

N.D. Supreme Court

**North Central Electric Coop., Inc. v. Public Service Commission - AE3**

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20130075

Burleigh County District Court No. 08-2012-CV-01464

NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

Plaintiff/Appellant,

vs.

NORTH DAKOTA PUBLIC SERVICE COMMISSION,  
OTTER TAIL POWER COMPANY AND  
TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS  
Defendants/Appellees.

BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

APPEAL FROM THE DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

BURLEIGH COUNTY, STATE OF NORTH DAKOTA

Ryan M. Norrell (ID#06582)  
Special Assistant Attorney General  
State Capitol 12th Floor  
600 E. Boulevard Ave. Dept. 408  
Bismarck, ND 58505-0480  
Telephone (701) 328-2400  
Facsimile (701) 328-2410  
rmnorrell

Attorney for North Dakota Public Service Commission

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#### STATEMENT OF THE ISSUES

1. Whether the North Dakota Public Service Commission properly decided it lacked regulatory authority over electric service to the Sky Dancer Casino on Turtle Mountain Reservation.

#### STATEMENT OF THE CASE

2. North Central Electric Cooperative, Inc. ("North Central") commenced this case by filing a Complaint against Otter Tail Power Company ("OTP") with the North Dakota Public Service Commission ("PSC") 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. App. 5. OTP moved for an Order dismissing North Central's Complaint because the PSC had no regulatory jurisdiction over the Turtle Mountain Band of Chippewa Indians (Tribe) Tribal Resolution permitting OTP to supply electric service to the tribally-owned Sky Dancer Casino ("Casino") located on tribal-trust land within the exterior boundaries of the Turtle Mountain Reservation. App. 27-28. The PSC ordered North Central's Complaint be dismissed, concluding it had no regulatory authority over electric service to the Sky Dancer Casino. App. 67. North Central appealed the PSC's Order to the district court. App. 84. The district court affirmed the PSC's Order dismissing North Central's Complaint. App. 166. North Central now appeals that decision. App. 169.

#### STATEMENT OF FACTS

3. Co-Appellee OTP's recitation of the Facts in this matter are essentially correct. On December 9, 2011 OTP 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. App. 69. North Central has served the Sky Dancer campus with an overhead distribution line since December 2, 1998. 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 OTP shall provide electric service to the Sky Dancer Casino. *Id.* The Sky Dancer Casino is located in North Central's service area. *Id.* Electric 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.* OTP's nearest pre-existing facility to the Sky Dancer campus is a transmission line approximately 1000 feet away. *Id.* at 70.

### STANDARD OF REVIEW

4. Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, 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 will not reverse an agency decision 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.

N.D.C.C. § 28-32-46; *Dakota Res. Council v. N.D. PSC*, 2012 ND 72, ¶ 5, 815 N.W.2d 286. 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). In reviewing an agency's findings of fact, this Court does not substitute its judgment for that of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. 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).

## LAW AND ARGUMENT

5. The PSC respectfully asks this Court to affirm its June 14, 2012 Order dismissing North Central's Complaint. The PSC's position is that the Order is in accordance with the law, its conclusions of law supported by the facts and the facts are supported by the preponderance of the evidence. Based on the facts and law at hand, and the PSC's technical expertise in this realm, the PSC does not have jurisdiction over the Tribe's regulation of electric service to a tribal-owned business on tribal-owned land.

6. The PSC determined it had no jurisdiction under North Dakota's Territorial Integrity Act because the question before the PSC was simply, "May the Tribe regulate a non-member utility which furnishes electrical power to a business within the Reservation, belonging to the Tribe and located on land owned by the Tribe?" *Application of Otter Tail Power Co.*, 451 N.W.2d 95, at 107 (N.D. 1990) (*OTP 1990*). If the Tribe may regulate the utility, then North Dakota's Territorial Integrity Act does not apply and a Certificate of Public Convenience and Necessity is not required by the utility. All that is needed to provide electrical power is authorization from the Tribe and the PSC lacks authority over the Tribal regulation.

7. The facts and argument in the *OTP 1990* case are laid out in detail by co-appellee, OTP's Appellee's Brief (hereby incorporated by reference) in Section II of "Law and Argument." In that case, the Devil's Lake Sioux Tribe had long acquiesced to PSC jurisdiction over the reservation and failed to even make an appearance before the PSC or this Court. *Id.* at 97-98. The Court determined OTP lacked standing to assert the Tribe's interests, but entertained the Tribal interests and explored the relationship between state regulation and Tribal sovereignty. Despite the long-time acceptance of PSC jurisdiction, OTP claimed the Tribe had regulatory authority over *all* electric service on the Reservation. Looking to *Montana v. United States*, 450 U.S. 544 (1981), as mandatory authority, as well as *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), this Court determined that the Tribe did not have the authority to regulate a non-member utility.

8. In beginning their analysis of the Devil's Lake Sioux Tribe's claims in *OTP 1990*, the North Dakota Supreme Court first analyzed the characterization of non-Indian ownership and activities on the reservation. "As in *Brendale*, this 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 determined that, generally, "an Indian tribe's inherent sovereignty is generally divested as to all external relations with non-tribal members absent express congressional delegation." *Id.* The *OTP 1990* Court found no such "express congressional delegation" granting authority over non-member utilities. *Id.* 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.*

9. Looking to the so-called *Montana* exceptions<sup>(1)</sup> to the general rule, this Court found there was no authority to for the Tribe to regulate all electric service on the Reservation. The 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.* This Court therefore concluded "that, under the circumstances, the Tribe does not derive power from its inherent sovereignty to regulate the choice of electric suppliers." *Id.*

10. In her concurring opinion in the *OTP 1990* case, Justice Levine concurred in the result of the decision but noted that if the Tribe had been before the court addressing the regulatory question, the question "would be only: May the Tribe regulate a non-member utility which furnishes electrical power to a business within the Reservation belonging to the Tribe and located on land owned by the Tribe?" *Id.* at 108. Invoking *Montana*, Justice Levine noted the answer to that "much narrower" question "is 'yes.'" *Id.*

11. As noted in Appellant and Co-Appellee, *OTP's* briefs, the question of regulation of non-member utilities on the Reservation continued through various courts and litigation culminating in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995). (*Devils Lake Sioux*), The *Devils Lake Sioux* case addressed Justice Levine's much narrower question, a question that has not yet been brought before this Court. *Devils Lake Sioux* involved the same parties as the *OTP 1990* case and, of importance to the district court, was the fact that the Tribe had recently enacted a comprehensive Tribal Utility Code. *Id.* at 958-959. Another distinguishing factor was the fact that the Tribe itself had intervened in the *Devils Lake Sioux* matter and therefore the question of standing to assert tribal interests had been met. *Id.*

12. After reviewing both *Montana* and *Brendale*, the district court determined that while there was "no justification for the exercise of regulatory authority over the provision of electrical service" within the entire reservation there was an exception whereby the Tribal regulatory authority may be granted over electric service. *Devils Lake Sioux*, at 961. This

narrow exception is the exact situation anticipated by Justice Levine in her *OTP 1990* concurrence. The district court concluded "that where the service sought is to a Tribal business located upon Trust land, the necessary nexus between Tribal Interests and inherent sovereignty is present." *Id.*

13. In drawing its narrow conclusion, the *Devils Lake Sioux* court cited the *Montana* court: "Indian tribes have lost any right of governing every person within their limits *except themselves*." *Montana*, at 565, at 1258. Emphases added. From that principle, the *Montana* court goes on to list its two exceptions under which "tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over *non-Indians*." *Id.* Emphases added, see 1, *supra*.

14. Since the Tribe itself was before the *Devils Lake Sioux* court, asserting its authority to regulate electricity to a tribal-owned business on tribal property and because a comprehensive electric code had been enacted by the Tribe, the district court held:

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.

*Id.* In so finding, the district court did not foray into a novel area of law, but simply articulated the long-standing status of Indian law in regards to regulation of Tribal members. This holding preserves the integrity of the *Montana* and *Brendale* decisions, as well as the *OTP 1990* decision, especially insofar as it answers Justice Levine's narrow question in her concurring opinion.

15. The United States Supreme Court has recently upheld this line of reasoning in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 128 S.Ct. 2709 (2008). The *Plains Commerce Bank* Court stated that "the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation." *Id.* at 327, at 2718.

16. In the matter at hand, the Public Service Commission examined the status of the law in North Dakota and the United States. The *OTP 1990* case is controlling in the State of North Dakota and the *Devils Lake Sioux* case carves an extremely limited exception to the rule. Appellant asserts that no factual findings were entered by the Commission on this matter. Under the *Devils Lake Sioux* analysis, the current law, which all electric utilities and the PSC have operated since 1995, the only facts that were necessary were stipulated to by the parties. App. 55-56. The only facts that mattered were whether this was a tribal-owned business on tribal-owned property. Once those two facts have been established, an analysis of the *Montana* exceptions and the *Brendale* interpretation are superfluous, because as stated in *Plains Commerce Bank* and *Devils Lake Sioux*, the tribe has authority to regulate electrical service in this narrow circumstance, as foreseen by Justice Levine in

*OTP 1990*. Justice Levine's "much narrower" question can be addressed in this matter because the Tribe had intervened in the matter.

17. The PSC respectfully requests this court for deference in the matter, in accordance with *Berger*, at ¶5 and *Montana-Dakota Utilities Co.*, at 312. The PSC has been granted authority to regulate electric utilities in the State, a highly technical task, and as such has appreciable expertise on the matter. Applying the current law in the State regarding electrical service to tribal-owned facilities on tribal-owned properties, the PSC determined it did not have the authority to exercise jurisdiction in this matter. If the PSC were to exercise authority in this matter it would violate tribal sovereignty and a long line of precedent.

### CONCLUSION

18. Acknowledging the narrow legal exception to the State TIA, granting tribal sovereignty in circumstances where the service in question is to tribal-owned facilities on tribal-owned land, the PSC properly applied the law to the stipulated facts in the case at hand. For these and the above-mentioned reasons, The North Dakota Public Service Commission respectfully requests that this Court affirm its Order dismissing the Complaint of North Central.

Dated this 28th day of May, 2013.

Ryan M. Norrell  
Special Assistant Attorney General  
State Bar ID No. 06582  
North Dakota Public Service Commission  
600 E. Boulevard Avenue, Dept. 408  
Bismarck, ND 58505  
701-328-2421

Attorney for North Dakota Public Service Commission

1. The two exceptions to this rule, regarding authority of the Tribe to regulate non-Indians on the Reservation, as 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." *See OTP 1990*, at 99.