changed and gave little analysis of how the law has changed since the Devils Lake Sioux Indian Tribe litigation. See generally, Hicks, 533 U.S. at 361-62 (holding that a state can exercise regulatory authority on tribal land); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650-51 (2001) (stating that 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); Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328-29, 341 (2008) (indicating that a Tribe lacks jurisdiction over non-Indian conduct on non-Indian land and non-Indian conduct must "imperil the subsistence of" the Tribe or "avert catastrophic consequences").

The United States Supreme Court has made it clear that Indian Tribes have very limited jurisdiction over non-members. 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, 532 U.S. at 650-51. In fact, in order for non-Indian conduct to be regulated by a Tribe, the conduct must imperil the Tribe. Plains Commerce, 554 U.S. at 328. There is no evidence that there is any harm to the Tribe or its members by the PSC's regulation of Otter Tail's activities in providing electric service to the Sky Dancer Casino. Regardless of the outcome, the Sky Dancer Casino would receive electrical power. The PSC's regulation does not imperil the Tribe. The Tribe's preference for Otter Tail is nothing more than one factor to consider under the TIA and is not controlling. Otter Tail 1990, 451 N.W.2d at 105.

Very little discussion is made of the fact that Otter Tail utilized a state right-of-way, crossed Central Power's electric service, or North Central's easement to provide electrical service to the Sky Dancer Casino. These facts are important. Otter Tail in passing mentions the land involved is Indian country and thus is not important to the question of jurisdiction. This is not true. These are property interests held by non-Indians, entitled to protection and carrying with them limitations on tribal sovereignty. The Tribe has no authority over non-Indian conduct on state highways. Strate v. A-1 Contractors, 520 U.S. 438, 456, 117 S.Ct. 1404 (1997). When the Tribe provided the easements for the state highways, it gave up its "gatekeeping right" and its regulatory jurisdiction over the land. Id. Without the utilization of the non-Indian property rights (state highway right-of-way, North Central's easement, and Central Power's easement), Otter Tail could not have provided electric service to the Sky Dancer Casino.

Even though the PSC determined that it has no regulatory authority over Otter Tail's action in providing electric service to the Sky Dancer Casino, it kept authority to regulate Otter Tail's rate and the effect the construction of its facilities on the Turtle

Mountain Indian Reservation. (*COR #52, PSC Order, Conclusions of Law No. 8.*) This begs the question as to how the PSC can regulate the Otter Tail's rate when it involves questions of the effect of the construction of facilities on the Turtle Mountain Indian reservation when it cannot regulate the construction of those facilities. It cannot be both ways.

Minimal burdens on tribal self-government are allowable. Otter Tail 1990, 451 N.W.2d at 107. Regulation by the PSC under the TIA over Otter Tail's action is at most, a minimal burden on the Tribe in this case. The record in this case is devoid of specific facts showing how regulation under the TIA would adversely affect the Tribe.

**II. THE FACTS ESTABLISH THAT JUDGMENT SHOULD HAVE BEEN ISSUED IN FAVOR OF NORTH CENTRAL**

The undisputed facts establish that Otter Tail violated the TIA by wasteful duplication of services. Judgment should have been entered in favor of North Central, but for the PSC's error on the jurisdiction error.

**CONCLUSION**

The PSC has regulatory authority over this matter and dismissed North Central's Complaint in error. North Central respectfully requests that the PSC's Order be reversed and the matter remanded to the PSC for summary disposition in favor of North Central.

Dated this 16<sup>th</sup> day of November, 2012.

PRINGLE & HERIGSTAD, PC

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