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April 22, 2013

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Re: North Central Electric Cooperative, Inc. v. ND PSC, et.al.
File Number 20130075

Dear Ms. Miller:

Please find enclosed the original Brief of Appellant and Appellant's Appendix along with the filing fee of \$25.00. Said Brief and Appendix were electronically filed today in the above-named matter.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Debra L. Hoffarth
DLH/js

Enclosure

cc: Ilona Jeffcoat-Sacco
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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

North Central Electric Cooperative, Inc.,)	
	)	Supreme Court No.
Plaintiff/Appellant,	)	20130075
)	
vs.	)	District Court No.
	)	08-2012-CV-01464
North Dakota Public Service Commission,)	
Otter Tail Power Company, and)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Defendants/Appellee.)	

AFFIDAVIT OF SERVICE

I, Jill Stanislawski, certify that on the 22nd day of April 2013, the following documents:

**Brief of Appellant North Central Electric Cooperative, Inc.
and
Appellant's Appendix**

were electronically served upon the following:

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Subscribed and sworn to before me this 22nd day of April, 2013.

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: _____

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Supreme Court Number 20130075

Burleigh County District Court Number 08-2012-CV-01464

NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

Plaintiff/Appellant,

vs.

**NORTH DAKOTA PUBLIC SERVICE COMMISSION,
OTTER TAIL POWER COMPANY AND
TUTLE MOUNTAIN BAND OF CHIPPEWA INDIANS**

Defendants/Appellees.

**APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, STATE OF NORTH DAKOTA**

**BRIEF OF APPELLANT
NORTH CENTRAL ELECTRIC COOPERATIVE, INC.**

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I. STATEMENT OF THE ISSUES

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

II. STATEMENT OF THE CASE

[¶4] This is a case of a territorial dispute between a rural electric cooperative and an electric public utility. When Otter Tail Power Company ("Otter Tail") unlawfully expanded its service into a rural area in violation of North Dakota's Territorial Integrity Act ("TIA") (N.D.C.C. ch. 49-03), North Central Electric Cooperative, Inc. ("North Central") complained to the North Dakota Public Service Commission ("PSC" or "Commission") pursuant to the procedures provided for under the TIA. The disputed area is the Sky Dancer Casino ("Casino" or "Sky Dancer") located near Belcourt, North Dakota. The PSC dismissed North Central's Formal Complaint claiming a lack of regulatory authority to hear the dispute because the Casino is a tribal business located on tribal trust land. *App.* 77–78. North Central appealed the PSC's ruling to the Burleigh County District Court pursuant to N.D.C.C. § 28-32-46, and the district court affirmed the PSC's determination. *App.* 84–86; 166–68. North Central now brings this appeal before the North Dakota Supreme Court, pursuant to N.D.C.C. § 28-32-49, from the district court's Order and Judgment of Dismissal affirming the PSC's decision to dismiss North Central's Formal Complaint against Otter Tail.

III. STATEMENT OF FACTS

[¶5] Prior to the events leading up to the present dispute, North Central had been providing electric service to the Sky Dancer Casino since December 2, 1998. *App.* 7. North Central's longstanding provision of services to Sky Dancer included electric service to the Casino building itself, the separate hotel building, and other various facilities throughout the Sky Dancer campus. *App.* 7. The North Dakota Department of Transportation has an easement through the Turtle Mountain Reservation for North Dakota Highway 5. North Central has an easement from the Turtle Mountain Band of Chippewa Indians for its facilities on the Turtle Mountain Reservation. *App.* 8.

[¶6] In the fall of 2011, as part of its planned construction of a new Casino, Sky Dancer requested that North Central provide additional electric service in support of Sky Dancer's construction activities, along with security lighting. North Central provided those requested services. *App.* 7.

[¶7] On November 28, 2011, Sky Dancer requested that North Central install an additional 600-amp electric service line to service construction trailers to be located on the Sky Dancer construction site. *App.* 7. However, shortly after that request was made, North Central was contacted by Otter Tail, which stated that the Tribe had requested that Otter Tail, not North Central, provide electric service for the new Casino project. *App.* 7. On December 1, 2011, Tribal Chairman Merle St. Claire confirmed that the Tribe had requested electric service for the Casino from Otter Tail on November 23, 2011 by a resolution of the Tribal Council. *App.* 7; *App.* 69. On December 7, 2011, North Central received a request via North Dakota One-Call to locate its electrical lines around the Casino property to accommodate Otter Tail's construction and installation activities.

App. 8. The request indicated that the work was for the installation of electric main/poles and anchors at a location staked for the construction of the new Casino. *App. 8.* Two days later, on December 9, 2011, Otter Tail began construction to expand its public utility plant and system and its transmission and distribution lines for electrical service on the Sky Dancer campus. *App. 8.* Otter Tail did not receive a certificate of public convenience and necessity from the PSC for the extension of its plan and facilities prior to beginning its construction and installation activities on the Sky Dancer campus. *App. 8.*

[¶8] On December 12, 2011, North Central filed a Complaint and Affidavit with the PSC 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 Commission a certificate that public convenience and necessity requires or will require such construction and service in violation of N.D.C.C. ch. 49-03; (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 (5) that such service was a wasteful duplication of facilities. *App. 5-6.*

[¶9] 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.

App. 24–25. 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. *App. 24–26.* Otter Tail denied that a certificate of public convenience and necessity was required to expand its facilities and to serve the Casino. *App. 24–26.* Otter Tail’s Answer also denied North Central’s interference and wasteful duplication of facilities claims. *App. 24–26; App. 68.*

[¶10] 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. *App. 27.* 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. *App. 27–29.*

[¶11] 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. *App. 39.* 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. *App. 51.*

[¶12] On May 3, 2012, the Turtle Mountain Band of Chippewa Indians (“The Tribe”) were allowed to intervene in the matter. *App. 57; App. 68.* The Tribe asserted

that it had the sovereign right to choose Otter Tail as its electric provider. *App.* 57–58. However, the Tribe did not produce any evidence that the PSC’s exercise of authority in the matter would threaten the political integrity, economic security, or health or welfare of the Tribe. *See App.* 57–58.

[¶13] The parties stipulated as to the evidence in the matter and a hearing was held on May 7, 2012. *App.* 55–56; *App.* 61–63; *App.* 68–69. The May 7, 2012 hearing was only for the purpose of oral arguments regarding Otter Tail’s Motion to Dismiss and North Central’s Motion for Summary Disposition on the Complaint. *App.* 69. The Tribe presented no evidence, no testimony, and no exhibits.

[¶14] On June 12, 2012, the PSC issued its Findings of Facts, Conclusions of Law, and Order (“PSC Order”). The PSC stated, “The Commission has jurisdiction over the parties and the subject matter of this proceeding.” *App.* 76. However, the PSC found and concluded that it did not have jurisdiction because the Sky Dancer 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. *App.* 77. The PSC’s decision was 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. *App.* 77. The PSC also suggested that its jurisdiction may be preempted by the federal supremacy clause, although the PSC’s Order was unclear as to whether such preemption occurred in the context of the Tribe’s inherent sovereignty, or if the PSC’s jurisdiction in this matter was preempted by federal law in some other way. *App.* 71; 77. In deciding this matter, the PSC considered the factors applied by the North Dakota Supreme Court in the earlier, factually similar case of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D.

1990). *App.* 72–76. Specifically, the PSC applied the factors set forth in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and, by extension, *Montana v. United States*, 450 U.S. 544 (1981). *App.* 72–76. However, instead of applying the rules in those cases to the facts of the present case, the PSC erroneously applied those rules to the facts of the earlier, factually similar case of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) (“*Otter Tail 1990*”). *App.* 73–76.

IV. SCOPE OF REVIEW

[¶15] “When a decision of an administrative agency is appealed from the district court to this Court, we review the decision of the agency.” *Berger v. N. Dakota Dep’t of Transp.*, 2011 ND 55, ¶ 5, 795 N.W.2d 707. The North Dakota Supreme Court’s review of this matter is governed by N.D.C.C. § 28-32-49, which provides in relevant part that “[t]he judgment of the district court in an appeal from an order . . . may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-46.” N.D.C.C. § 28-32-46 states in relevant part:

[T]he court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
- ...
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.

N.D.C.C. § 28-32-46.

[¶16] “An agency’s decisions on questions of law are fully reviewable.” *Huff v. N. Dakota State Bd. of Med. Examiners-Investigative Panel B*, 2004 ND 225, ¶ 8, 690 N.W.2d 221. The North Dakota Supreme Court gives deference to an agency’s findings, but will still review questions of law de novo. *Sayler v. N. Dakota Dep’t of Transp.*, 2007 ND 165, ¶ 7, 740 N.W.2d 94.

V. ARGUMENT

[¶17] Because the PSC’s Order was not in accordance with the law, and because the PSC’s Findings of Fact were not supported by a preponderance of the evidence and failed to sufficiently address North Central’s evidence in this matter, the PSC’s Order and Judgment should be reversed.

A. **The PSC’s Dismissal of North Central’s Complaint was not in accordance with the law.**

[¶18] The PSC’s conclusions that its authority was superseded by inherent tribal sovereignty or that its authority was preempted by federal law were not in accordance with the law, and the PSC’s dismissal of North Central’s Complaint on those grounds should be reversed. North Dakota law gives the PSC jurisdiction over such matters, and the PSC is required to follow North Dakota law. *See* N.D.C.C. ch. 49-03.

1. **The PSC has jurisdiction over the parties in this matter under North Dakota law.**

[¶19] Under North Dakota law, the PSC has the jurisdiction to grant relief to North Central under the TIA. *See* N.D.C.C. § 49-03-01. The TIA requires that, prior to commencing construction, a publicly owned utility must apply for and be granted a certificate of public convenience and necessity in rural areas. *Id.* 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).

[¶20] In *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 98 (N.D. 1990) (“*Otter Tail 1990*”), a case with facts nearly identical to those in the present case, the North Dakota Supreme Court concluded that “the PSC had jurisdiction in this case.” In that case, Otter Tail and 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, stating, “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.

[¶21] The North Dakota Supreme Court’s decision in *Otter Tail 1990* reflects the current state of the law as it pertains to the PSC’s jurisdiction in cases brought under the TIA. Therefore, unless there is some controlling authority that preempts or otherwise

proscribes the PSC's jurisdiction, the PSC should be held to have jurisdiction in this matter, and the PSC's Order dismissing North Central's Complaint should be reversed.

[¶22] It is also worth noting that, in its Conclusions of Law, the PSC stated, "The Commission has jurisdiction over the parties and the subject matter of this proceeding." *App. 76*. This statement is consistent with North Dakota law, which does give the Commission jurisdiction over the parties in this case; however, it is inconsistent with the PSC's ultimate conclusion in this matter, and for that reason the PSC's Order dismissing North Central's Complaint should be reversed.

2. The rule applied in the *Devils Lake Sioux Indian Tribe* case is not consistent with Eighth Circuit or U.S. Supreme Court law, and should therefore not control the outcome of this case.

[¶23] In dismissing North Central's Complaint, the PSC stated in its Conclusions of Law:

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

App. 77.

[¶24] As is clear from the PSC Order, the chief basis for the PSC's conclusion that it did not possess regulatory authority in this matter was its application of the rule set forth in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) ("*Devils Lake Sioux Indian Tribe* case"). In that case, the Federal District Court for the District of North Dakota was considering facts similar to those at issue in the present case. *See Devils Lake Sioux Indian Tribe*, 896 F.Supp. at

957–960. In order to resolve the question of whether the Tribe or the PSC had regulatory authority over the provision of electric service to a tribally-owned manufacturing plant, the Federal District Court weighed the facts in that case against the rule set out in *Montana v. United States*, 450 U.S. 544, 566 (1981) as well as that rule’s two exceptions. *See id.* at 960–61.

[¶25] Despite the court’s finding that “[t]he facts of this case present no justification for the exercise of regulatory authority [by the Tribe] over the provision of electrical service within the exterior boundaries of the reservation” and that “[n]o showing has been made, and by inference at least, can be made, that the health, welfare or safety of any Tribal Member is in any way threatened under the present system,” the court nevertheless concluded 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.” *Id.* at 961. In so ruling, the Federal District Court ignored its own sound analysis regarding the *Montana* rule and its exceptions, opting instead to apply a novel test concerning Tribal businesses located on Trust land. *See id.* However, a review of the rule in *Montana*, the rule’s two exceptions, and the case law that has governed the application of the rule and its exceptions, all show that the rule set forth by the Federal District Court in that case did not reflect the true state of the law with regard to inherent tribal sovereignty at that time, nor does that rule reflect the state of the law as it has developed in the years following the *Devils Lake Sioux Indian Tribe* case. In fact, the Federal District Court’s holding in the *Devils Lake Sioux Indian Tribe* case was at that time, and is currently, plainly contradicted by controlling Eighth Circuit and U.S.

Supreme Court law, and should not be cited as dispositive authority in questions of inherent tribal sovereignty.

[¶26] The general rule expressed in *Montana* is that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” 450 U.S. at 565. However, there are two exceptions to this general rule whereby tribes “retain inherent sovereign authority to exercise some forms of civil jurisdiction over non-Indians on their reservations.” *Id.* These exceptions arise: (1) when nonmembers “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (2) when a nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565–66.

[¶27] In the *Devils Lake Sioux Indian Tribe* case, the Federal District Court performed a brief analysis of the general principle in *Montana* and the rule’s two exceptions and concluded that neither exception to the general rule applied. *See* 896 F.Supp. at 960–61. However, despite its conclusion that neither exception was met, the court went ahead with its own novel test and found that PSC authority in that case was a violation of the Tribe’s inherent sovereignty. *See id.* at 961. As a result, the court’s holding in the *Devils Lake Sioux Indian Tribe* case is an outlier and is not consistent with Eighth Circuit or U.S. Supreme Court law in existence at the time that case was decided or that has developed since. The court’s holding in the *Devils Lake Sioux Indian Tribe* case would not survive appeal today, and therefore the PSC’s dismissal of North Central’s Complaint was predicated on the holding of a case that is at odds with the overwhelming weight of controlling legal authority.

[¶28] The second exception to the *Montana* rule has been applied very narrowly since it was first announced in 1981. *Montana*'s second exception is concerned with non-Indian activity that directly affects a Tribe's political integrity, economic security, or health and welfare. *See Montana*, 450 U.S. at 565–66. "The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). "Read in isolation, the *Montana* rule's second exception can be misperceived." *A-1 Contractors v. Strate*, 520 U.S. 438, 459 (1997). 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." *Id.* (quoting *Montana*, 450 U.S. at 564). In order to be regulated by a Tribe, the nonmember conduct "must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotations omitted). Applying the second exception broadly would cause the exception to "severely shrink" the general rule. *See id.* 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 (2001). "[T]he 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 the tribes, and so cannot survive without express congressional delegation.” *South Dakota v. Bourland*, 508 U.S. 679, 694–95 (1993) (emphasis added).

[¶29] In *Nevada v. Hicks*, 533 U.S. 353, 356–57 (2001), the United States Supreme Court reviewed a claim against a Nevada state official for the execution of a state search warrant on reservation land. The United States Supreme Court used the *Montana* analysis to determine the scope of the Fallon Paiute-Shoshone Tribe’s regulatory jurisdiction over a state game warden. *See 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. *See id.* at 364.

[¶30] The state and tribe can have concurrent jurisdiction over a matter. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (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.

[¶31] The case law cited above clearly establishes the appropriate test for determining whether the second *Montana* exception has been met. It is abundantly clear that the extremely relaxed application of the rule by the Federal District Court in the *Devils Lake Sioux Indian Tribe* case simply cannot be reconciled with the extraordinarily narrow application of that exception that is required by the case law cited above. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51;

Bourland, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458. In essence, the rule set forth in the *Devils Lake Sioux Indian Tribe* case is not just a broader, more relaxed iteration of the same rule that is so narrowly applied in all of the other case law; it is a different and contradictory rule altogether. For instance, what test governs when the nonmember conduct relates to conduct on Tribal land, but when such conduct has no demonstrable impact on the Tribe’s political integrity or economic security? Despite the holding in the *Devils Lake Sioux Indian Tribe* case, the United State Supreme Court has indicated that the impact on the Tribe’s political integrity or economic security is the dispositive test. See *Hicks*, 533 U.S. at 356–57. That is precisely the situation in this case. The United States Supreme Court requires a showing that the nonmember conduct would not merely injure but would “imperil the subsistence of the tribal community.” *Plains Commerce Bank*, 554 U.S. at 341. However, Otter Tail offers no proof of such impending peril, but instead contends that it is exempted from the United States Supreme Court’s law because the PSC’s regulatory authority in this case would pertain to a Tribal business on Trust land, and the Federal District Court says that is all that is required.

[¶32] When weighing the facts of the present case against the U.S. Supreme Court’s exceedingly narrow application of *Montana*’s second exception, it is clear that the PSC’s exercise of authority under the TIA does not threaten the Tribe’s health, welfare, political integrity, or economic security. In fact, there is no evidence in the record detailing how any such conduct would threaten the Tribe’s ability to govern itself. Nor would a finding of such a threat logically follow from the facts of this case. Neither the Casino, nor the Tribe would be deprived of electric service if the PSC exercised jurisdiction over this case. Nor would the Tribe or its members be prejudiced with

materially higher rates if the PSC were allowed to exercise jurisdiction. *See App. 77.* The PSC has an interest in the off-reservation effects of the provision of electrical service, which warrants state jurisdiction over such service. *See Mescalero Apache Tribe*, 462 U.S. at 336. The PSC even recognized the off-reservation effects of Otter Tail's rates and kept authority over the rate matter. *See App. 77.* 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.

[¶33] Although the PSC based much of its decision in this matter on the fact that the nonmember conduct related to tribally-owned Trust land, it also must be acknowledged that much of North Central's presence on the reservation for the provision of services to the Casino takes place on land that the Tribe does not control, including the North Dakota Department of Transportation's easement for North Dakota Highway 5 and North Central's easement for its plant and facilities. *App. 8.* 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. The highway right of way and the easements take away the Tribe's gatekeeping rights and result in a corresponding loss of jurisdiction and sovereignty. *See id.* Without utilization of that state right of way and North Central's easement, electric service from Otter tail could not reach the Casino. *See App. 8.* 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.

[¶34] This line of reasoning should be familiar to the North Dakota Supreme Court. In *Otter Tail 1990*, the North Dakota Supreme Court weighed nearly identical facts, discussed earlier in this brief at ¶¶ 20–21, the Court concluded that “the PSC had jurisdiction in this case.” 451 N.W.2d 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 inherent sovereignty. *See id.* at 101–07. 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. *Id.* at 104–06.

The Court reasoned:

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). This reasoning mirrors perfectly the U.S. Supreme Court’s rulings in the case law cited above. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51; *Hicks*, 533 U.S. at 364; *Bourland*, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458.

[¶35] The Court also noted the important fact that the electric supply systems in that case were not confined to the reservation and thus could impact non-reservation customers. *Otter Tail 1990*, 451 N.W.2d at 105, 107. The same is true in this case, as North Central also provides service to the areas surrounding the reservation. The 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.” *Id.* at 105. The North Dakota Supreme Court went on to state that, “[b]ecause 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 could] accord little if any weight to any asserted interest in tribal sovereignty.” *Id.* (citation omitted). The Court ultimately concluded “that the State’s interest in regulating a public utility outweighed the minimal burden on tribal self-government.” *Id.*

[¶36] The North Dakota Supreme Court’s reasoning in *Otter Tail 1990* is as valid today as it was then. The Tribe has the burden of proof to establish that one of the *Montana* exceptions allows it to maintain jurisdiction through its inherent sovereignty. *See Plains Commerce Bank*, 554 U.S. at 330. However, the Tribe has presented no testimony, no evidence, and no exhibits tending to prove that PSC jurisdiction in this matter would threaten or have any sort of demonstrably serious impact on the Tribes ability to govern itself. *Otter Tail*’s argument in favor of inherent tribal sovereignty in this matter is not based on evidence that the PSC’s jurisdiction would threaten the Tribe, but is based solely on the standard set forth in the *Devils Lake Sioux Indian Tribe* case, which contradicts the standard used by the Eighth Circuit and the United States Supreme Court for resolving these matters. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51; *Bourland*, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458. Because the holding in the *Devils Lake Sioux Indian Tribe* case is superseded by Eighth Circuit and Supreme Court law, and because no evidence has been presented by the Tribe or otherwise that the PSC’s authority in this matter would directly threaten the tribe, the

PSC's dismissal of North Central's Complaint was not in accordance with the law and should be reversed.

3. **To the extent that the PSC's Order holds that the PSC's authority has been preempted by federal law, there has been no preemption of the PSC's authority, and such holding is error.**

[¶36] The PSC's Order is unclear about whether the PSC believes that its authority has been preempted by federal law. In its Findings of Fact, the PSC discussed the general principles surrounding preemption, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *Silkwood* holds that state law can be preempted in either of two general ways. *Id.* First, “[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.” *Id.* Second, “If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted 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.* In its Conclusions of Law, the PSC stated, “The Commission recognizes the Supremacy Clause of the Constitution and, by extension, the interplay between the States’ rights and that of the Federal Government. . . . Essentially, although limited to specific circumstances, North Dakota has been deregulated by compulsion rather than by action of its Legislature and Governor.” *App.* 77.

[¶37] To the extent that the PSC relied on *Silkwood* as determinative that the PSC's authority in this matter has been preempted, that reliance was misplaced. First, *Silkwood* involved preemption of state law under the Atomic Energy Act and did not address the issue of inherent sovereignty of a Tribe. *See Silkwood*, 464 U.S. at 241–46.

Second, even if *Silkwood* did apply in this case, unless there is express preemption, there is a basic assumption that Congress did not displace state law. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (“despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law”). Third, both of the options under *Silkwood* require Congress to have acted. The present case does not concern reconciling state law with a competing act of Congress. The PSC did not cite any statute or regulation from Congress that has preempted the PSC’s authority in this case. This case is purely concerned with the question of inherent tribal sovereignty, and therefore the issue of preemption is not applicable in the resolution of this case. For that reason, to the extent that the PSC dismissed North Central’s Complaint based on federal preemption, that conclusion of law was erroneous and it should be reversed.

B. The PSC’s Findings of Fact were not supported by a preponderance of the evidence and do not sufficiently address North Central’s evidence.

[¶38] The PSC 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.C.C. § 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.C.C. § 28-32-46 (7).

[¶39] The hearing on this matter was held to determine 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. *App.* 69. North Central provided evidence and Otter Tail admitted that construction was ongoing without the Certificate of Public Convenience and Necessity. *App.* 24–25. The PSC made a finding that Otter Tail had begun construction of infrastructure to serve the Casino. *App.* 69. North Central also provided evidence regarding the crossing of North Central facilities, use of North Central’s easements, and utilization of the state road right-of-way *App.* 7–8; *App.* 70; *App.* 77. The PSC failed to sufficiently address the evidence that clearly established Otter Tail’s blatant disregard of the law.

[¶40] 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.” *App.* 73 (*PSC’s emphasis*). The PSC then discussed the *Brendale* and *Montana* factors. *App.* 72–76. However, bizarrely, the PSC utilized the facts from *Otter Tail 1990* as a basis for its own Findings of Fact, rather than the facts of record in the present action. *App.* 72–76. No analysis of the particular facts in this case was done by the PSC. *See App.* 72–76. Since the analysis of the *Brendale* and *Montana* factors is particular to each factual situation, it was clearly erroneous 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 such a finding without evidentiary support.

[¶41] The undisputed facts show a blatant case of wasteful duplication such that Otter Tail would almost certainly be ordered to remove its extension of service, were it

not for the tribal sovereignty issue in this case. *See App. 77.* 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, therefore the entire record of facts does not support the PSC's decision.

[¶42] Because the PSC's Findings of Fact were not supported by a preponderance of the evidence and do not sufficiently address North Central's evidence, The PSC's order dismissing North Central's Complaint should be dismissed.

CONCLUSION

[¶43] Based on the arguments above, it is clear that the PSC's conclusions of law in this matter were not in accordance with the law, and that its findings of fact simply were not based on a preponderance of the evidence and failed to sufficiently address the evidence before it. 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 22nd day of April, 2013.

PRINGLE & HERIGSTAD, P.C.



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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Supreme Court Number 20130075

Burleigh County District Court Number 08-2012-CV-01464

NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

Plaintiff/Appellant,

vs.

**NORTH DAKOTA PUBLIC SERVICE COMMISSION,
OTTER TAIL POWER COMPANY AND
TUTLE MOUNTAIN BAND OF CHIPPEWA INDIANS**

Defendants/Appellees.

**APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, STATE OF NORTH DAKOTA**

APPELLANT'S APPENDIX

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APPENDIX

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PU-11-701 **North Central Electric Cooperative, Incorporated** Status:Open
 Descriptio: **vs. Otter Tail Power Company**
 Case Type: Complaint Portfolio: Brian P. Kalk
 Date Filed: 12/12/2011 Advisory Staff: Jerry R. Lein
 Catagory: Electric Docket Count: 57

Doc	Filed	Description	Pages:	Exhibit:	Cerified to Court
1	12/12/2011	Complaint - extension of utility system By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	20		<input type="radio"/> Yes <input type="radio"/> No
2	12/21/2011	Commission Motion finding complaint a prima facie case and serving the complaint on the Respondent By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
3	12/23/2011	Affidavit of Service cert. mail - Formal Complaint and Motion dated Dec. 21, 2011 By: Public Service Commission	22		<input type="radio"/> Yes <input type="radio"/> No
4	1/17/2012	Answer to Complaint By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	5		<input type="radio"/> Yes <input type="radio"/> No
5	1/17/2012	Notice of Appearance, Notice of Motion to Dismiss, Motion to Dismiss, Brief in Support of Motion By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	15		<input type="radio"/> Yes <input type="radio"/> No
6	1/26/2012	Letter re Motion to Dismiss, response and filing dates By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	1		<input type="radio"/> Yes <input type="radio"/> No
7	2/2/2012	Brief of North Central Electric responding to Otter Tail's Motion to Dismiss including exhibits By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle and Herigstad	60		<input type="radio"/> Yes <input type="radio"/> No
8	2/6/2012	Right of way plats By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	10		<input type="radio"/> Yes <input type="radio"/> No
9	2/13/2012	Reply Brief in Support of Otter Tail Power Company's Motion to Dismiss By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	8		<input type="radio"/> Yes <input type="radio"/> No
10	2/14/2012	Letter request for Administrative Law Judge By: Public Service Commission	3		<input type="radio"/> Yes <input type="radio"/> No
11	2/14/2012	North Central Electric Cooperative, Inc. Brief Responding to Otter Tail's Reply Brief on Motion to Dismiss By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	4		<input type="radio"/> Yes <input type="radio"/> No
12	2/21/2012	Letter designating Administrative Law Judge By: Allen Hoberg - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
13	2/17/2012	Letter comments By: Turtle Mountain Band of Chippewa Indians by Merle St. Claire, Chairman	1		<input type="radio"/> Yes <input type="radio"/> No
14	3/23/2012	Letter regarding Court Reporter By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
15	4/24/2012	Prehearing Conference Summary and Stipulations By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
16	4/25/2012	Commission Motion issuing Notice of Hearing By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No

8/21/2012

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
17	4/25/2012	Notice of Hearing By: Public Service Commission	2		<input type="radio"/> Yes <input type="radio"/> No
18	4/26/2012	Petition to Intervene for Special Appearance to Object to Jurisdiction By: Turtle Mountain Band of Chippewa Indians by Merle St. Claire, Chairman	4		<input type="radio"/> Yes <input type="radio"/> No
19	4/27/2012	Email re request for waivers of 45 day rule By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
20	4/27/2012	Email re waiver of 45 day rule By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	1		<input type="radio"/> Yes <input type="radio"/> No
21	4/27/2012	Notice of Appearance of Counsel By: Turtle Mountain Band of Chippewa Indians by Rjay J. Brunkow, Tribal Attorney	3		<input type="radio"/> Yes <input type="radio"/> No
22	4/27/2012	Email re waiver of 45 day rule By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	2		<input type="radio"/> Yes <input type="radio"/> No
23	4/30/2012	Objection to Petition to Intervene for Special Appearance to Object to Jurisdiction By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	17		<input type="radio"/> Yes <input type="radio"/> No
24	5/1/2012	Email re no objection to Petition to Intervene for Special Appearance to Objection to Jurisdiction By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	2		<input type="radio"/> Yes <input type="radio"/> No
25	5/1/2012	Petition to Intervene for Special Appearance to Object to Jurisdiction By: Turtle Mountain Band of Chippewa Indians by Clara J. Holloway, Zuger Kirmis & Smith	4		<input type="radio"/> Yes <input type="radio"/> No
26	5/2/2012	Notice of Appearance By: Turtle Mountain Band of Chippewa Indians by Clara J. Holloway, Zuger Kirmis & Smith	3		<input type="radio"/> Yes <input type="radio"/> No
27	5/2/2012	Email re Petition to Intervene for Special Appearance to Object to Jurisdiction By: Al Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
28	5/2/2012	Order on Petition to Intervene for Special Appearance to Object to Jurisdiction By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
29	5/2/2012	Email re No objection to Petition to Intervene for Special Appearance to Object to Jurisdiction By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	2		<input type="radio"/> Yes <input type="radio"/> No
30	5/2/2012	Objection to Intervention by Turtle Mountain Band of Chippewa Indians By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	7		<input type="radio"/> Yes <input type="radio"/> No
31	5/4/2012	Order Granting Intervention By: Allen Hoberg, ALJ - Office of Administrative Hearings	4		<input type="radio"/> Yes <input type="radio"/> No
32	5/4/2012	Copy of email to ALJ with attached Stipulation By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	7		<input type="radio"/> Yes <input type="radio"/> No
33	5/4/2012	Motion for Admission Pro Hac Vice of Rjay J. Brunkow and Affidavit By: Otter Tail Power Company by Tracy Vigness Kolb, Zuger Kirmis&Smith	5		<input type="radio"/> Yes <input type="radio"/> No

8/21/2012

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
34	5/7/12	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	25		<input type="radio"/> Yes <input type="radio"/> No
35	5/8/2012	Order Granting Admission Pro Hac Vice By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
36	5/8/2012	Letter closing OAH file By: Allen Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
37	5/9/2012	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	24		<input type="radio"/> Yes <input type="radio"/> No
38	4/23/2012	Electronic record of pre-hearing conference By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
39	5/7/2012	Electronic record of formal hearing By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
40	5/8/2012	Objection to Special Appearance Objecting to Jurisdiction By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	5		<input type="radio"/> Yes <input type="radio"/> No
41	5/10/2012	Order Striking Brief By: Allen Hoberg, ALJ - Office of Administrative Hearings	4		<input type="radio"/> Yes <input type="radio"/> No
42	5/10/2012	Response to Tribe's Special Appearance and North Central's Objection By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	4		<input type="radio"/> Yes <input type="radio"/> No
43	5/11/2012	Response to Otter Tail's response to Tribe's Special Appearance and North Central's objection By: Allen Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
44	5/11/2012	Response to Objection to the Special Appearance Objecting to Jurisdiction by the Turtle Mountain Band of Chippewa Indians By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	7		<input type="radio"/> Yes <input type="radio"/> No
45	5/14/2012	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	24		<input type="radio"/> Yes <input type="radio"/> No
46	5/17/2012	Letter - Order Striking Brief further response By: Allen Hoberg, ALJ - Office of Administrative Hearings	2		<input type="radio"/> Yes <input type="radio"/> No
47	5/17/2012	Proposed Findings of Fact, Conclusions of Law, and Order By: Otter Tail Power Company by Bruce Gerhardson	6		<input type="radio"/> Yes <input type="radio"/> No
48	5/17/2012	Proposed Findings of Facts, Conclusions of Law and Order By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	18		<input type="radio"/> Yes <input type="radio"/> No
49	5/22/2012	Transcript of Hearing By: Emineth & Associates Court Reporters	120		<input type="radio"/> Yes <input type="radio"/> No
50	6/4/2012	Electronic record of work session By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
51	6/14/2012	Commission Motion adopting Order granting Motion for Dismissal of Formal Compliant By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
52	6/14/2012	Findings of Fact, Conclusions of Law, and Order By: Public Service Commission	12		<input type="radio"/> Yes <input type="radio"/> No

8/21/2012

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
53	6/28/2012	Affidavit of Service Cert. Mail- Order By: Public Service Commission	13		<input type="radio"/> Yes <input type="radio"/> No
54	6/28/2012	Request for Reconsideration By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	10		<input type="radio"/> Yes <input type="radio"/> No
55	7/9/2012	Response of Otter Tail Power Company to Request for Reconsideration By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	10		<input type="radio"/> Yes <input type="radio"/> No
56	7/13/2012	Reply to Otter Tail Power Company's Response to Request for Reconsideration By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	4		<input type="radio"/> Yes <input type="radio"/> No
57	8/6/2012	APPEAL - Notice of Appeal and Specifications of Error, Undertaking on Appeal to District Court By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	20		<input type="radio"/> Yes <input type="radio"/> No

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.)	
)	
Complainant,	)	COMPLAINT
vs.)	
)	
Otter Tail Power Company,)	
)	
Respondent.	)	Case No. _____

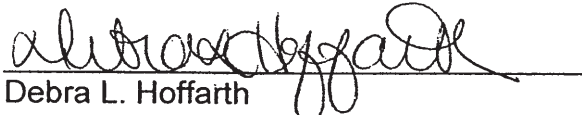
1. North Central Electric Cooperative, Inc. (North Central) is a "rural electric cooperative" under N.D.C.C. 49-03-01.5 subsection 6. North Central is an interested electric cooperative corporation under ND.C.C. 49-03-05.
2. Otter Tail Power Company (Otter Tail) is an "electric public utility" under N.D.C.C. 49-03-01.5 subsection 2. Its address is 215 South Cascade Street, PO Box 496, Fergus Falls, MN, 56538-0496.
3. Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer in the SW ¼ of Section 34, Township 162N, Range 71W, Rolette County, North Dakota (the place to be served), without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and service.
4. The place to be served is not located within the corporate limits of any municipality.
5. The place to be served is located in North Central's service area.
6. The place to be served is presently served by North Central.
7. Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer at the place to be served threatens to interfere with North Central's service and system and is wasteful duplication of facilities.
8. The allegations are shown by the attached affidavit of Wayne Martian.
9. Otter Tail's construction of an extension of its public plant and system and of its transmission and distribution lines to the place to be served is a violation of sections N.D.C.C. 49-03-01 through 49-03-01.5.

10. Otter Tail is subject to the jurisdiction of the Public Service Commission. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984); Application of Otter Tail Power Co., 451 N.W.2d 95, (N.D. 1990).

Therefore, under N.D.C.C. §§ 49-02-02 (2), (4), 49-03-01.1, 49-03-01.4, 49-03-05, North Central requests the Commission, with or without notice, to make its order restraining, enjoining and requiring Otter Tail to cease and desist from constructing an extension of its electric public utility plant and system to and from serving any customer at the place to be served and to require Otter Tail to conform to the laws of this State, until the further order of the Commission after hearing after due notice and that Otter Tail be ordered to remove the extension if its electric public utility plant and system to the Sky Dancer campus.

Dated this 12th day of December, 2011

PRINGLE & HERIGSTAD, P.C.



Debra L. Hoffarth
Attorneys for North Central Electric Cooperative, Inc.
P.O. Box 1000
Minot, ND 58702
701-852-0381

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.)	
)	
Complainant	)	AFFIDAVIT IN SUPPORT OF
Vs.	)	COMPLAINT
)	
Otter Tail Power Company,)	
	)	Case No. _____
Respondent.)	

I, Wayne Martian, declare on oath:

1. I am the general manager of North Central Electric Cooperative, Inc. (North Central). I make this declaration in support of North Central's attached complaint against Otter Tail Power Company.
2. North Central provides electric service to the Sky Dancer Hotel and Casino at a location in the SW ¼ of Section 34, Township 162N, Range 71W, Rolette County, North Dakota, approximately 4 miles west of the unincorporated community of Belcourt. Sky Dancer Hotel and Casino (Sky Dancer) is "the place to be served" described in the complaint.
3. North Central has provided electric service to Sky Dancer at the place to be served since December 2, 1998. Service is provided to separate hotel and casino buildings and other facilities on the Sky Dancer campus. North Central was requested to and has provided electric service for the construction of a new casino building and security lighting on the campus, since the fall of 2011. North Central serves a total of seven (7) separately metered service entrances on the Sky Dancer campus. The construction is serviced by a separate meter.
4. Otter Tail's pre-existing facilities nearest to the Sky Dancer campus is a transmission line approximately 1000 feet from the Sky Dancer campus. Otter Tail's nearest retail consumer is about 3 miles distant from the Sky Dancer campus.
5. On November 28, 2011, North Central was requested to provide 600 amp electric service for construction trailers to be located on the construction site on the Sky Dancer campus. This will be another metered service on the Sky Dancer campus.
6. In late November 2011, I conversed by telephone with Mark Helland, Vice President of Customer Service; Scott Sigette, Energy Management Representative-Devils Lake, Langdon, Rugby; and Jeff Lemen, a representative of Otter Tail who informed me that Otter Tail had received a request for electric service to Sky Dancer's new building on the Sky Dancer campus, including

temporary construction service. I also spoke with Dennis Ellefson, area manager of Rugby, Garrison, Jamestown, and Oakes who informed me that Otter Tail had received a request for electric service to Sky Dancer's new building on the Sky Dancer campus, including temporary construction service.

7. On December 1, 2011, North Central discussed this matter with the Turtle Mountain Tribal Chairman who confirmed the Tribe had requested electric service from Otter Tail.
8. On December 7, 2011, North Central received a request to locate its electrical lines for Otter Tail via North Dakota One-Call. The request indicates that the work to be done is the installation of electric main/poles & anchors at a location staked to the construction of the new casino. The request to locate and photographs are attached hereto as Exhibits 1 and 2.
9. 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. It appears that Otter Tail will bore under Highway 5 and that Otter Tail will cross over two of North Central's main three phase underground feeders, one of which serves the Sky Dancer campus, with an overhead distribution line. Otter Tail will cross under Central Power Electric Cooperative, Inc.'s transmission, which provides electrical service to North Central's facilities. It is estimated that Otter Tail's construction will be complete by 12/13/2011. Photographs of the construction are attached hereto as Exhibit 3.
10. Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve Sky Dancer would interfere with North Central's service and system and is wasteful duplication of facilities.
11. Otter Tail has not obtained from the Public Service Commission a certificate that public convenience and necessity require or will require such construction and service by Otter Tail.

EXHIBIT 1

NORTH DAKOTA ONE-CALL
REQUEST TO LOCATE

NORTH DAKOTA ONE-CALL

Request #: 11163327

LORQ ROUTINE

Send To: NCENTL01 Seq No: 1 Map Ref:

Original Call Date: 12/07/11 Time: 10:02 AM CT Op: mnkimb

Work to Begin Date: 12/09/11 Time: 10:15 AM CT

Transmit Date: 12/07/11 Time: 10:42 AM CT Op: mnkimb

County: ROLETTE

Place: TURTLE MOUNTAIN UNOR

Address: Street: HWY 281

Nearest Intersecting Street: 39TH AVE NE

Type of Work: INSTALLATION OF ELECTRIC MAIN//POLES & ANCHORS

Work Being Done For: OTTER TAIL POWER

Depth: 6FT

Explosives: N Tnling/Boring: Y

Extent of Work: FROM GO E HWY 281 APPROX 1/2 MILE TO SKY DANCER CASINO
: APPROACH LOCATED ON N SIDE OF RD AND STAKES LOCATED ON S SIDE OF APPROACH
: AND MARK 25FT RADIUS OF EACH OF APPROX 15 STAKES GOING N AND W TO NEW
: CONSTRUCTION OF NEW CASINO AND FROM THIS POINT MARK 20FT RADIUS OF WHITE
: FLAGGD AREA GOING N INTO CASINO

Remarks: CALLER STATES WORK IS ALSO UNDERGROUND CABLE

: CALLER STATES 39TH AVE NE AKA BIA 11 AKA ROLETTE RD/HWY 281 AKA HWY 5

Twp: 162N Rng: 71W Sect-Qtr: 34

Ex. Coord NW Lat: 48.8210012 Lon: -99.8549928 SE Lat: 48.8046020 Lon: -99.8313530

Company : OTTER TAIL POWER

Fax:

Contact Name: MIC DECOTEAU

(701)477-3577

Alt. Contact: MIC DECOTEAU / C

Phone: (701)550-0023

Caller Address: P.O. BOX 877

Call Back:

ROLLA, ND 58367

UNITED01

Link To Map for NCENTL01: <http://nd.itic.occinc.com/YWH4-CF2-W62-D2Y>

EXHIBIT 2
PHOTOGRAPHS OF OTTER TAIL
STAKING



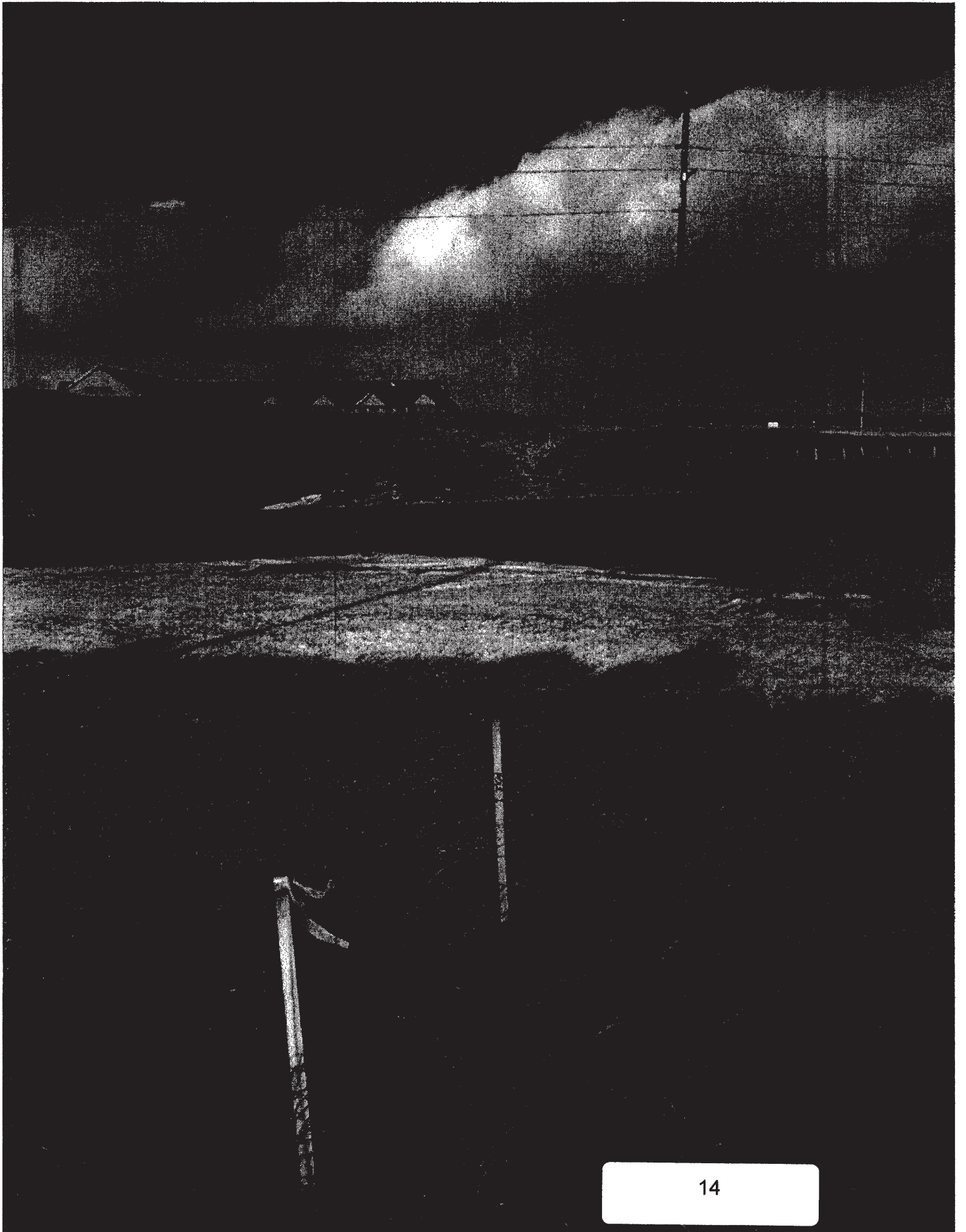
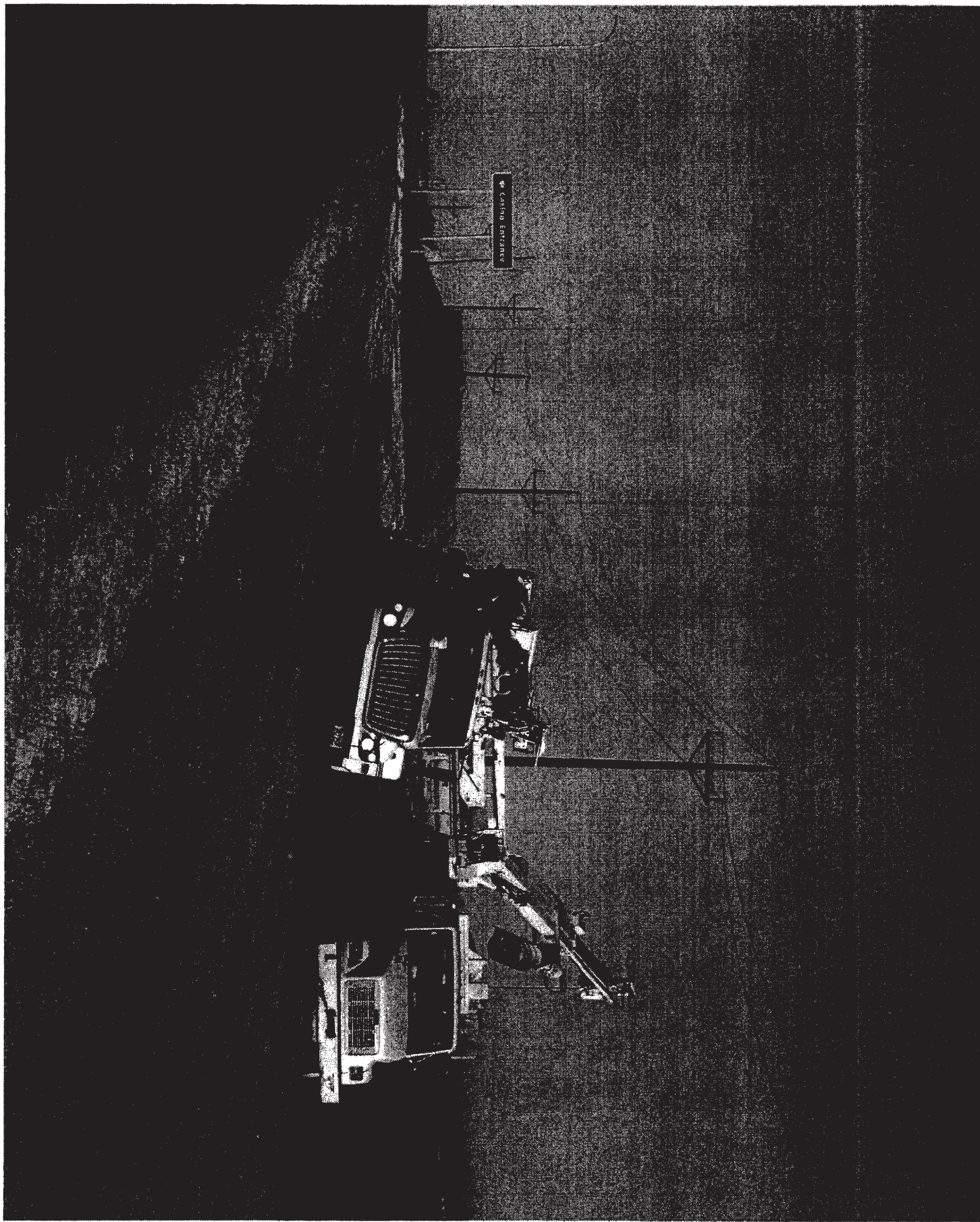


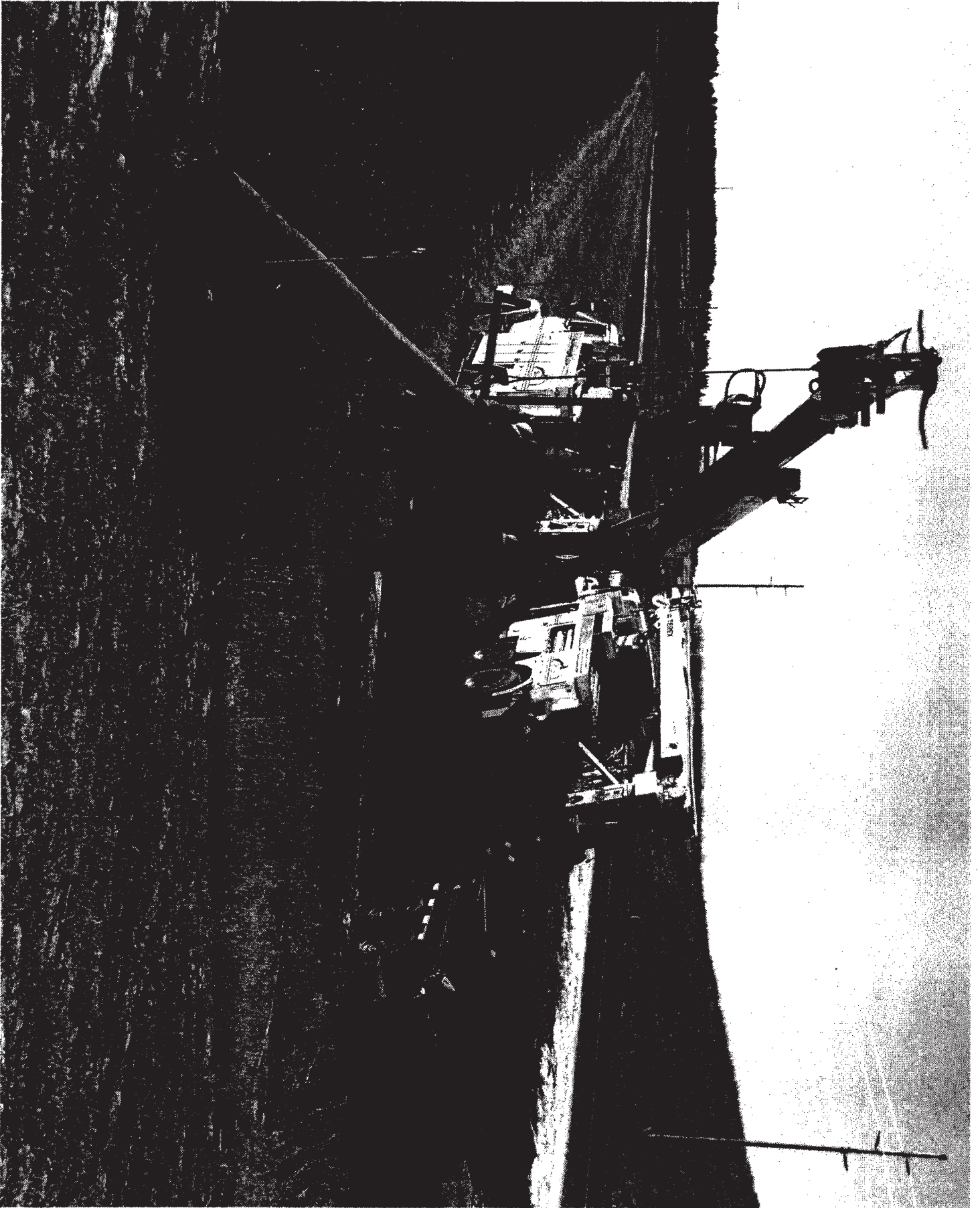


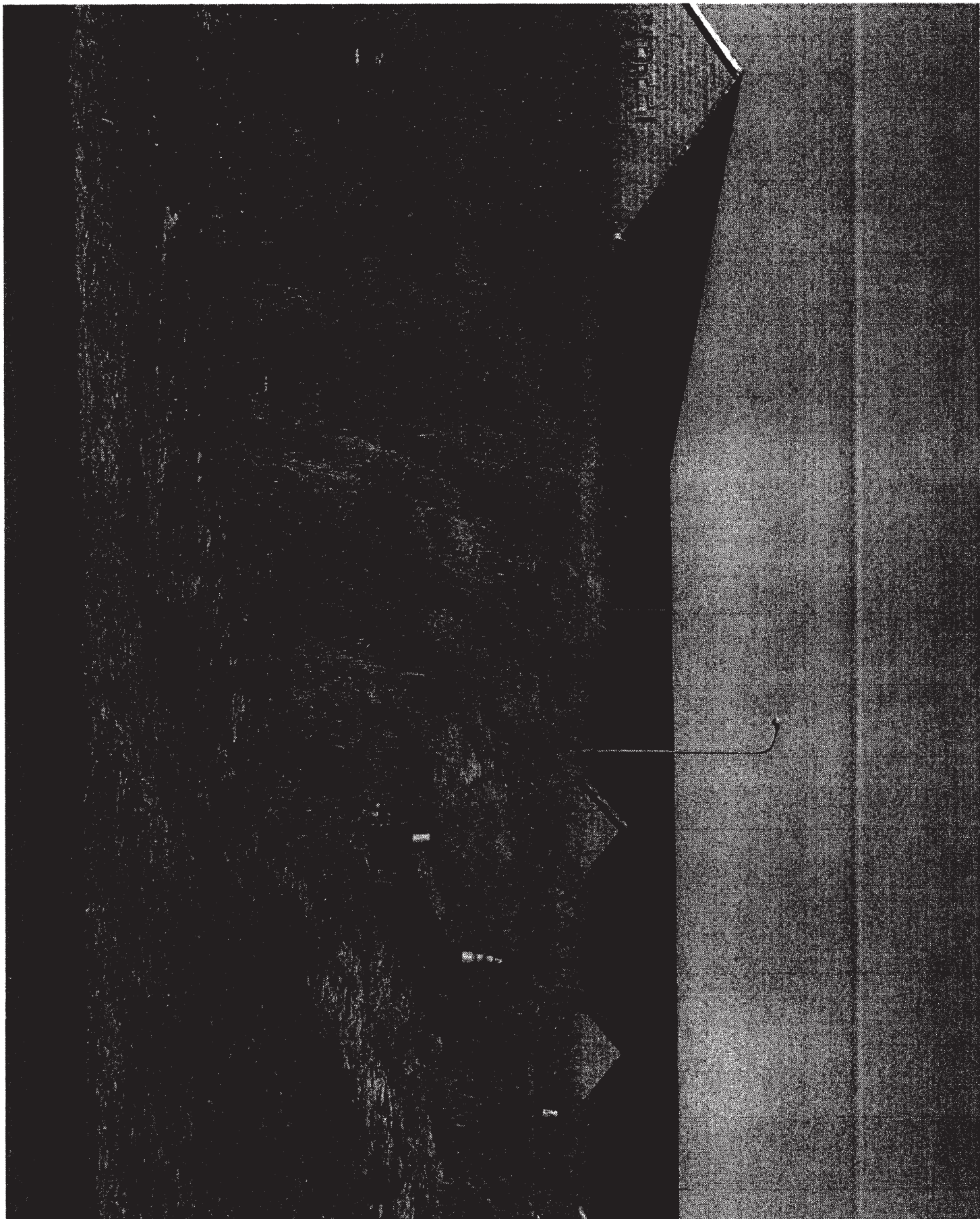


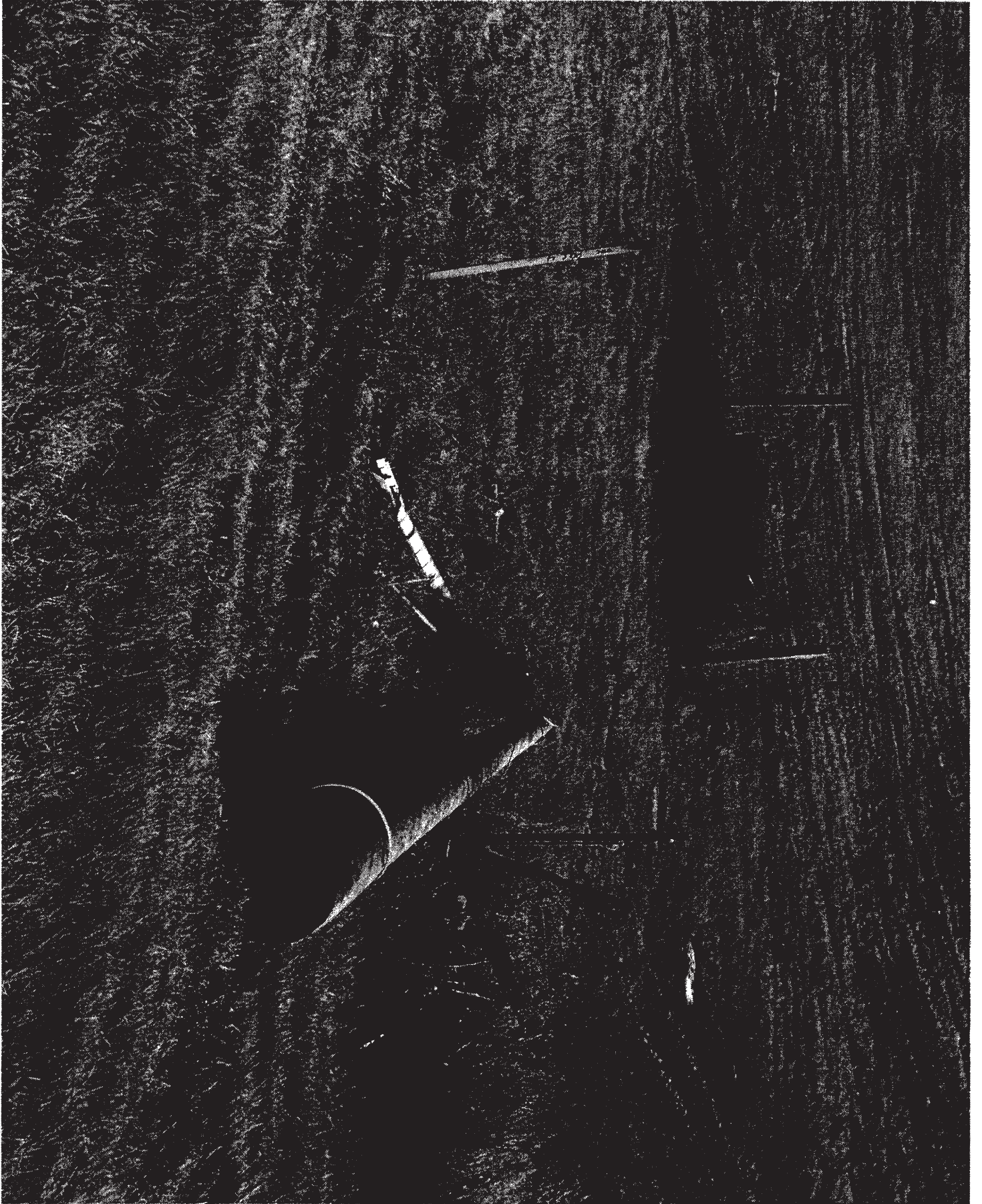
EXHIBIT 3

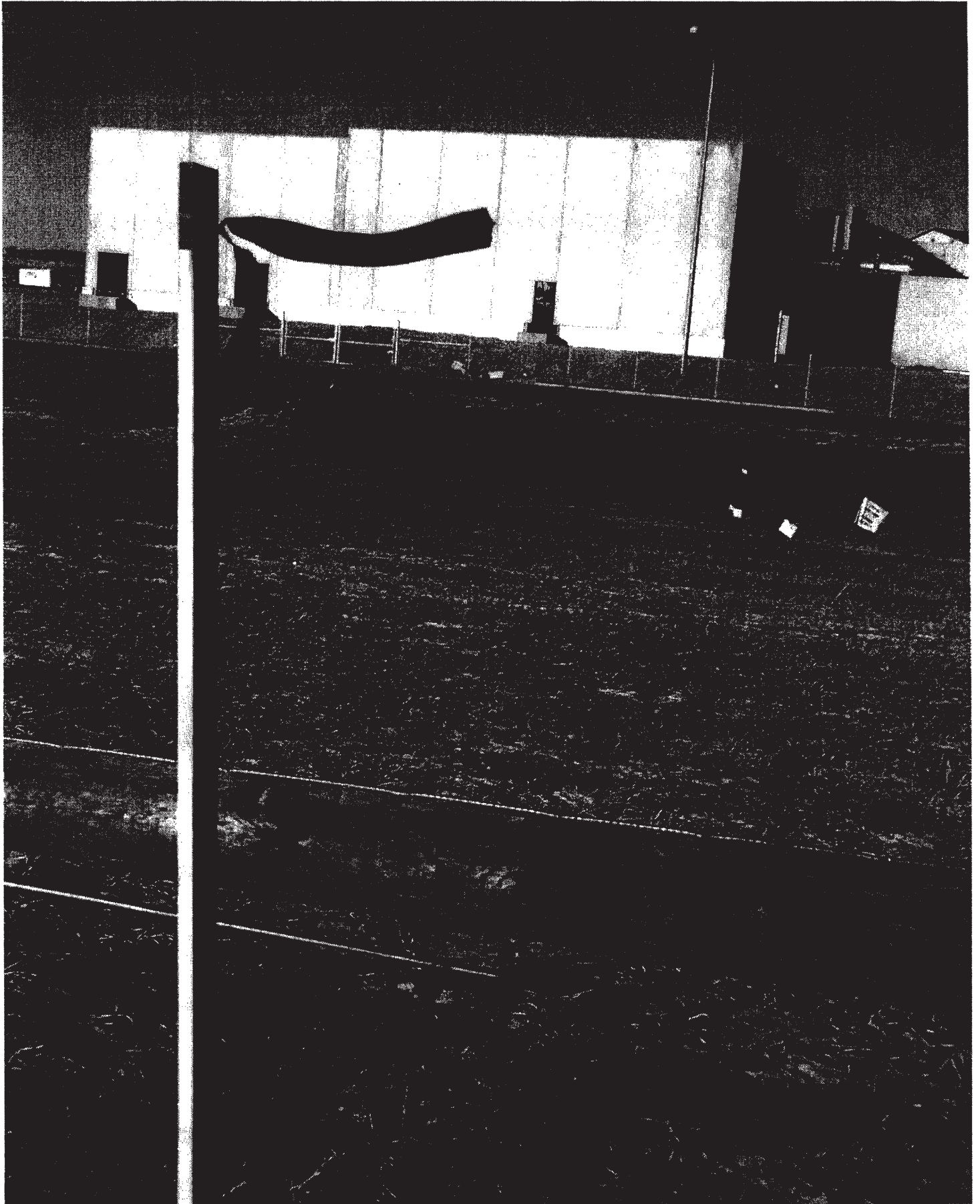
**PHOTOGRAPHS OF OTTER TAIL
CONSTRUCTION**

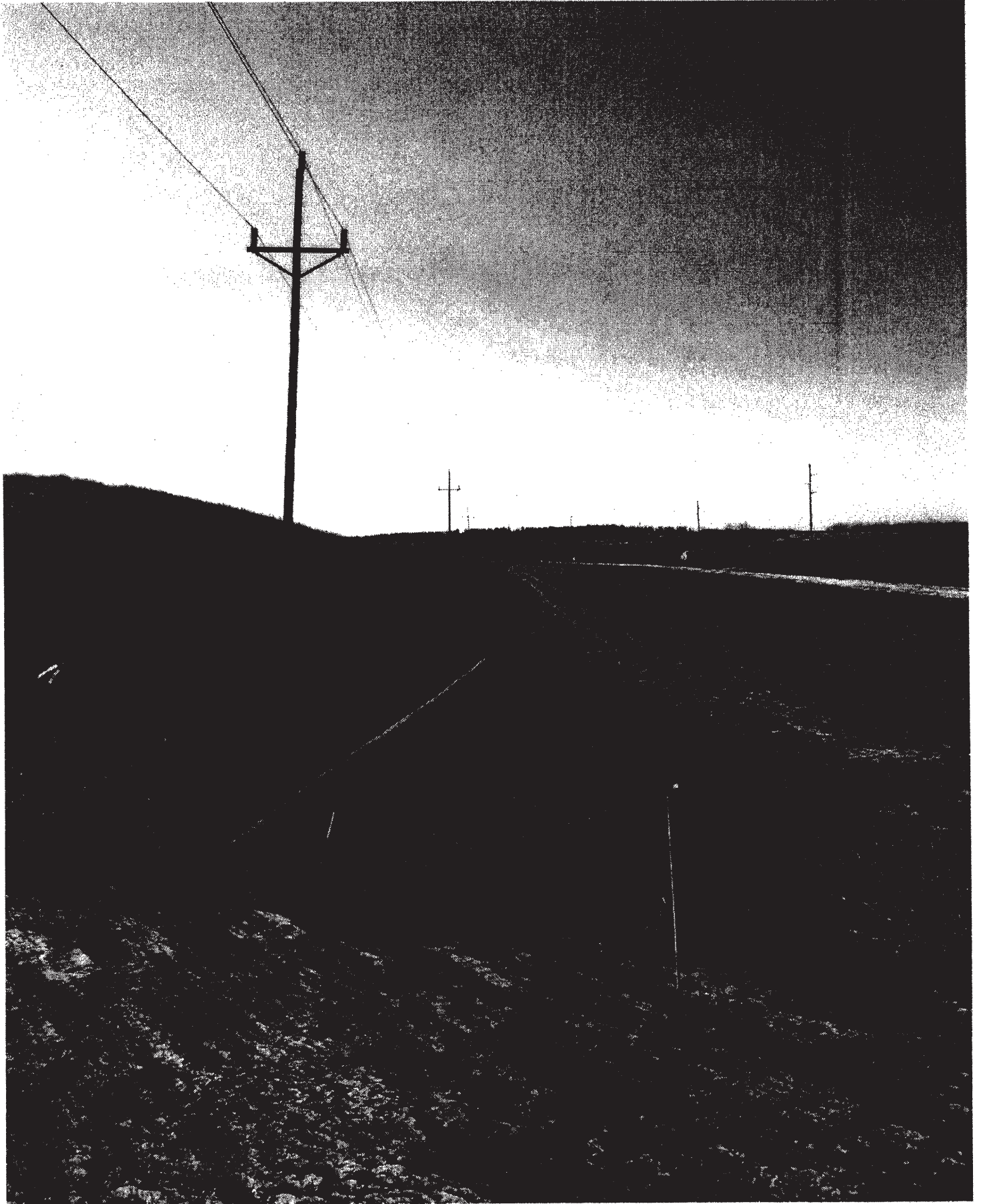












BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)	
)	
Complainant,	)	ANSWER OF OTTER TAIL
	)	POWER COMPANY
vs.)	
)	
Otter Tail Power Company,)	
)	
Respondent.	)	Case No. PU – 11 - 701

Otter Tail Power Company ("OTP") states the following as its Answer to North Central Electric Cooperative, Inc.'s ("North Central") Complaint.

I.

Except as otherwise admitted, qualified, or explained, OTP denies each and every allegation of the Complaint.

II.

With respect to the allegations contained in paragraph 1 of the Complaint, OTP admits North Central is a rural electric cooperative under N.D.C.C. § 49-03-01.5(6), but denies the remaining allegations contained in the paragraph.

III.

OTP admits the allegations contained in paragraph 2 of the Complaint.

IV.

With respect to the allegations contained in paragraph 3 of the Complaint, OTP admits it has begun construction of an extension of its public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians' ("Tribe") facility located on the Turtle Mountain Reservation, with a specific property description of N1/2 of the SW1/4, Section 34, Township 162N, Range 71W, Rolette County, but specifically

denies that a certificate of public convenience and necessity is required to supply electric service to the Tribe's facility located on Tribal Trust land on the Turtle Mountain Reservation. OTP's position is supported by Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995), which held that the North Dakota Public Service Commission had no regulatory authority over a federally recognized Indian Tribe's right to determine who supplies electric service to Tribal-owned facilities located on the reservation.

V.

OTP admits the allegations contained in paragraphs 4 and 6 of the Complaint.

VI.

OTP denies the allegations contained in paragraphs 5, 7, 8, 9, and 10 of the Complaint.

VII.

With respect to the paragraph of the Complaint which appears as a "Therefore" clause, OTP denies such allegations and asserts the relief requested in such paragraph is inappropriate in this case.

VIII.

OTP affirmatively asserts the Complaint fails to state a claim against it upon which relief can be granted.

XI.

OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally-

owned facility located on Tribal land on the Turtle Mountain Reservation pursuant to the legal precedent set forth in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995).

WHEREFORE, Otter Tail Power Company respectfully requests that the Complaint be dismissed.

Dated this 16th day of January, 2012.

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

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

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." Id. at § 21.0101(1). The Tribal Utility Code was enacted pursuant to the sovereign tribal powers delegated to the Tribal Council under the Tribal Constitution. Id. at § 21.0101(4).

The Sky Dancer Casino is a gaming casino owned and operated by the Tribe and located on the Turtle Mountain Reservation. Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Sky Dancer Casino is located on Tribally-owned Trust land. See Exhibit A (Warranty Deed).

North Central is currently providing electric service to the Sky Dancer Casino. See Complaint. However, on November 23, 2011, the Tribal Council 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 starting June 1, 2012. See Exhibit B (Tribal Resolution TMBC598-11-11).

On December 12, 2011, North Central filed a Complaint with the North Dakota Public Service Commission ("Commission") seeking to enjoin OTP from constructing an extension of its public utility system to serve the Sky Dancer Casino. See Complaint. The basis for North Central's Complaint was that the North Dakota Public Service Commission ("Commission") has regulatory authority over OTP's providing electric service to the Tribe on the Reservation under the Territorial Integrity Act pursuant to the North Dakota Supreme Court case Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as "Otter Tail (1990) ").

OTP served its Answer to North Central's Complaint on January 16, 2012. See Answer. OTP denied the Commission has any regulatory control over a federally recognized Indian Tribe's determination of who will provide electric service to Tribal-owned facilities located on Tribal land on the Reservation. Id. OTP's position is based the legal precedent set forth in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). Id.

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.

LAW AND ARGUMENT

OTP moves the Commission for an order dismissing North Central's Complaint because 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 the Tribe's land within the exterior boundaries of the Turtle Mountain Reservation. OTP files the Motion to Dismiss as a supplemental pleading pursuant to N.D.C.C. § 28-32-21(1)(h).

A. Standard of Review.

OTP's Motion to Dismiss is brought pursuant to N.D.R.Civ.P. 12(b)(vi). "The purpose of a N.D.R.Civ.P. 12(b)(vi) motion is to test the legal sufficiency of the statement of the claim presented in the complaint." See Ziegelmann v. DaimlerChrysler Corp., 2002

ND 134, ¶ 5, 649 N.W.2d 556. A motion to dismiss a complaint under Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure should be granted "if it is disclosed with certainty the impossibility of proving a claim for which relief can be granted." *Id.* A judgment dismissing a complaint for failure to state a claim should be found if the court cannot "discern a potential for proof to support it." *Id.* If matters outside the pleadings are presented in support of a motion to dismiss under N.D.R.Civ.P. 12(b)(vi), the motion is treated as a motion for summary judgment under N.D.R.Civ.P. 56. Zutz v. Kamrowski, 2010 ND 155, ¶ 8, 787 N.W.2d 286.

B. An Indian Tribe may by resolution 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.

OTP seeks to dismiss North Central's Complaint because the current law 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 land within the exterior boundaries of the Reservation. North Central's Complaint in this case is based upon its interpretation of the Otter Tail (1990) case. However, North Central's reliance upon the Otter Tail (1990) case is misplaced as it was overruled by the subsequent appellate history of the parties.

North Central erroneously relies upon the Otter Tail (1990) case as support for its claim that the Commission has regulatory authority over the Tribe's resolution to permit OTP to supply electric service to the Sky Dancer Casino. In the Otter Tail (1990) case, the North Dakota Supreme Court held that that the Commission had regulatory authority over OTP's electric service contract to provide service to the Devils Lake Sioux Tribe's facility

located on the reservation. 451 N.W.2d at 107. One of the key factors in the Supreme Court's decision was that the Devils Lake Sioux Tribe had not previously attempted any regulation of electric utilities. Id. at 101. The Court concluded that the Devils Lake Sioux Tribe did not have the authority through its inherent sovereignty to regulate electric service to its facilities. Id. at 103-04.

However, the Otter Tail (1990) holding was just the beginning of the legal dispute between OTP, the Commission, the Devils Lake Sioux Tribe, and the electric cooperatives. Following the Otter Tail (1990) opinion, the parties continued litigating the issue 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).

The issue of whether the Commission had regulatory authority over the Devils Lake Sioux Tribe's resolution permitting OTP to provide electric service to a Tribally-owned business located on Tribal land culminated in the North Dakota Public Service Comm'n case. 896 F.Supp. 955. Following the Otter Tail (1990) case, the Devils Lake Sioux Tribe brought a direct action against the Commission in federal court. Id. Prior to commencing its action against the Commission, the Devils Lake Sioux Tribe enacted a complex utility regulation scheme and claimed it had the sovereign power to regulate electric service on the reservation. Id. at 957. The court determined that the Tribe has the inherent sovereignty to contract with whomever it will for the provisions of electric service to its lands and businesses and such sovereignty takes precedence over power of the State of North

Dakota on the reservation. Id. (finding that where the service is to a Tribal business located on Tribal land, the necessary nexus between Tribal interests and inherent sovereignty is present). In the North Dakota Public Service Comm'n case, 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. The Commission did not appeal the holding of the district court. The holding of the North Dakota Public Service Comm'n case is the current status of the law regarding the Commission's regulatory authority over Tribal resolutions for electric service to Tribal facilities located on the reservation. Id. The North Dakota Public Service Comm'n opinion effectively overruled the holding in the Otter Tail (1990) case.

In the present case, the Sky Dancer Casino is owned and operated by the Tribe on Tribal Trust land located on the Turtle Mountain Reservation. See Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Tribe passed a Resolution authorizing it to enter into a contract with OTP to provide electric service to the Sky Dancer Casino starting June 1, 2012. See Exhibit B. The inherent sovereignty of the Tribe to determine who will provide electric service to its facilities located on its land takes precedent over the right of the Commission to regulate OTP. North Dakota Public Service Comm'n, 896 F.Supp. at 957. The Commission has no regulatory authority over the Tribe's determination of who provides electric service to the Sky Dancer Casino. Id. at 961. Accordingly, North Central's Complaint seeking to have the Commission exercise

regulatory authority over OTP's agreement with the Tribe for service to the Sky Dancer Casino should be dismissed. Id.

North Central's Complaint asserts North Dakota's Territorial Integrity Act, N.D.C.C. Ch. 49-03, grants the Commission jurisdiction and regulatory authority over the OTP's agreement with the Tribe for electric service to the Sky Dancer Casino as evidence by the Otter Tail 1990 case. However, as previously outlined above, the Otter Tail (1990) opinion was overruled by the subsequent appellate history and is no longer good law. North Dakota Public Service Comm'n, 896 F.Supp. at 961. North Central's reliance on legal precedent that has been overruled is erroneous. The Commission litigated the same issue following the Otter Tail (1990) case. The end result of the Commission's subsequent litigation is that the Commission does not have regulatory authority over a Tribe's resolution for electrical service for Tribal owned businesses located upon Tribal lands. Id. The Otter Tail (1990) case should not be considered as binding legal precedent in this case. Accordingly, North Central's reliance on the Otter Tail 1990 case is erroneous and its Complaint should be dismissed.

In addition, the Otter Tail 1990 case is factually distinguishable from the present case. In Otter Tail 1990, one of the key factors the court relied upon was that the Devils Lake Sioux Tribe had not enacted any regulations governing electric utilities and it was the first time the Tribe attempted any regulation of the electric utilities. 451 N.W.2d at 101. However, prior to commencing an action against the Commission, the Devils Lake Sioux Tribe adopted a comprehensive set of electric utility regulatory ordinances which regulate the rates and service within the exterior boundaries of the Reservation. See North Dakota

Public Service Comm'n, 896 F.Supp. at 958-59.

In the present case, the Tribe has enacted a comprehensive regulatory scheme to regulate electric service on the Turtle Mountain Reservation. See Title 21, Turtle Mountain Tribal Code. The Tribe specifically found that the power to regulate public utilities on the reservation is an essential aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, limited only to the extent that such power has been specifically limited or withdrawn by federal law." See Turtle Mountain Tribal Code, § 21.0101(1). The Tribe's enactment of the Turtle Mountain Tribal Utility Code to regulate electric service on the Reservation is factually analogous to the North Dakota Public Service Comm'n case and distinguishable from the Otter Tail (1990) case. Because the Tribe has adopted its own regulatory code governing electric service on the Turtle Mountain Reservation, North Central's Complaint should be dismissed as the Commission has no regulatory authority over the Tribe's resolution permitting OTP to provide electric service to a Tribal facility located on Tribal land. See North Dakota Public Service Comm'n, 896 F.Supp. at 961.

CONCLUSION

Otter Tail Power Company respectfully requests the North Dakota Public Service Commission grant its Motion to Dismiss North Central Electric Cooperative, Inc.'s, Complaint because the Commission has no 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. The Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with

whomever it will for the provisions of electric service to its lands and businesses. North Central's reliance on legal precedent that has been subsequently overruled provides no support for its Complaint.

Dated this 16th day of January, 2012.

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

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

This Indenture, Made this 21st day of February in the year of our Lord One Thousand Nine Hundred and Forty-one between Walter John Charlton, Unmarried

50965

whose postoffice address is 30 South Ninth Street, Minneapolis, Minn. part Y of the first part and United States of America in trust for the Indians of the Turtle Mountain Reservation whose postoffice address is Washington, D. C.

part Y of the second part; WITNESSETH, That the said part Y of the first part, in consideration of the sum of Five Hundred and no/100 to him in hand paid by the said part Y of the second part, the receipt whereof is hereby acknowledged, do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said part Y of the second part and assigns, FOREVER, all that tract or parcel of land lying and being in the County of Boeotte and State of North Dakota, to-wit: North Half of the Southwest Quarter of Section Thirty-four in Township One Hundred Sixty-two North of Range Seventy-one West of the Fifth Principal Meridian, North Dakota, containing eighty acres, more or less, according to the United States Government Survey thereof. (N 1/2 of SW 1/4 Sec. 34, Twp. 162, Rge. 71)

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said part Y of the second part, unto the said part Y of the first part, his heirs, assigns, executors and administrators do hereby covenant with the said part Y of the second part and assigns that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in the manner aforesaid, that the same are free from all incumbrances.

Amount \$ 500

and the above bargained and granted lands and premises in the quiet and peaceable possession of the said part Y of the second part and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said part Y of the first part will Warrant and Defend.

IN TESTIMONY WHEREOF, the said part Y of the first part has hereunto set his hand and seal the day and year next above written.

Signed, Sealed and Delivered in Presence of Patricia Ellis, E. A. Lassala, Walter John Charlton, (SEAL), (SEAL), (SEAL), (SEAL)

MINNESOTA STATE OF MINNESOTA County of Hennepin On this 21st day of February A. D. 1941 before me personally appeared Walter John Charlton, Unmarried known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same. E. L. Durand Notary Public, Hennepin County, Minn. My commission expires August 11 23rd 1943

Delinquent taxes and special assessments, or installments of special assessments paid) and transfer entered AUG 27 1941 By VCJ Deputy, Jas. H. Penny Auditor, Boeotte County, North Dakota.

Filed for record this 27th day of August A. D. 1941 at 4:10 P. M. and recorded in Deed Record 28 on page 370 By Deputy, Register of Deeds.



RESOLUTION NUMBER TMBC598-11-11 (*Revised) ELECTED AND CERTIFIED GOVERNING BODY OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

WHEREAS, the Turtle Mountain Band of Chippewa Indians, hereinafter referred to as the Tribe, is an unincorporated Band acting under a revised Constitution and By-Laws approved by the Secretary of the Interior on June 16th, 1959 and amendments thereto approved; and

WHEREAS, Article IX (a) Section 1 of the Turtle Mountain Constitution and By-Laws empowers the Tribal Council with the authority to represent the Band and to negotiate with Federal, State, and Local Governments and with private persons; and

WHEREAS, Article 1X (C) Section 10 of the Turtle Mountain Band Constitution and By-Laws as amended May 14th, 1990, and approved by the Secretary of the Interior on October 25th, 1990, empowers the Tribal Council with the authority to manage, lease, permit, or otherwise deal with Tribal land, interest in lands and other assets under Tribal Jurisdiction and to purchase or otherwise acquire lands, or interest in lands within and outside the boundaries of the Turtle Mountain Reservation in accordance with law, or dispose of any such lands or interest in lands authorized by law; and

WHEREAS, Otter Tail is proposing to be the electric service provider at the Sky Dancer Casino and anything built or residing on the casino grounds; and

WHEREAS, the start-up date for the Electric Service Agreement is June, 2012 and construction power would generally be obtained from existing facility, with one (1) meter; and

WHEREAS, current cost savings/future cost savings, will be greater when new facility is up and running because of rate structure; now

THEREFORE BE IT RESOLVED that the Tribe is entering into a ten (10) *year Electric Service Agreement with Otter Tail Power Company to provide electric service to the Sky Dancer Casino and anything built or residing on the casino grounds and is hereby authorizing the Tribal Chairman to sign the agreement, with a starting date of June 1, 2012.

CERTIFICATION

I, the undersigned Tribal Secretary of the Turtle Mountain Band Chippewa Indians, do hereby certify that the Tribal Council is composed of nine (9) members of whom nine (9) constituting a quorum were present at a meeting duly called, convened and held on the 8th day of November, 2011, that the foregoing resolution was adopted by an affirmative vote of five (5) in favor - Representatives Curtis L. Poitra, Cindy Malaterre, Larry DeCoteau, Jeff 'BJ' Delorme and Zelma Peltier, three (3) absent-Representatives Mike Malaterre, Lorne Jay and Elmer Davis, Jr.; with the Chairman not voting.

Jolean A. Morin
Jolean A. Morin, Tribal Secretary 11/22/11

SIGNED INTO LAW/Dated this 23 day of November, 2011
 VETOED/Dated this ___ day of _____, 2011

Merle St. Claire
Merle St. Claire, Chairman



under N.D.C.C. §§ 49-03-01.4 and 49-03-05 that Otter Tail Power Company (herein 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.

Procedural Background

On December 12, 2011, North Central filed a complaint and affidavit alleging that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system to serve a customer at a place to be served not located within the corporate limits of any municipality in Rolette County without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and that construction by Otter Tail is a violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5. The customer at the place to be served is the Sky Dancer Hotel and Casino. The complaint also alleges Otter Tail's construction interferes with North Central's service and system.

On December 21, 2011, the Commission found that North Central's complaint stated a prima facie case.

On January 16, 2012, Otter Tail filed an answer to North Central's complaint admitting the allegation about construction but "...specifically denies that a certificate of public convenience and necessity is required to supply electric service to the Turtle Mountain Band of Chippewa Indians' (Tribe) facility located on the Turtle Mountain Indian Reservation...." and the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Otter Tail's answer also denied North Central's interference claim. Answer ¶¶ IV and XI.

On January 16, 2012, Otter Tail filed a motion to dismiss the complaint in and a brief in support of the motion.

Facts of the Case

The pleadings and Otter Tail's motion establish the following facts:

1. North Central is a "rural electric cooperative" under N.D.C.C. § 49-03-01.5(6). North Central is an interested electric cooperative corporation under ND.C.C. § 49-03-05. Complaint, ¶ 1.
2. Otter Tail is an "electric public utility" under N.D.C.C. 49-03-01.5(2). Complaint, ¶ 2; Answer ¶ III.
3. Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer in the SW ¼ of Section 34, Township 162N, Range 71W, Rolette County, North Dakota (the place to be served), without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and service. The customer at the place to be served is the Sky Dancer Hotel and Casino. Complaint, ¶ 3; Answer ¶ IV; Martian Affidavit, ¶ 6-9.
4. The place to be served is not located within the corporate limits of any municipality. Complaint ¶ 4; Answer ¶ V.
5. The place to be served is located in North Central's service area. Complaint ¶ 5.
6. The place to be served is presently served by North Central.
Complaint ¶ 6; Answer ¶ V.

Otter Tail admitted the central fact alleged by North Central, that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and

system at the place to be served without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction. Complaint, ¶ 3; Answer ¶ IV. Otter Tail's denials (Answer ¶¶ II and VI) of other allegations of fact are meaningless in the context of Otter Tail's motion to dismiss, because all North Central's allegations are deemed admitted for purposes of Otter Tail's motion to dismiss. "We construe the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint." Ziegelmann v. DaimlerChrysler Corp. 2002 N.D. 134, ¶ 5; 649 N.W.2d 556. Otter Tail's brief (p. 3-4) cites and quotes this same case and paragraph regarding principles applied on a motion to dismiss.

As a result of presenting matters outside the pleadings, motion exhibits A and B, Otter Tail's motion for dismissal under N.D.R.Civ.P. Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56. See N.D.R.Civ.P. Rule 12 (d); see also Zutz v Kamrowski, 2010 ND 155, ¶ 8, cited in Otter Tail's brief, p. 4. If there are no genuine issues as to material facts, judgment may be entered as a matter of a law. N.D.R.Civ.P. Rule 56(c).

Otter Tail's motion exhibits A and B appear to show as matters of fact that the place to be served is a Tribal owned business located on land owned by the United States as "trust land." Exhibit A lacks appropriate foundation and is inadmissible. Both exhibits are inadmissible for the more important reason that the facts asserted are not material facts affecting the issues of law under North Central's complaint and Otter Tail's answer and motion. Not material because Otter Tail lacks "standing."

The Territorial Integrity Act

S.L. 1965, Ch. 319, codified as N.D.C.C. §§ 49-03-01 through 49-03-01.5 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. This statute is commonly called the Territorial Integrity Act. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 418 (N.D. 1967).

The Territorial Integrity Act 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 § 49-03-01.1.

Otter Tail denies that a Certificate of Public Convenience and Necessity is required to extend its facilities to supply electric service to a customer in a rural area. Otter Tail asserts it is immune from the Commission's jurisdiction under the Act, immune because "the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Answer ¶ XI. This theory is repeated in slightly different words in Otter Tail's motion.

Customer Preference

"Customer preference" is a factor in cases under the Territorial Integrity Act.

Before adoption of the Territorial Integrity Act, territorial disputes were usually settled by the customer's choice. See Capital Elec. Coop., Inc. v. Public Service Commission of State of North Dakota, 534 N.W.2d 587, 589 (N.D. 1995) and Cass County Elec. Coop. 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 Territorial Integrity Act, customer choice or preference has a different status in cases where a customer requests an electric public utility 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 Territorial Integrity Act 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.

In another of the early cases under the new Territorial Integrity Act, 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).

The most recent Supreme Court case under the Territorial Integrity Act involving Otter Tail reiterated and reinforced the Public Service Commission'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").

Otter Tail's Affirmative Defense and Motion to Dismiss

Otter Tail asserts that the Turtle Mountain Band of Chippewa Indians ("the Tribe") has a controlling customer preference for electric service at the Sky Dancer Casino to be furnished by Otter Tail. Otter Tail does not assert the Tribe's preference is a controlling factor in the Public Service Commission's determination of public convenience and necessity under the Territorial Integrity Act. Otter Tail makes a different assertion, that the Tribe's preference immunizes Otter Tail from the Public Service Commission's jurisdiction under the Territorial Integrity Act. ". . . OTP specifically denies that a certificate of public convenience and necessity is required to supply electric service to the Tribe's facility located on Tribal Trust land on the Turtle Mountain Reservation." and "OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Answer ¶¶ IV and XI. Otter Tail cites Devils Lake Sioux Indian Tribe v. North Dakota Public Service Commission, 896 F.Supp. 955 (D.N.D. 1995) in support of its position. That case is referred to as Devils Lake Sioux v PSC.

Otter Tail Lacks Standing to Assert the Sovereign Immunity Defense

The sovereign immunity defense was asserted and rejected in Otter Tail 1990. In that case, Otter Tail filed a "Notice of Intent to Extend Service" to a customer on the Fort Totten Indian reservation. In response, the Commission notified Otter Tail that the Commission had jurisdiction and Otter Tail should formally apply for a certificate of public convenience and necessity. Otter Tail did apply for a certificate but before the Commission acted Otter Tail extended service in defiance of the Commission's

jurisdiction. In its 1990 case, Otter Tail asserted the Commission did not have jurisdiction because assumption of jurisdiction would unlawfully interfere with the Indian tribe's sovereign rights of self-government. Otter Tail appealed the Commission's decision that it had jurisdiction. The North Dakota Supreme Court decided that Otter Tail did not have "standing" to defeat the PSC's authority over Otter Tail's activities. Assuming Otter Tail had standing to assert the immunity defense, the court addressed the immunity defense and concluded that the Commission did have jurisdiction.

"Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe's sovereign rights of self-government. However, because the Tribe (which did not appear) was the proper party to press the potential of harm to its governmental interests, we conclude that Otter Tail had no standing to advance the Tribe's self-government interests.

...

"We conclude Otter Tail could not assert the self-government interests of the Tribe to defeat the PSC's authority over Otter Tail's activities.

...

"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." Otter Tail 1990, 451 N.W.2d at 97-98.

Otter Tail attempts to avoid the Otter Tail 1990 precedent that rejected the same defense it now asserts in 2011 by arguing "...the Otter Tail (1990) opinion was overruled by the subsequent appellate history and is no longer good law." (Otter Tail Brief, p.7). 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, litigation incompletely described in Otter Tail's brief.

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; 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 v PSC, 896 F.Supp at 956. The four district court cases were consolidated and appealed. The 8th Circuit Court remanded "with instructions to the district court to make detailed factual determinations and set out its analysis in support of its legal determinations." Baker Electric Cooperative, Inc. v Chaske, 28 F.3d 1466, 1476. (8th Cir. 1994.) The district court did so. The final decision was "... 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 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 v PSC, 896 F. Supp. at 961-62. That decision was not appealed by any of the several parties.

In the collateral litigation in federal court, the Tribe had standing and asserted – successfully - the sovereignty issue that Otter Tail lacked standing to assert. The name of the litigation makes it plain; the party with standing, the Tribe, asserted its sovereignty. The federal court litigation did not “overrule” the North Dakota Supreme Court’s decision quoted above and repeated here, that Otter Tail lacks standing.

“Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe’s sovereign rights of self-government. However, because the Tribe (which did not appear) was the proper party to press the potential of harm to its governmental interests, we conclude that Otter Tail had no standing to advance the Tribe’s self-government interests.

...

“Otter Tail could not assert the self-government interests of the Tribe to defeat the PSC’s authority over Otter Tail’s activities.” Otter Tail 1990, 451 N.W.2d at 97-98.

In this case, Otter Tail lacks standing to assert the Public Service Commission lacks jurisdiction over service to the Sky Dancer Casino under sovereign immunity concepts. Otter Tail has no sovereign immunity and it is not the Tribe’s surrogate to assert sovereign immunity on behalf of either Otter Tail or the Tribe. Sovereign immunity may be asserted only by the Tribe, not by Otter Tail.

Standing is a threshold issue. Otter Tail cannot pass the threshold. The Turtle Mountain Band might assert sovereign immunity, but Otter Tail cannot assert the Tribe’s interests to defeat the Public Service Commission’s authority over Otter Tail’s activities. Otter Tail 1990.

The Tribe is not a party to this action asserting immunity on its own behalf or on behalf of Otter Tail. The Tribe’s resolution, Otter Tail’s motion exhibit B, does not amount to an appearance. Otter Tail 1990, 451 N.W.2d at 97. The Tribe has not

asserted a power to immunize Otter Tail or to supersede the Public Service Commission's exercise of its jurisdiction over Otter Tail's activities.

The standing argument might appear to be a legal technicality. It is. It is an important technicality. Parties to litigation may present their claims and defenses, not the claims and defenses of non-parties. This fundamental principle is particularly important in cases involving issues of Constitutional Law such as are involved in Otter Tail's assertions of Tribal sovereignty. Whatever words are used to describe the Tribe's status vis-à-vis the North Dakota Public Service Commission – sovereignty, pre-emption, exemption, limitation, immunity, privilege, self government, or any other label – the Tribe's special status is founded in the supremacy clause of Article VI of the United States Constitution, a fundamental principle infusing both North Dakota's Supreme Court's decision in Otter Tail 1990 and all the federal courts' opinions in the collateral litigation post Otter Tail 1990. The special status is the Tribe's, not Otter Tail's. Otter Tail has no special status under Article VI vis-à-vis the North Dakota Public Service Commission and the Territorial Integrity Act. Another principle is involved. Courts (and agencies) abstain from addressing constitutional questions that are unnecessary to be addressed. The two principles coalesce in a single expression: A litigant may assert only its own constitutional rights. See Bismarck v Materj, 177 N.W. 2d. 530, 545 (N.D. 1970). See also N.D.C.C. 28-32-46(2); if Otter Tail were to appeal an adverse decision of the Commission, Otter Tail could assert only "its" constitutional rights.

Otter Tail cannot pass the standing threshold. Absent the Tribe's intervention in this proceeding to assert the Commission lacks jurisdiction over the Tribe's preference for electric service from Otter Tail - despite issues of public convenience and necessity

and despite Otter Tail's interference with North Central's service - Otter Tail's motion to dismiss should be denied.

Summary Judgment Should Be Entered Against Otter Tail

Otter Tail's motion to dismiss under N.D.R. Civ. Proc. Rule 12(b) must be treated as a motion for summary judgment under Rule 56 as a result of Otter Tail's presenting materials outside the pleadings. Rule 12 (d). Under Rule 56(c), "The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment, when appropriate, may be entered against the moving party."

Otter Tail's only basis for its affirmative defense and motion to dismiss is a theory of sovereign immunity, a theory that Otter Tail lacks standing to assert under Otter Tail 1990. Under the Territorial Integrity Act, all the precedents and particularly Otter Tail 1990, the moving party is not entitled to judgment as a matter of law to dismiss the complaint.

Otter Tail admitted the central fact alleged by North Central, that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system at the place to be served without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction. Complaint, ¶ 3; Answer ¶ IV. That admission shows there is no genuine issue as to the central material fact. Because material facts are undisputed, it is appropriate for summary judgment to be entered against Otter Tail under Rule 56(c). See Spier v. Power Concrete, 304 N.W.2d 68, 72 (N.D. 1981).

If The Tribe Were To Intervene The Case Cannot Be Resolved Under Rule 56

If the Tribe were to intervene, there would be material issues of fact. The Tribe and Otter Tail would need to successfully perform “the fact specific tap dance that is required whenever Tribal sovereignty issues are raised.” Devils Lake Sioux v PSC, 896 F.Supp at 960. The Tribe’s sovereign power to contract with whomever it will for the provision of electric service to its lands and businesses “may be 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 v PSC, 896 F.Supp. at 957.

North Central’s Complaint and affidavit to establish a prima facie case include information that OTP’s construction crossed North Dakota’s Highway 5. North Dakota’s highway right of way must be under North Dakota Public Service Commission jurisdiction over OTP’s construction. See Martian affidavit § 9, and exhibit A attached to this brief. OTP’s construction to get power to the Sky Dancer Casino would be material facts if the Tribe were to intervene.

If the Tribe were to intervene, the particular business of the Sky Dancer Casino would be a material issue of fact affecting the Tribe’s assertion of sovereign immunity to contract with whomever it will for the provision of electric service to this particular location and business. Under the Gaming Compact between the Tribe and the State of North Dakota, the sovereign immunity issue is addressed, including the State’s retention of its jurisdiction. See exhibit B attached to this brief, § 17.2.

(As noted above, in Otter Tail 1990 the North Dakota Supreme Court assumed Otter Tail had standing to assert the immunity defense, addressed the immunity defense and concluded that the Commission did have jurisdiction. If it were to be assumed in this case that Otter Tail has standing to assert the immunity defense, the case cannot be resolved under Rule 56 because of these material issues, "the fact specific tap dance that is required whenever Tribal sovereignty issues are raised." Devils Lake Sioux v PSC, 896 F.Supp at 960.)

CONCLUSION

Under precedents of the Commission and of the North Dakota Supreme Court, the Public Service Commission does not take a narrow view of its jurisdiction under the Territorial Integrity Act. See Capital Elect. Coop.v. Montana-Dakota Utilities Co., PSC Case No. PU-05-551, Order ¶ 10, affirmed at Capital Elec. Coop. v. City of Bismarck, 2007 N.D. 128, 736 N.W.2d 788. Under the Territorial Integrity Act, the Commission has jurisdiction and authority over Otter Tail's activities alleged in North Central's complaint and admitted in Otter Tail's answer.

Under Otter Tail's admission (Answer ¶ IV), Otter Tail's construction of an extension of its public utility plant and system to serve the Sky Dancer Hotel and Casino 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 is a violation of North Dakota Century Code Section 49-03-01.1.

Otter Tail lacks standing to assert the Public Service Commission lacks jurisdiction over service to the Sky Dancer Casino under sovereign immunity concepts.

Otter Tail has no sovereign immunity and it is not the Tribe's surrogate to assert sovereign immunity on behalf of either Otter Tail or the Tribe. Sovereign immunity may be asserted only by the Tribe, not by Otter Tail. Otter Tail has no standing to assert the Tribe's sovereignty to defeat the PSC's authority over Otter Tail's activities. Otter Tail 1990, 451 N.W.2d at 98. If the Tribe were to intervene, the case cannot be resolved under Otter Tail's motion.

The Commission should assert and exercise its jurisdiction over Otter Tail's activities under the Territorial Integrity Act and all the precedents from Montana-Dakota v. Johanneson in 1967 through Capital v. Bismarck in 2007, and particularly Otter Tail 1990.

The Commission should deny Otter Tail's motion to dismiss and enter its order under N.D.C.C. §§ 49-03-01.4 and 49-03-05 and N.D.R.Civ.P. Rule 56 restraining Otter Tail from serving the Sky Dancer Casino in Rolette County and enjoining it to dismantle its extension of its electric public utility plant and system that it constructed without first obtaining an order from the Commission authorizing such extension and service.

Dated this 2nd day of February, 2012.

PRINGLE & HERIGSTAD, P.C.



Debra L. Hoffarth
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Minot, ND 58702
701-852-0381

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

RECEIVED

APR 24 2012

North Central Electric Cooperative, Inc.)
)
Complainant)
vs.)
)
Otter Tail Power Company)
)
Respondent.)

**PUBLIC SERVICE COMMISSION
PREHEARING CONFERENCE
SUMMARY AND STIPULATIONS**

Case No. PU-11-701
OAH File No. 20120087

.....
A prehearing conference regarding the above titled administrative matter was held on April 23, 2012, attended by the procedural hearing officer, ALJ Hoberg, counsel for the parties, Ms. Hoffarth, Mr. Sanderson, and Mr. Gerhardson, counsel for the Public Service Commission ("Commission"), Mr. Gruman, and two other Otter Tail employees who did not materially participate. No one appeared representing the Turtle Mountain Band of Chippewa Indians (the "Tribe" or "Tribal").

After the hearing officer summarized the status of the case, the parties agreed to the following stipulations:

1. Sky Dancer Casino is a Tribal owned facility.
2. Sky Dancer Casino is located on Tribal trust property.
3. The Tribe passed a resolution on November 23, 2011, stating that the Tribe wants Otter Tail Power Company to provide electric service to the Sky Dancer Casino facility.
4. The Tribe has a long-standing tribal utility code.
5. The Tribe filed a letter with the Commission through its tribal chairman on February 15, 2012, stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to 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)."

The parties agreed that the above facts are true but reserve the right to argue the relevancy of any of the stipulated facts in oral argument.

The parties agreed that unless a request for an evidentiary hearing is specifically made, the hearing scheduled for May 7, 2012, will be held only for the purpose of oral argument on a motion to dismiss and argument for summary disposition of the Complaint. If a request for an evidentiary hearing is made, and an evidentiary hearing is held on May 7, 2012, or otherwise, only parties, including any interveners, will be allowed to present evidence. If no request for an evidentiary hearing is made, only parties, including any interveners, will be allowed to make oral argument at the hearing on May 7, 2012. A request for an evidentiary hearing must be made prior to 5:00 p.m. on May 4, 2012.

The parties agreed that they are likely to waive the 45 day notice requirement of N.D.C.C. section 28-32-21 and N.D. Admin. Code section 69-02-02-02(5), and they will shortly be filing such a waiver with the Commission.

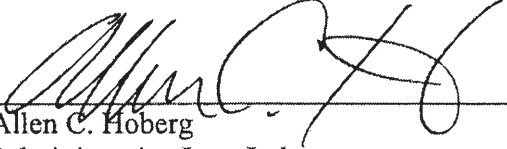
The parties agreed that the Commission's statement of the issues made by Commission Counsel at the prehearing conference are the issues for this matter. Commission counsel will notice the hearing and the issues for the hearing shortly and counsel agreed to state prior to the hearing if they object to the Commission's statement of the issues.

The parties acknowledged that the Tribe may file a petition to intervene. If the Tribe does file a petition to intervene, the parties agreed that if any party has an objection to the Tribe's intervention, the party will file the objection as soon as possible to expedite a ruling on the petition so that the May 7, 2012, hearing may be held as scheduled. Any petition to intervene must be filed at least 10 days prior to the hearing. See N.D. Admin. Code section 69-02-02-05.

Dated at Bismarck, North Dakota, this 23rd day of April, 2012.

State of North Dakota
Public Service Commission

By: _____


Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,

Complainant,

vs.

Otter Tail Power Company,

Respondent.

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**ORDER GRANTING
INTERVENTION**

PUBLIC SERVICE COMMISSION

**No. PU-11-701
OAH File No. 20120087**

.....

The petitioner to intervene in this matter is the Turtle Mountain Band of Chippewa Indians (the "Tribe"). On May 1, 2012, the Tribe filed its petition to intervene. The Tribe seeks to intervene in this matter by making a special appearance to object to the jurisdiction of the Commission to determine which utility will provide electric service to the Sky Dancer Casino. The Tribe states it has a legal interest which may be substantially affected by this proceeding. The Tribe states its position is in opposition to the relief sought by North Central in its Complaint. The Tribe states its petition is only to contest jurisdiction and should not be construed as voluntary general appearance under N.D.R. Civ. P. 4(b)(4).

North Central filed an objection to both the Tribe's May 1 petition and the initial petition filed by the Tribe on April 26, 2012, which the hearing officer determined was void. The petitions' contents were virtually identical. North Central states in its initial objection that the Tribe's participation is not necessary because customer preference is only one of many factors that the Commission will consider in determining the merits of this matter. In its later objection North Central appears to state that customer preference is not a factor in determining the merits of this matter. North Central also appears to state that the issues will be unduly broadened if the Tribe intervenes.

Otter Tail does not object to the Tribe's intervention.

On February 15, 2012, the Tribe filed a letter with the Commission stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to Sky Dancer Casino pursuant to the legal precedent set forth in 896 F. Supp 955..." That letter was part of the stipulations agreed upon by the parties at prehearing conference.

The Complaint and Answer in this matter, and the subsequently filed briefs, show that this matter is about the Commission's jurisdiction to determine which utility will provide electric service to Sky Dancer Casino, *i.e.*, the regulatory authority of the Commission *vis-à-vis* Otter Tail and North Central as it concerns Otter Tail's actions pursuant to the Tribe's resolution that Otter Tail will provide electric service to Sky Dancer Casino, and what is the result if the Commission does or does not have jurisdiction in this matter through its regulatory authority.

Under N.D. Admin. Code section 69-02-02-05, the Tribe has a legal interest that may be substantially affected by the proceeding. North Central apparently agrees that customer preference is or might be one of the factors that the Commission will consider in determining the merits of this matter. The issue of jurisdiction over the Tribe is there either directly or indirectly because of the facts not in dispute, including the stipulations. The Tribe's petition will not be unduly broadening the issues. This matter is now about arguing facts which are not in dispute. Thus, the Tribe should be allowed to participate as an intervener in the May 7, 2012, hearing, which will restrict the Tribe, North Central, and Otter Tail to argument on the motion to dismiss and argument for summary disposition.

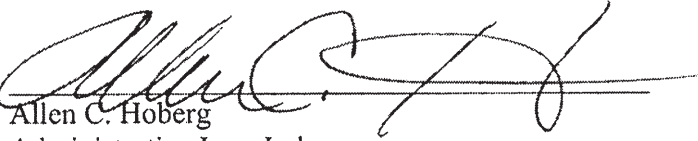
The Tribe's petition to intervene is **granted**.

It appears from the *Wallwork* case that a party may make other than a general appearance (a special appearance) just to object to the jurisdiction of the court (the tribunal, *i.e.*, the Commission). See 398 N.W. 2d 127, 129. It appears that is what the Tribe has done in this matter; it has made a special appearance. However, as noted in North Central's objections, North Central's complaint is against Otter Tail, not against the Tribe. Otter Tail and North Central, and perhaps indirectly the Tribe, will be bound by the Commission's decision regarding the motion to dismiss and any summary disposition of this matter, or other final disposition.

Dated at Bismarck, North Dakota, this 3rd day of May, 2012.

State of North Dakota
Public Service Commission

By:



Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)
)
Complainant,)
vs.)
)
Otter Tail Power Company,)
)
Respondent.)

CERTIFICATE
OF SERVICE

Case No. PU-11-701
OAH File No. 20120087

.....
The undersigned certifies that true and correct copies of the ORDER GRANTING INTERVENTION were mailed, regular mail, on the 3rd day of May, 2012, to:

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Tracy Vigness Kolb
Zuger Kirmis & Smith
PO Box 1695
Bismarck, ND 58502-1695

and that a true and correct copy of the above document was mailed, inside mail, at the State Capitol on the 3rd day of May, 2012, to:

Mark Gruman
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

OFFICE OF ADMINISTRATIVE HEARINGS
Allen C. Hoberg, Administrative Law Judge



Frances Zuther

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.)	
)	
Complainant,)	
)	
vs.	)	Case No. PU-11-701
	)	OAH File No. 20120087
)	
Otter Tail Power Company,)	
)	
Respondent,)	
)	
and)	
)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Intervenor.)	

STIPULATION

COMES NOW the Complainant North Central Electric Cooperative, Inc., by and through its attorney, Debra L. Hoffarth, of Pringle & Herigstad, PC, Minot, North Dakota; Respondent Otter Tail Power Company, by and through its attorney, Paul Sanderson, Bismarck, North Dakota hereby agree and stipulate to the following stipulations and exhibits in addition to those as part of the Prehearing Stipulations dated April 23, 2012:

1. December 12, 2011 Affidavit of Wayne Martian (Docket #1), with the exception of Paragraph 10 to the extent that it calls for a legal conclusion;
2. Request to Locate (Docket #1 - Exhibit 1 to Wayne Martian's Affidavit);
3. Photographs of Otter Tail Staking (Docket #1 - Exhibit 2 to Wayne Martian's Affidavit);
4. Photographs of Otter Tail Construction (Docket #1 - Exhibit 3 to Wayne Martian's Affidavit);

5. Grant of Easement for Right of Way to NDDOT from BIA (Docket # 7 - Exhibit A to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
6. Right of Way Plat for NDDOT (Docket #7 – Exhibit A1 to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
7. Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota (Docket #7 - Exhibit B to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
8. October 29, 1975 Underground Easements to North Central Electric Cooperative, Inc. from Turtle Mountain Tribe (Attached hereto as Exhibit 1);
9. Map Showing State Highway 5 Running Adjacent to Casino (Attached hereto as Exhibit 2); and
10. Otter Tail Power Company's Distribution Lines Cross North Dakota Highway 5 and North Central's Distribution line and Central Power Electric Cooperative Inc.'s Transmission Lines, from which North Central purchases its electricity.


The parties agree that the above facts are true but reserve the right to argue the relevancy of any of the stipulated facts in oral argument.

Dated this 4th day of May, 2012.


Dated this 4th day of May, 2012.

PRINGLE & HERIGSTAD, PC

ZUGER KIRMIS & SMITH



 Debra L. Hoffarth #05668



 Paul R. Sanderson #05830

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

Attorneys for Otter Tail Power Company
 PO Box 1695
 Bismarck ND 58502
 (701) 223-2711

THIS STIPULATION IS HEREBY APPROVED:

Dated this ____ day of May, 2012.

State of North Dakota
Public Service Commission

Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, ND 58503
(701) 328-3200

UNDERGROUND EASEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT we, the undersigned _____
(I or We)

Tenth Mn Band of Chippewa Indians
(Designate whether single, widow, widower, husband and wife, or corporation)

of the post office address of Belmont, ND
in consideration of their mutual covenants and for other valuable consideration, the receipt whereof is hereby acknowledged, do hereby grant unto NORTH CENTRAL ELECTRIC COOPERATIVE, INC., whose post office address is Bottineau, North Dakota and to its successors or assigns, the right to enter upon the lands of the undersigned, situated in the County of Bottineau, State of North Dakota, and more particularly described as follows:

NW 1/4, Sec. 35 Twp. 162 Rge. 71
SE 1/4, Sec. 34 Twp. 162 Rge. 71
N 1/2 SW 1/4, Sec. 34 Twp. 162 Rge. 71

and to place, construct, operate, repair, maintain, relocate, and replace a _____

15 KV line on said above described lands and in or upon, etc., together with the right to excavate and refill trenches for the location of the said underground rural distribution line and the further right to remove trees, bushes, undergrowth and other obstructions interfering with the location, construction, and maintenance of said underground electric distribution line and the Cooperative is herewith further afforded the right and privilege to construct, place, and locate surface cable markers along the route of the said underground distribution line as required, along with the right to repair and maintain same.

The undersigned covenant that they are the owners of the above described lands and that the said lands are free and clear of encumbrances and liens of whatsoever character except those held by the following persons:

and except taxes and assessments not yet due.

IN WITNESS WHEREOF, the undersigned has set their hand and seal this 29th day of October, 1975.

WITNESSES:
Curtis A. Plouffe John J. Agnew

ACKNOWLEDGMENT FOR INDIVIDUALS

STATE OF NORTH DAKOTA

County of Bottineau

On this 29th day of October, 1975, before me, a Notary Public, appeared John J. Agnew - Tenth Mn Band of Chippewa Indians known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that he executed the same.

CLAYTON LIDER
Notary Public, BOTTINEAU CO., N. DAK.
My Commission Expires 06/15/1977

Clayton Lider
Notary Public

My Commission expires _____
_____, North Dakota
(Month)



UNDERGROUND EASEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT we, the undersigned _____

(I or We)
Turtle Mtn Band of Chippewa Indians
(Designate whether single, widow, widower, husband and wife, or corporation)

of the post office address of Bellevue, N. Dak
in consideration of their mutual covenants and for other valuable consideration, the receipt whereof is hereby acknowledged, do hereby grant unto NORTH CENTRAL ELECTRIC COOPERATIVE, INC., whose post office address is Bottineau, North Dakota and to its successors or assigns, the right to enter upon the lands of the undersigned, situated in the County of Bellevue, State of North Dakota, and more particularly described as follows:

NW 1/4, _____, Sec. 25 Twp. 162 Rge. 71
SE 1/4, _____, Sec. 24 Twp. 162 Rge. 71
N 1/2, SW 1/4, _____, Sec. 34 Twp. 162 Rge. 71

and to place, construct, operate, repair, maintain, relocate, and replace a _____

15 KV. line on said above described lands and in or upon, etc., together with the right to excavate and refill trenches for the location of the said underground rural distribution line and the further right to remove trees, bushes, undergrowth and other obstructions interfering with the location, construction, and maintenance of said underground electric distribution line and the Cooperative is herewith afforded the right and privilege to construct, place, and locate surface cable markers along the route of the said underground distribution line as required, along with the right to repair and maintain same.

The undersigned covenant that They the owners of the above described lands and that the said lands are free and clear of encumbrances and liens of whatsoever character except those held by the following persons:

and except taxes and assessments not yet due.

IN WITNESS WHEREOF, the undersigned has set their hand and seal _____ this 29th day of October, 1975.

WITNES:
Curtis A. Plain _____
X Peter J. Agnes _____

ACKNOWLEDGMENT FOR INDIVIDUALS

STATE OF NORTH DAKOTA

County of Bottineau

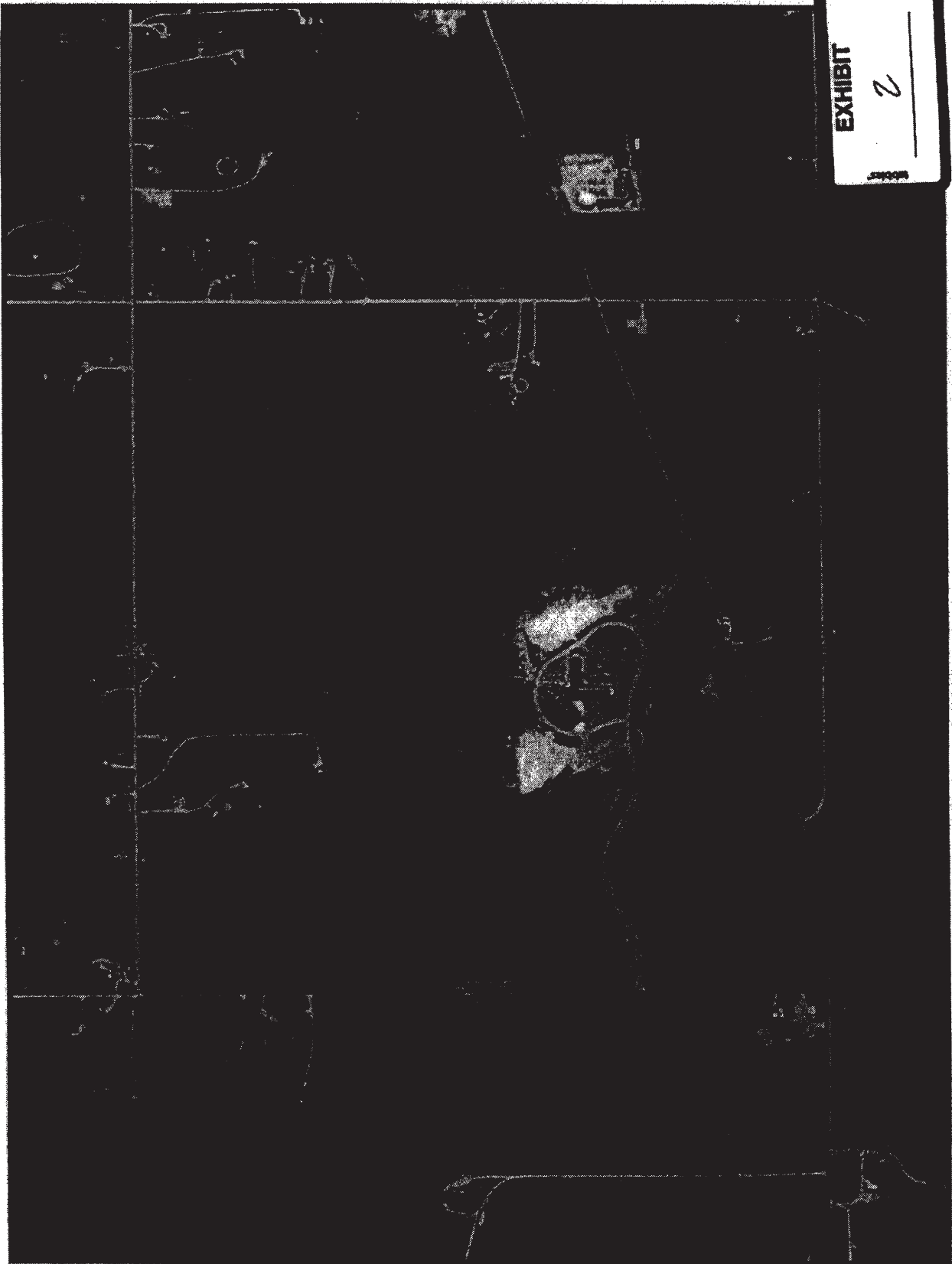
On this 29th day of October, 1975, before me, a Notary Public, appeared Peter J. Agnes - Turtle Mtn. Band of Chippewa Indians known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that _____ he executed the same.

CLAYTON LEGER
Notary Public - BOTTINEAU CO., N. DAK.
My Commission Expires OCT. 10, 1976

Clayton Leger
Notary Public

My Commission expires _____

_____, North Dakota



EXHIBIT

2

1/2/2008

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**North Central Electric Cooperative, Incorporated
Complainant**

Case No. PU-11-701

v.

**Otter Tail Power Company
Respondent**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 14, 2012

Appearances

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

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

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

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

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

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

Preliminary Statement

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

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

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

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

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

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

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

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

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

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

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

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

Findings of Fact

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

10. Otter Tail's nearest pre-existing facility to the Sky Dancer campus is a transmission line approximately 1000 feet away. Otter Tail's nearest retail consumer is approximately 3 miles distant from the Sky Dancer campus.
11. Otter Tail's distribution lines cross North Dakota Highway 5, North Central's distribution line and Central Power Electric Cooperative Inc.'s transmission lines (from which North Central purchases its electricity).
12. There is an Amended Gaming Compact between the Tribe and the State of North Dakota, wherein the State of North Dakota retains its jurisdiction.
13. North Central has October 29, 1975 Underground Easements from the Tribe.
14. Otter Tail submits their motion for dismissal pursuant to North Dakota Rule of Civil Procedure 12(b)(vi) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995). Otter Tail's motion to dismiss under North Dakota Rules of Civil Procedure Rule 12(b) must be treated as a motion to dismiss under North Dakota Rules of Civil Procedure 56 as a result of additional evidence presented outside of the pleadings and not excluded by the Court, pursuant to North Dakota Rule of Civil Procedure 12(d). Otter Tail's motion "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* North Central's motion for summary disposition is subject to the same standard.
15. Otter Tail, as the movant for summary judgment, bears the burden to prove that there is no genuine issue of material fact and North Central, as the party opposing the motion, will be given all favorable inferences which may reasonably be drawn from the evidence. *Wolff v. Light*, 156 N.W.2d 175 (N.D. 1968). North Central's motion for summary disposition is subject to the same standard.
16. "An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation. ... If any electric public utility is constructing or extending its line, plant or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions". N.D.C.C. § 49-03-01(01).
17. Pre-emption is a "principle (derived from the Supremacy Clause [of the United States Constitution]) that a federal law can supersede or supplant any inconsistent state

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. The Federal District Court in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) only diverges with the North Dakota Supreme Court's analysis in *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990) in one, yet material, finding. "The Court does feel however, that where the service sought is to a Tribal business located upon Trust land, the necessary nexus between Tribal Interests and inherent sovereignty is present." *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955, 961 (D.N.D. 1995).

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

Conclusions of Law

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

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

6. Neither the North Dakota Department of Transportation Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5, the requirement of Otter Tail plant crossing the property of North Central and Central Power Electric Cooperative, Inc., the Amended Gaming Compact between the Tribe and the State of North Dakota, nor the underground easements granted to North Central by the Tribe constitute as sufficient "divestment" to change the Commission's "inherent sovereignty" conclusion so stated above. *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990).

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

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

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

Order

The Commission Orders:

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

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

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

PUBLIC SERVICE COMMISSION



**Kevin Cramer
Commissioner**



**Tony Clark
Chairman**



**Brian P. Kalk
Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-11-701

AFFIDAVIT OF SERVICE CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Cara DeSaye deposes and says that:

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

Order

The envelopes were addressed as follows:

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

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

Cert. No. 7011 2000 0002 0363 3394

Cert. No. 7011 2000 0002 0363 3400

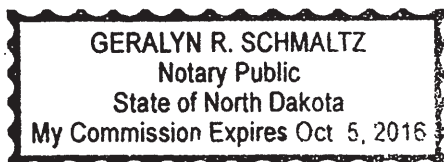
RJ Brunkow
PO Box 900
Highway 5 West
Belcourt ND 58316

Cert. No. 7011 2000 0002 0363 3417

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

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

SEAL



Cara DeSaye

Gerald R. Schmaltz

Notary Public

APPROVED

DATE: 6-14-12

[Signature]

MOTION

June 14, 2012

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

Case No. PU-11-701

I move the Commission adopt the Order granting Otter Tail Power Company's Motion for Dismissal of North Central Electric Cooperative, Inc.'s Formal Complaint and denying North Central Electric Cooperative, Inc.'s motion for Summary Disposition of North Central Electric Cooperative, Inc.'s Formal Complaint, Case No. PU-11-701.

MG

REGISTER OF ACTIONS

CASE NO. 08-2012-CV-01464

North Central Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.

§
§
§
§
§
§
§

Case Type: **Administrative Appeal**
 Date Filed: **08/06/2012**
 Location: **-- Burleigh County**
 Judicial Officer: **Hagerty, Gail**
 Supreme Court Docket Number: **20130075**

PARTY INFORMATION

Appellant	North Central Electric Cooperative, Inc.	<p>Attorneys Debra Lynn Hoffarth</p> <p><i>Retained</i></p> <p>701-852-0381 x0000(W)</p>
Appellee	North Dakota Public Service Commission	<p>Illona A Jeffcoat-Sacco</p> <p><i>Retained</i></p> <p>701-328-2400 x0000(W)</p> <p>Illona A Jeffcoat-Sacco</p> <p><i>Retained</i></p> <p>701-328-2400 x0000(W)</p> <p>Mark Edward Gruman</p> <p><i>Retained</i></p> <p>202-225-2611 x0000(W)</p>
Appellee	Otter Tail Power Company	<p>Paul Reginald Sanderson</p> <p><i>Retained</i></p> <p>701-223-2711 x0000(W)</p> <p>Bruce Gilbert Gerhardson</p> <p><i>Retained</i></p> <p>218-998-7152 x0000(W)</p>
Appellee	Turtle Mounain Band of Chippewa Indians	<p>Tracy Lynn Vigness Kolb</p> <p><i>Retained</i></p> <p>701-223-2711 x0000(W)</p>

EVENTS & ORDERS OF THE COURT

02/25/2013	<p>DISPOSITIONS</p> <p>Dismissed (Judicial Officer: Hagerty, Gail)</p>
08/06/2012	<p>OTHER EVENTS AND HEARINGS</p> <p>Findings Doc ID# 1 <i>of Fact, Conclusions of law, Order of June 14, 2012 hearing/Public Service Commission</i></p>
08/06/2012	<p>Notice Doc ID# 2 <i>of Appeal and Specifications of Error</i></p>

08/06/2012	Civil Filing	Doc ID# 3	
	<i>Undertaking on Appeal to District Court</i>		
08/06/2012	Service Document	Doc ID# 4	
	<i>George A. Koeck, Registered agent; Paul Sanderson; Bruce Gerhardson; Rjay Brunkow, Tracy Vigness Kolb</i>		
08/06/2012	Notice of Assignment and Case Number	Doc ID# 5	
08/15/2012	Service Document	Doc ID# 6	
	<i>Ryan Brankon</i>		
08/15/2012	Service Document	Doc ID# 7	
	<i>Paul Sanderson</i>		
08/15/2012	Service Document	Doc ID# 8	
	<i>Bruce Gerhardson</i>		
08/15/2012	Service Document	Doc ID# 9	
	<i>George A Kueck</i>		
08/15/2012	Service Document	Doc ID# 10	
	<i>Tracy Vigness Kolb</i>		
08/15/2012	Service Document	Doc ID# 11	
	<i>Sheriff Return</i>		
08/21/2012	Service Document	Doc ID# 12	
	<i>Affidavit of Service by Regular Mail</i>		
08/21/2012	Notice	Doc ID# 13	
	<i>Notice to appellant of Actual Costs</i>		
08/21/2012	Certificate	Doc ID# 14	
	<i>Certificate of Record on Appeal with CD attached (in Cupboard)</i>		
08/29/2012	Service Document	Doc ID# 15	
08/29/2012	Notice	Doc ID# 16	
	<i>of Appearance</i>		
09/21/2012	Service Document	Doc ID# 17	
	<i>Affidavit of Service by Mail</i>		
09/21/2012	Stipulation / Agreement	Doc ID# 18	
	<i>Stipulated Briefing Schedule</i>		
09/21/2012	Proposed Order	Doc ID# 19	
	<i>Proposed Order</i>		
09/25/2012	Order	Doc ID# 20	
	<i>Order Approving Stipulated Briefing Schedule</i>		
10/05/2012	Service Document	Doc ID# 21	
	<i>Affidavit of Service by Mail</i>		
10/05/2012	Brief	Doc ID# 22	
	<i>Brief of Appellant North Central Electric Cooperative, Inc.</i>		
11/01/2012	Service Document	Doc ID# 23	
	<i>Affidavit of Service by Certified Mail and Hand Delivery</i>		
11/01/2012	Brief	Doc ID# 24	
	<i>Appellee, ND Public Service Commission Response Brief</i>		
11/05/2012	Service Document	Doc ID# 25	
11/05/2012	Brief	Doc ID# 26	
	<i>Otter Tail Power Company's Appellee Brief</i>		
11/05/2012	Service Document	Doc ID# 27	
11/05/2012	Brief	Doc ID# 28	
	<i>Turtle Mountain Band of Chippewa Indians' Appellee Brief</i>		
11/16/2012	Service Document	Doc ID# 29	
	<i>Certificate of Service</i>		
11/16/2012	Brief	Doc ID# 30	
	<i>Appellant NCEC Reply Brief</i>		
12/06/2012	Service Document	Doc ID# 31	
12/06/2012	Substitution of Attorneys	Doc ID# 32	
	<i>Substitution of Counsel</i>		
01/02/2013	Letter	Doc ID# 33	
	<i>from Atty. Hoffarth on status of case</i>		
01/22/2013	Order	Doc ID# 34	
02/25/2013	Judgment	Doc ID# 35	
	<i>Judgment of Dismissal</i>		
02/27/2013	Service Document	Doc ID# 36	
02/27/2013	Notice of Entry of Judgment	Doc ID# 37	
	<i>Notice of Entry of Judgment of Dismissal</i>		
03/06/2013	Notice	Doc ID# 38	
	<i>Notice of Appeal</i>		
03/06/2013	Service Document	Doc ID# 39	
	<i>Certificate of Service</i>		
03/08/2013	Notice of Filing the Notice of Appeal	Doc ID# 40	
03/11/2013	Letter	Doc ID# 41	
	<i>Email from North Dakota Supreme Court</i>		
04/04/2013	Clerk's Certificate on Appeal	Doc ID# 42	

FINANCIAL INFORMATION

Appellant North Central Electric Cooperative, Inc.	
Total Financial Assessment	80.00
Total Payments and Credits	80.00

	Balance Due as of 04/08/2013			0.00
08/06/2012	Transaction Assessment			80.00
08/06/2012	Mail Payment	Receipt # 08-2012-12627	Hoffarth, Debra Lynn	(80.00)

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.)

**NOTICE OF APPEAL
AND SPECIFICATIONS
OF ERROR**

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, OTTER TAIL POWER COMPANY, AND TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS.

PLEASE TAKE NOTICE that North Central Electric Cooperative, Inc. ("North Central") appeals to the District Court for Burleigh County, South Central Judicial District, from an order of the North Dakota Public Service Commission ("Commission") issued June 14, 2012 and served June 20, 2012, and the Request for Reconsideration being denied due to no action by the Commission on July 28, 2012, determining that it did not have jurisdiction to hear the dispute regarding electric service facilities to the Sky Dancer Casino because it is a tribal business located on tribal trust land and thereby dismissed North Central's Formal Complaint and denied North Central's Motion for Summary Disposition. The Public Service Commission'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. Conclusions of Law, ¶ 5.

North Central specifies the following errors as grounds for the appeal:


1. The Order is not in accordance with the law in at least the following respects:
 - a. In Paragraph 1 of the Conclusions of Law, the Commission determined it had "jurisdiction over the parties and the subject matter of this proceeding." Conclusions of Law, ¶ 1. This conclusion is inconsistent with the remainder of the Commission opinion where it concluded that it did not have jurisdiction to regulate Otter Tail's activities. If the Commission has jurisdiction over the parties and subject matter of the proceeding, it should proceed to determine the matter on the merits.
 - b. The Order is based upon the interpretation of federal case law, without recognition of State law that is binding on the Public Service Commission.
 - c. The Order is not in accordance with judicial precedent and state law that the Public Service Commission has jurisdiction under the Territorial Integrity Act. The Commission is a state agency obliged to follow North Dakota's laws, its statutes and the North Dakota Supreme Court precedents under The Territorial Integrity Act (TIA). N.D.CENT.CODE § 49-03-01 through 49-03-01.5.
 - d. The Order results in an unlawful delegation of authority to the Turtle Mountain Tribe based upon an interpretation of federal law, not State law. The Tribe does not have the inherent sovereignty to regulate the utilities. Devils Lake Sioux Tribe v. PSC, 896 F.Supp. 955, 961-62 (DND 1995). A Tribe cannot reach outside the reservation to regulate a public utility and " 'minimal' burdens on tribal self-government are allowable." In re Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (ND 1990).
 - e. The Commission's determination that it did not have jurisdiction over the matter is not in accordance with the law and long established precedent under Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978) and Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981) and its progeny.
 - f. The Order errs in where it concluded "that the North Dakota Department of Transportation Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5, the requirement of Otter Tail plant crossing the property of North Central and Central Power Electric Cooperative, Inc., the Amended Gaming Compact between the Tribe and the State of North Dakota, nor the underground easements granted to North Central by the Tribe" did not divest the Tribe of its sovereignty. Conclusions of Law, ¶ 6. All of these entities or property rights involve non-Indians,

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

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

Dated this 2nd day of August, 2012.

PRINGLE & HERIGSTAD, PC



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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

**Brief of Appellant
North Central Electric Cooperative, Inc.**

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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.)

**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.

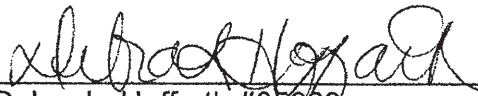
The undisputed facts show a blatant case of wasteful duplication such that Otter Tail should be ordered to remove its extension of service, were it not for the tribal authority issue. (*COR #52, PSC Order, Conclusions of Law No. 8.*) Otter Tail cannot support its action and it lacks standing to assert 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.

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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:

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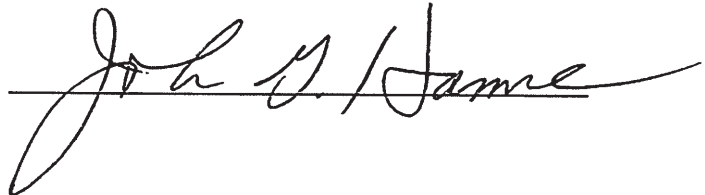
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John Hamre further states that on the **1st** day of **November 2012**, he hand delivered the original of the same to the following:

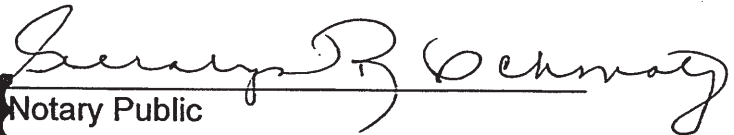
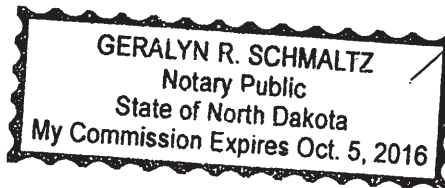
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Each address shown is the respective addressee's last reasonably ascertainable post office address.



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

SEAL


Notary Public

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.)

North Dakota Public Service)

Commission, Otter Tail Power)

Company, and Turtle Mountain)

Band of Chippewa Indians)

Appellees.)

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

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: 

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By: /s/ Bruce Gerhardson
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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.)

North Dakota Public Service)

Commission, Otter Tail Power)

Company, and Turtle Mountain Band)

of Chippewa Indians,)

Appellees.)

AFFIDAVIT OF MAILING

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:

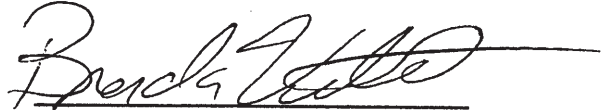
Otter Tail Power Company's Appellee Brief

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.

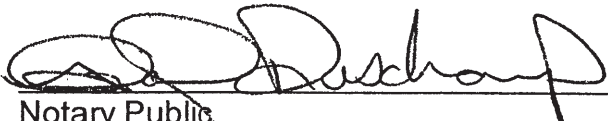
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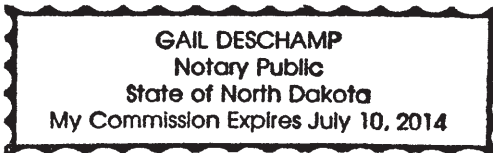
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Rjay Brunknow
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Brenda Vitek

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


Notary Public



STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

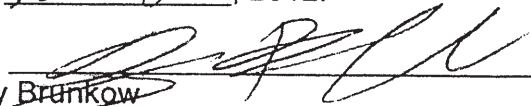
IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO: 08-2012-C-1464

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

**TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS'
APPELLEE BRIEF**

The Turtle Mountain Band of Chippewa Indians intervened in the underlying case before the North Dakota Public Service Commission for the limited purpose of asserting its inherent sovereignty over the determination of which utility will provide electric service to the Sky Dancer Casino. The Turtle Mountain Band of Chippewa Indians asserts it possesses the 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 Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). The Tribe's position is in opposition to the relief sought by North Central Electric Cooperative in this appeal. The Tribe respectfully requests this Court affirm the dismissal of North Central Electric Cooperative's Complaint.

Dated this 2nd day of November, 2012.

By: 
Rjay Brunkow
Tribal Attorney
Turtle Mountain Band of Chippewa Indians
P.O. Box 900
Belcourt, ND 58316
Telephone (701) 477-6121

Dated this 2nd day of November 2012.

By: Tracy Vigness Kolb
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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.)

North Dakota Public Service)

Commission, Otter Tail Power)

Company, and Turtle Mountain Band)

of Chippewa Indians,)

Appellees.)

AFFIDAVIT OF MAILING

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:

Turtle Mountain Band of Chippewa Indians' 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.

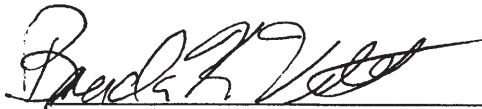
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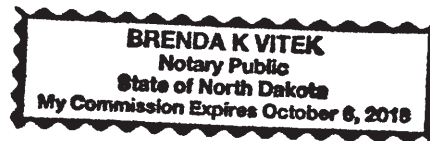
Paul Sanderson
Zuger Kirmis & Smith
PO Box 1695
Bismarck, ND 58502


Victoria Szklarski

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



Notary Public



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2012-CV-1464

North Central Electric Cooperative, Inc.,

Appellant,

vs.

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

Appellees.

ORDER

On October 5, 2012, North Central Electric Cooperative filed a brief, asking this Court to reverse and remand the decision of the Public Service Commission (PSC) and direct them to enter summary disposition in favor of themselves. North Central Electric Cooperative argues that the PSC incorrectly decided they lack regulatory power over the activities of Otter Tail Power Company. On November 5, 2012, Otter Tail Power Company filed a response brief arguing that the PSC was correct in determining that they lack regulatory authority in this situation, because the Turtle Mountain Band of Chippewa has the inherent sovereignty to contract with Otter Tail Power Company.

LAW AND DECISION

The Administrative Agencies Practice Act governs this Court's review of an administrative agency's decision to suspend an individual's driving privileges. N.D.C.C. § 28-32-46. "Courts exercise limited review in appeals from administrative agency decisions, and the agency's decision is accorded great deference." *Berger v.*

N.D. Dep't of Transp., 2011 ND 55, ¶ 5, 795 N.W.2d 707. This Court must affirm the agency's decision, unless the decision violates any of the statutorily defined reasons. N.D.C.C. § 28-32-46.

Both parties rely significantly on *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) to support their respective positions. Appellants, North Central Electric Cooperative, argue that the controlling authority is the *Application of Otter Tail Power Co.* case, while Appellee, Otter Tail Power Company, assert the narrow exception delineated in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n* should be controlling. The three requirements of the *Rooker-Feldman* doctrine have been met which would normally make the decision in *Application of Otter Tail Power Co.* mandatory authority. 460 U.S. 462 (1983). A more recent United States Supreme Court decision indicates this is not always the case. In *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, the United States Supreme Court determined that the *Rooker-Feldman* doctrine is inapplicable to the decisions rendered by a state administrative agency. 535 U.S. 635, 644 (2002). This more recent decision would make *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n* mandatory authority in regards to the instant case.

The Court does not find a recitation of the facts necessary, as both parties have stipulated to the facts contained in the record. After a detailed analysis of the decisions rendered in *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995), the PSC determined that there was one

material difference between the two cases. The Court in ***Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*** stated, "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." 896 F.Supp. 955, 961 (D.N.D. 1995). The PSC properly found that the Sky Dancer Casino is tribally owned and is also located on tribal trust property. Due to these facts and the controlling authority, the PSC correctly determined it would be a violation of the Tribe's inherent sovereignty to execute the PSC's power under the Territorial Integrity Act. See ***Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n***, 896 F.Supp. 955 (D.N.D. 1995).

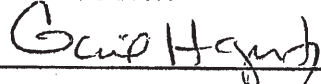
The narrow exception delineated in ***Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*** clearly applies to the facts that were before the PSC. 896 F.Supp. 955 (D.N.D. 1995). Based upon the facts before the PSC they could reasonably have concluded that they do not possess any regulatory authority powers over Otter Tail's activities in this situation.

CONCLUSION

The PSC's decision is in accordance with the law, supported by a preponderance of the evidence, and their findings sufficiently address the evidence provided by North Central and is accordingly *affirmed*.

January 18, 2013.

BY THE COURT:



Gail Hagerty
District Judge

CC: Debra L. Hoffarth Paul R. Sanderson Bruce Gerhardson

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc.,)

Plaintiff,)

vs.)

North Dakota Public Service Commission,)

Otter Tail Power Company, and)

Turtle Mountain Band of Chippewa Indians,)

Defendants.)

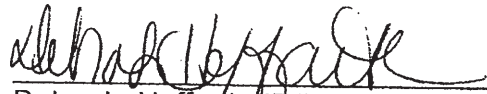
NOTICE OF APPEAL

Case No. 08-2012-CV-01464

NOTICE IS HEREBY GIVEN that North Central Electric Cooperative, Inc., the above-named Plaintiff, hereby appeals to the North Dakota Supreme Court from the Order issued on January 18, 2013, and the Judgment entered in this action on February 25, 2013.

Dated this 6th day of March, 2013.

PRINGLE & HERIGSTAD, PC



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