

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Number 20130075

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

NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

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

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

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[¶1.] North Central Electric Cooperative, Inc. (“North Central”) filed its Appellant’s Brief on April 22, 2013. Otter Tail Power Company (“Otter Tail”), the Turtle Mountain Band of Chippewa Indians (“Tribe”) and the Public Service Commission (“PSC”) filed their Appellee’s Briefs on May 28, 2013. Oral arguments are scheduled for June 11, 2013. North Central will rely chiefly on its Appellant Brief and the record to refute the factual and legal assertions raised in Appellees’ Briefs. However, North Central does believe a Reply Brief is necessary to respond to Appellees’ arguments.

[¶2.] **LAW AND ARGUMENT**

[¶3.] This is an egregious case of interference and wasteful duplication under the Territorial Integrity Act (“TIA”). North Central began providing service to the Sky Dancer Hotel and Casino (“Casino”) on December 2, 1998. App. 7, ¶ 3. At the time of the Complaint with the PSC, North Central had seven metered services on the Casino property. *Id.* Otter Tail had to construct 2½ miles of build-out and 3 miles of underbuild, cross North Dakota State Highway 5, cross Central Power Electric Cooperative, Inc.’s transmission line, cross North Central’s distribution line, and utilize North Central’s easement to provide electric service to the Casino. Transcript p. 101, ll. 16-21; App. 7, ¶ 9; App. 62, ¶ 10. Otter Tail’s closest consumer was three miles from the Casino. App. 70, ¶ 10. The Appellees all agree that the PSC has no regulatory authority over Otter Tail’s blatant disregard of the TIA.

[¶4.] The PSC argues that it does not have jurisdiction over the Tribe’s regulation of electric service to a tribal-owned business on tribal-owned land and

that the only facts relevant to its inquiry are whether or not the land is tribal-owned and whether it involves a tribal-owned business. PSC's Brief, ¶¶ 6, 16. Any analysis of the *Montana* factors is superfluous in the PSC's opinion. *Id.* ¶ 16. The PSC's analysis of the law is wrong because the Courts are clear that the *Montana* analysis is used to make this determination. Application of Otter Tail Power Co., 451 N.W.2d 95, 104-07 (N.D. 1990) ("Otter Tail 1990"); Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n, 896 F.Supp. 955, 961 (D.N.D. 1995) ("Devils Lake Sioux Indian Tribe"); Baker Electric Cooperative, Inc. v. Chaske, 28 F.3d 1466, 1477 (8th Cir. 1994).

[¶5.] The Turtle Mountain Band of Chippewa Indians argues that federal law preempts the regulatory authority of the PSC in this case. Tribe's Brief, ¶ 8. The Tribe cites the Indian Tribal Energy Development and Self-Determination Act of 2005 which encourages Indian self-government, preempts PSC regulatory authority. *Id.* at ¶ 13. This argument was not made below and should be disregarded by the Supreme Court. Even if the Court accepts this argument, there is no preemption of state law by this Act. 25 U.S.C. § 3501 *et. seq.* The Tribe further argues that its "choice was influenced by economic considerations and current and future costs savings because of a less expensive rate structure." *Id.* at ¶ 14. However, the record is clear that the Tribe presented no evidence, no exhibits, and no testimony regarding the economic impact of the request for service from Otter Tail on how the regulation of the electric service provider imperiled tribal authority. The Tribe bears the burden of establishing interference with its sovereign authority or that the PSC's actions will adversely affects its

tribal health or welfare. Otter Tail 1990, 451 N.W.2d at 105. The Tribe's failure to adduce evidence is fatal. Simply stating that the Tribe was asserting its inherent sovereignty is not enough. It must do more.

[¶6.] Otter Tail argued that the PSC lacks regulatory jurisdiction over electric service to the Casino because the Tribe has the inherent authority to regulate electric service to a tribal business located on tribal owned land. North Central believes that the position of the Appellees are not in accordance with the law.

[¶7.] **I. THE TIA APPLIES AND THE PSC HAS REGULATORY AUTHORITY.**

[¶8.] The TIA is at the heart of this case. The TIA has been the law governing provision of electric service in rural areas since 1965. Public utilities, including Otter Tail, unsuccessfully challenged the constitutionality of the TIA. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 425 (N.D. 1967). This case is an attempt to do an end-run around the TIA. The TIA's purpose is to minimize wasteful duplication of investment, facilities, and services and to minimize conflicts between electric public utilities and rural electric cooperatives. Capital Elec. Cooperative, Inc. v. Public Serv. Comm'n of the State of North Dakota, 534 N.W.2d 587, 590, 592 (N.D. 1995); see also Cass County Elec. Cooperative, Inc. v. Wold Properties, Inc., 249 N.W.2d 514, 521 (N.D. 1976).

[¶9.] The TIA requires an electric public utility to obtain a certificate of public convenience and necessity before it may construct an extension of its plant, system, transmission or distribution lines to serve any customer outside the limits of any municipality. N.D.C.C §§ 49-03-01 and 49-03-01.1. Appellees argue that

the PSC correctly analyzed the applicable law when it determined it had no regulatory authority under the TIA in this case and Otter Tail was not required to acquire the requisite certificate of public convenience and necessity. The PSC erred by not enforcing the TIA.

[¶10.] Appellees rely on cases from the Fort Totten Indian Reservation and do not cite the case affecting the Tribe involved in this case. In 1984, the North Dakota Supreme Court reviewed the jurisdiction of the PSC over service to the Bureau of Indian Affairs School on the Turtle Mountain Indian Reservation. Application of Otter Tail Power Co., 354 N.W.2d 701, 702 (N.D. 1984) (“Otter Tail 1984”). In that case, the North Dakota Supreme Court determined that Otter Tail had agreed to follow PSC regulations when it purchased the BIA’s electrical system in 1968. Id. at 703. The North Dakota Supreme Court found that the PSC had jurisdiction and such jurisdiction did not infringe upon the rights of tribal self-government. Id. at 705. This is still good law in North Dakota.

[¶11.] In 1990, the North Dakota Supreme Court again visited the issue regarding jurisdiction of the PSC on the Fort Totten Indian Reservation. Otter Tail 1990, 451 N.W.2d 95. Otter Tail asserted the PSC did not have jurisdiction over Otter Tail’s service to DTI because assumption of jurisdiction would unlawfully interfere with the Indian Tribe’s sovereign rights of self-government. Id. at 96-97. The North Dakota Supreme Court concluded that the PSC did have jurisdiction. Id. at 98. This is the controlling law in North Dakota on this issue.

[¶12.] As part of its decision, the Court considered 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 determined that the Tribe had no inherent sovereignty to regulate the choice of electric suppliers. *Id.* at 103. Also, the electric supply system was 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." *Id.* at 105. 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. *Id.* at 104-06. 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.* at 107.

[¶13.] 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.

[¶14.] Appellees urges this Court to find that Devils Lake Sioux Indian Tribe is the binding authority and is directly on point with this case. It is not. In the Devils Lake Sioux Indian Tribe case, the Tribe entered evidence to show how the PSC's actions would affect its tribal sovereignty. 896 F.Supp. at 957-60. The

evidence included its treaties with the United States, the reservation location, the reservation size, the percentage of fee land, unemployment statistics, and census information. Id. The Court also reviewed evidence regarding rates and existing loads for it to determine the impact of the PSC's regulation over the matter on the Spirit Lake Tribe's health and welfare. Id. None of this evidence was presented in this case. The Devils Lake Sioux Indian Tribe case is a fact specific situation dealing with the Devils Lake Sioux Indian Tribe in 1995 and it should not be applied here.

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

[¶16.] The PSC failed to recognize that Indian Law jurisprudence has changed and gave little analysis of how the law has changed since the Devils Lake Sioux Indian Tribe litigation. See generally, Hicks, 533 U.S. at 361 (holding that a state can exercise regulatory authority on tribal land); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650-51 (2001) (stating that tribal sovereignty is limited to those matters that are "necessary to protect tribal self-government or to control internal relations" as is consistent with the tribe's dependent status); Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328-29, 341 (2008)

(indicating that a Tribe lacks jurisdiction over non-Indian conduct on non-Indian land and non-Indian conduct must “imperil the subsistence of” the Tribe or “avert catastrophic consequences”).

[¶17.] The United States Supreme Court has made clear that Indian Tribes have very limited jurisdiction over non-members. Tribal sovereignty is limited to those matters that are “necessary to protect tribal self-government or to control internal relations” as is consistent with the tribe’s dependent status. Atkinson, 532 U.S. at 650-51. In fact, in order for non-Indian conduct to be regulated by a Tribe, the conduct must imperil the Tribe. Plains Commerce, 554 U.S. at 341. There is no evidence that there is any harm to the Tribe or its members by the PSC’s regulation of Otter Tail’s activities in providing electric service to the Sky Dancer Casino. The PSC’s regulation does not imperil the Tribe. The Tribe’s preference for Otter Tail is nothing more than one factor to consider under the TIA and is not controlling. Otter Tail 1990, 451 N.W.2d at 104.

[¶18.] Appellees gloss over the important facts that Otter Tail utilized a state right-of-way, crossed Central Power’s electric service, utilized North Central’s easement, and crossed North Central’s distribution lines to provide electrical service to the Sky Dancer Casino. Transcript p. 101, ll. 16-21; App. 7, ¶ 9; App. 62, ¶ 10. These are property interests held by non-Indians, entitled to protection and carrying with them limitations on tribal sovereignty. The Tribe has no authority over non-Indian conduct on state highways. Strate v. A-1 Contractors, 520 U.S. 438, 456, 117 S.Ct. 1404 (1997). When the Tribe provided the easements for the state highways and electric, it gave up its “gatekeeping right”

and its regulatory jurisdiction over the land. Id.; see also Big Horn County Elec. Cooperative, Inc. v. Adams, 219 F.3d 944, 950 (9th Cir. 2000) (holding that the cooperative's "rights-of-way are the equivalent of non-Indian fee land). Without the utilization of the non-Indian property rights (state highway right-of-way, North Central's easement, and Central Power's easement), Otter Tail could not have provided electric service to the Sky Dancer Casino. It is important to note that the Tribe has waived sovereign immunity under its Gaming Compact. App. 62 and 70, ¶ 12; Docket No. 14 of District Court (Ex. B); Docket No. 7 of PSC (Ex. B), pp. 20-58.

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

[¶20.] **II. THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE TRIBE'S AUTHORITY IS IMPERILED.**

[¶21.] In this case, the Tribe presented no evidence regarding the effects on its political integrity, health or welfare. This is fatal to the Appellees' arguments. Without the Tribe's evidence regarding the effects on the Tribe's political integrity or the health and welfare of its members, the PSC's authority is not abrogated. Despite having no evidence from the Tribe, the PSC relied on facts from the Otter Tail 1990 case instead of analyzing the facts of this case. App. 72-

76. Each case regarding tribal sovereignty or jurisdiction is fact and case specific. Utilizing the facts from other cases to make findings in this case was error.

[¶22.] Appellees also argue that the Tribe's utility code, makes this case distinguishable from Otter Tail 1990 and allows for the Tribe to assert its sovereign authority. The Tribal Utility Code was not a part of the record. No evidence was presented that the Tribe in this case has in fact regulated utilities. Nothing in the record shows that the Tribe or any of its governmental entities relied upon the Tribal Code in its actions vis-à-vis North Central or Otter Tail. Most importantly, the courts have ruled that the Tribe does not have the authority to regulate utilities. Otter Tail 1990, 451 N.W.2d at 104 (holding that an Indian Tribe does not have inherent authority to regulate choice of electric service providers); Devils Lake Sioux Indian Tribe, 896 F.Supp. at 961-62 (holding that an Indian Tribe does not have inherent authority to regulate electric utilities); Rolling Frito-Lay Sales LP v. Stover, 2012 WL 252938, *3 (D. Ariz. 2012) (indicating that a Tribe's regulatory authority cannot exceed its legislative authority.)

[¶23.] **CONCLUSION**

[¶24.] Based on the arguments above, North Central respectfully requests that the PSC's order be reversed and the matter be remanded to the PSC for summary disposition in favor of North Central.

Dated this 5th day of June, 2013.

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CERTIFICATE OF COMPLIANCE

[¶25.] The undersigned, as attorney for the Appellant North Central Electric Cooperative, Inc., and as the author of the attached brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance does not exceed 2,500.

Dated this 5th day of June, 2013.

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vs.)	District Court No.
)	08-2012-CV-01464
North Dakota Public Service Commission,)	
Otter Tail Power Company, and)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Defendants/Appellee.)	

AFFIDAVIT OF SERVICE

I, Jill Stanislawski, certify that on the 5th day of June, 2013, the following document:

Reply Brief of Appellant North Central Electric Cooperative, Inc.

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Jill Stanislawski
Jill Stanislawski

Subscribed and sworn to before me this 5th day of June, 2013.

JUDITH A TOSSETT
Notary Public
State of North Dakota
My Commission Expires March 26, 2016

Judith A Tossett
Notary Public
For the State of North Dakota
My Commission Expires: _____