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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 8<sup>th</sup> 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 (8<sup>th</sup> 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 or 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.

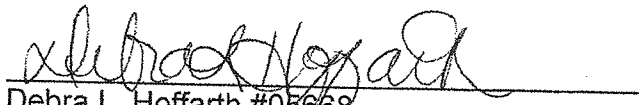
The undisputed facts show a blatant case of wasteful duplication such that Otter Tail should be ordered to remove its extension of service, were it not for the tribal authority issue. (COR #52, PSC Order, Conclusions of Law No. 8.) Otter Tail cannot support its action and it lacks standing to assert 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 5<sup>th</sup> 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, )

Civil File No. 08-2012-CV-01464

v. )

Agency Case No. PU-11-701

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

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., 7<sup>th</sup> 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.**

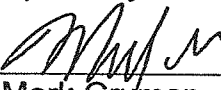
The Commission defers to its argument so articulated in I.B. above.

**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 1<sup>st</sup>, 2012

Respectfully submitted:

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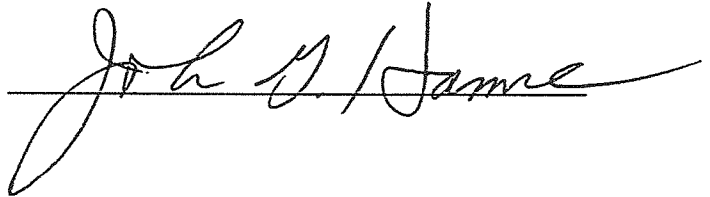
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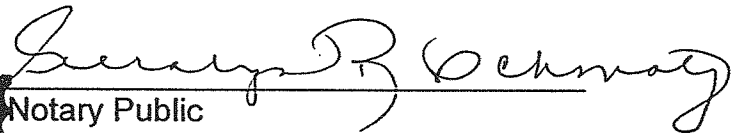
John Hamre further states that on the 1<sup>st</sup> day of November 2012, he hand delivered the original of the same to the following:

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

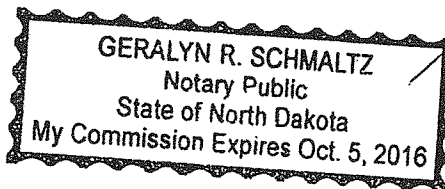
Each address shown is the respective addressee's last reasonably ascertainable post office address.



Subscribed and sworn to before me this 1<sup>st</sup> 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 7<sup>th</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 2<sup>nd</sup> day of November, 2012.

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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:

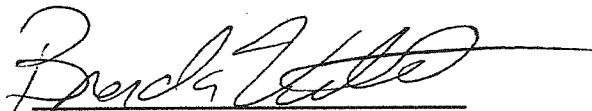
**Otter Tail Power Company's Appellee Brief**

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.

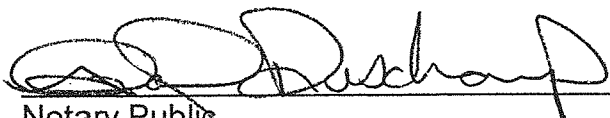
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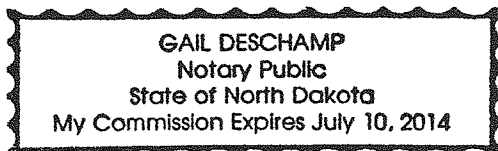
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Brenda Vitek

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

  
Notary Public



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

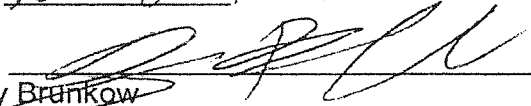
IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO: 08-2012-C-1464

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 Brankow  
Tribal Attorney  
Turtle Mountain Band of Chippewa Indians  
P.O. Box 900  
Belcourt, ND 58316  
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Dated this 2nd day of November 2012.

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STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
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:

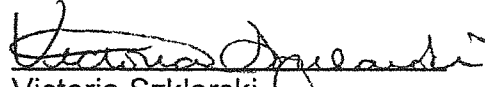
**Turtle Mountain Band of Chippewa Indians' Appellee Brief**

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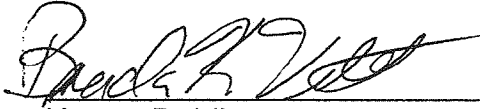
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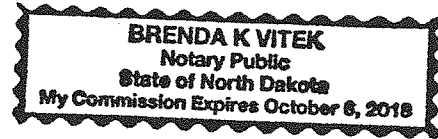
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Victoria Szklarski

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

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).

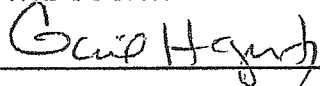
The narrow exception delineated in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n* clearly applies to the facts that were before the PSC. 896 F.Supp. 955 (D.N.D. 1995). Based upon the facts before the PSC they could reasonably have concluded that they do not possess any regulatory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

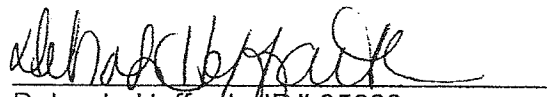
**NOTICE OF APPEAL**

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 6<sup>th</sup> day of March, 2013.

**PRINGLE & HERIGSTAD, PC**



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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. )

**JUDGMENT OF DISMISSAL**

Based upon the Order issued by the Honorable Gail Hagerty on January 18, 2013,

**IT IS HEREBY ORDERED AND ADJUDGED** that Appellant North Central Electric Cooperative, Inc.'s, appeal be dismissed with prejudice and without costs to any party.

Dated this 25<sup>th</sup> day of February 2013.

Debra Simenson  
Debra Simenson  
Clerk of District Court *by*  
*Spring J. Dorsch, Deputy Clerk*

**RECEIVED & FILED**

**FEB 25 2013**

Ck. of Crt. Burleigh Co.

cc. Simenson