

Hamre, John G.

From: Jeffcoat-Sacco, Illona
Sent: Friday, May 16, 2008 9:53 AM
To: Hamre, John G.
Subject: FW: Otter Tail Corporation and MDU Advance Determination of Prudence Review Case No PU 06 481 Case No PU 06 482
Attachments: Applicants Response to Intervenors Motion to Suspend.PDF

John-please docket and distribute the electronic copy as the other will arrive next week. Thanks.

Illona A. Jeffcoat-Sacco
ND PSC
701-328-2407 (fax 2410)
ijs@nd.gov

RECEIVED

MAY 16 2008

PUBLIC SERVICE COMMISSION

From: Kristen A. Swenson [<mailto:kswenson@lindquist.com>]
Sent: Friday, May 16, 2008 9:37 AM
To: Jeffcoat-Sacco, Illona; -Info-Public Service Commission
Cc: Mark Bring; Kuntz, Dan; jwbreen2@bis.midco.net; dschlissel@synapse-energy.com; mark@drcinfo.com; Don.Ball@MDU.com; claseur@gmail.com; Todd J. Guerrero; Lisa A. Crum; awahl@nd.gov; denise.emineth@midconetwork.com
Subject: Otter Tail Corporation and MDU Advance Determination of Prudence Review Case No PU 06 481 Case No PU 06 482

Hello,

Attached please find the Applicants' Response to Intervenors' Motion to Suspend Procedural Schedule and Motion to Take Administrative Notice filed today in regard to the above referenced matter. A copy is also being served by mail to the attached service list. Please contact me if you have trouble opening the attached documents.

Thank you,

Kristen A. Swenson
Legal Administrative Assistant
Lindquist & Venum
80 South 8th Street
Minneapolis, MN 55402
612-371-3227 (Work)
612-371-3207 (Fax)
kswenson@lindquist.com

318 **PU-06-481** Filed: 5/16/2008 Pages: 8
Applicants' Response to Intervenors' Motion to Suspend Procedural Schedule and Motion to Take Administrative Notice

Otter Tail Corporation and Montana-Dakota Utilities Co.

Todd Guerrero, Lindquist & Venum PLLP

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Otter Tail Corporation and Montana-Dakota Utilities Co.

Todd Guerrero, Lindquist & Venum PLLP

NOTICES

IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that, except to the extent expressly provided to the contrary, any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402-2274
TELEPHONE: 612-371-3211
FAX: 612-371-3207

IN DENVER:
600 17TH STREET, SUITE 1800 SOUTH
DENVER, CO 80202-5441
TELEPHONE: 303-573-5900
FAX: 303-573-1956

ATTORNEYS AT LAW

www.lindquist.com

TODD J. GUERRERO
612/371-3258
tguerrero@lindquist.com

May 16, 2008

VIA REGULAR MAIL & EMAIL

Ilona Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
State Capitol
Bismarck, ND 58505

**Re: Montana Dakota Utilities Co., and Otter Tail Corporation; Advance
Determination of Prudence, Big Stone II Generating Station
Case Nos. PU-06-481 and PU-06-482**

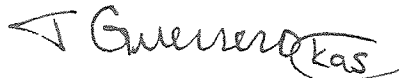
Dear Ms. Jeffcoat-Sacco:

Enclosed for filing in the above matter please find an original and seven copies of the Applicants' Response to the Intervenors' Motion to Suspend Procedural Schedule and Motion to Take Administrative Notice along with an Affidavit of Service.

Please direct any questions to Montana-Dakota's Mr. Daniel Kuntz (701-530-1016), Otter Tail's Mr. Mark Bring (218-998-7152), or to the undersigned.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink that reads "Guerrero" with "kas" written in a smaller, cursive script below it, all enclosed within a hand-drawn oval.

Todd J. Guerrero

TJG/kas
cc: Attached Service List (w/encl.)

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Corporation
Advance Determination
of Prudence Application

Case No. PU-06-481
Case No. PU-06-482

Montana-Dakota Utilities Co.,
A Division of MDU Resources Group, Inc.
Advance Determination
of Prudence Application

**APPLICANTS' RESPONSE TO
INTERVENORS' MOTION TO
SUSPEND PROCEDURAL
SCHEDULE AND MOTION TO
TAKE ADMINISTRATIVE NOTICE**

The Applicants Otter Tail Corporation and Montana-Dakota Utilities Co. hereby file this response to the Motion of Intervenors to Suspend Procedural Schedule and Motion to Take Administrative Notice of Minnesota Administrative Law Judges' Report.

I. Motion to Take Administrative Notice of Minnesota ALJs' Report

Responding to the motions in reverse order, the Applicants have no objection to the Commission taking administrative notice of the May 9, 2008, Report of the Minnesota Administrative Law Judges entitled Supplemental Findings of Fact, Conclusions of Law, and Recommendation in the Big Stone matter. In fact, the Commission itself on August 28, 2007, advised the parties that it intended to take official notice of the ALJs' First Report dated August 15, 2007, in which the same ALJs recommended approval of the Big Stone II transmission lines.

Moreover, the Commission can take judicial notice of the schedule that the Minnesota Public Utilities Commission has established to consider this matter. A copy of that notice is attached. The parties are presently preparing Exceptions to the ALJs' Report, which are due on May 19. Replies are due May 27. The Minnesota Commission will hear oral arguments on June 3, 2008. The Commission will then meet to deliberate within a week or so later.

II. Motion to Suspend Procedural Schedule.

The Applicants object to any suspension or extension of the schedule. Briefs in this matter are currently due on May 21, 2008, and reply briefs on May 30, 2008. Nothing is to be gained by delaying those deadlines. Once briefs are submitted, the Commission can exercise its discretion to wait until the Minnesota Commission has made a final decision sometime in June if it is inclined to want to know what the Minnesota Commission has decided before this Commission makes its decision in this matter.

Obviously, the Applicants disagree with the Minnesota ALJs' Report and will be filing Exceptions next week in accordance with the Minnesota Commission's notice. The Applicants will show that the ALJs' recommendation is lacking in evidentiary support, contrary to law, and represents misguided energy policy. For all the reasons this Commission heard regarding why the Applicants' participation in this project is prudent, the Applicants are confident that the Minnesota Commission will not follow the ALJs' recommendation and will instead approve the transmission lines associated with Big Stone II. The South Dakota Public Utilities Commission has already determined that the project should go forward, and that decision was upheld by the South Dakota Supreme Court. *In the Matter of Otter Tail Power Company on Behalf of Big Stone II co-Owners for an Energy Conversion Facility Permit for the Construction of the Big Stone II Project*, 744 N.W.2d 594 (S.D. 2008).

The ALJs' Report is merely a recommendation. Not only do the ALJs recognize specifically in their Report at p. 2 that the Minnesota Commission can accept, modify, condition, or reject the Report, it is well established that agencies are free to adopt their own findings and reach their own conclusions. The Minnesota Supreme Court made that clear 25 years ago in *Hymanson v. City of St. Paul*, 329 N.W.2d. 324, 326-327 (Minn. 1983):

[The hearing examiner's or ALJ's] functions are subordinate to a reviewing agency's [i.e., the Commission's] power. A hearing examiner presides at meetings and makes recommendations for decision. But the [Commission] is not bound by the findings and recommendations of the hearing examiner. K. Davis, *Administrative Law Text*, § 10.07 (3d ed. 1972). In this sense, the relationship differs from that of an appellate court reviewing a lower court's findings of fact: an agency [i.e., the Commission] could make new findings and decide contrary to the hearing examiner's recommendations. *Id.* at § 10.04. A hearing examiner takes no power away from an agency.

It's hardly unusual for agencies to reject findings and recommendations of the administrative judges who conducted the hearing. See *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). In fact, the Minnesota Commission has never been hesitant to reject the findings and recommendation of the administrative law judge when necessary. See e.g., *In the Matter of the Application of the Grand Rapids Public Utilities Commission to extend its Assigned Service Area into the Area Presently Served by Lake Country Power*, 731 Minn. 866 (Minn. Ct. App. 2007) and *City of Moorhead v. Minn. Public Utilities Commission*, 343 N.W.2d 843, 847 (Minn. 1984). In the recent *Grand Rapids* case, involving compensation for lost revenue, the Commission specifically decided the matter contrary to the ALJ's recommendation. The Court said, at 870:

Initially, the City argues that the Commission erred by rejecting the ALJ's report. The decision of the ALJ is entitled to some weight. *In re Denial of Eller Media Co.'s Application for Outdoor Adver. Permits*, 664 N.W.2d 1, 6 (Minn. 2003). But the agency decision-maker owes no particular deference to the ALJ's findings, conclusions, or recommendation. *Blue Cross & Blue Shield*, 624 N.W.2d at 278.

The Intervenors have put forth no compelling reason to delay briefing of this matter. The Dakota Resource Council is not involved in the Minnesota proceeding so it can argue no prejudice in being required to continue with the briefing schedule to which it previously agreed. On the other hand, if, as the Applicants are confident will occur, the Minnesota Commission disagrees with the ALJs' Report, delaying the briefing in this proceeding will have been wasteful

to all parties, because the parties would then only have to agree on a new schedule. That is simply administratively inefficient. If the Commission wants to wait until the Minnesota Commission has made a decision before making its determination in this case, it has the discretion to do that. But there is no reason to delay briefing.

III. Conclusion

For the foregoing reasons, the Commission should take administrative notice of the ALJs' Report but should not agree to delay the procedural schedule in this matter.

Date: May 16, 2008

Respectfully submitted,

MDU Resources Group, Inc.

Otter Tail Corporation

By: _____

Daniel S. Kuntz

Its: Associate General Counsel

P.O. Box 5650

1200 West Century Avenue

Bismarck, ND 58506-5650

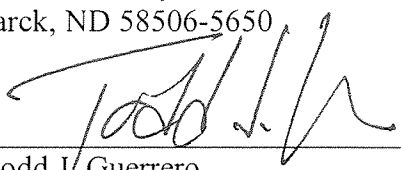
By: _____

Mark Bring

Its: Associate General Counsel

215 South Cascade Street

Fergus Falls, MN 56538-0496

By:  _____

Todd J. Guerrero

LINDQUIST & VENNUM PLLP

80 South Eighth Street

Suite 4200 IDS Center

Minneapolis, MN 55402

Attorneys for Applicants

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Corporation, Advance
Determination of Prudence
Application

AFFIDAVIT OF SERVICE

Montana-Dakota Utilities Co.,
a Division of MDU Resources Group,
Inc., Advance Determination of Prudence
Application

Case Nos. PU-06-481, PU 06-482

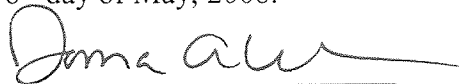
Kristen A. Swenson, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn on oath says: that on the 16th day of May, 2008, she served the following:

Applicants' Response to the Intervenors' Motion to Suspend Procedural Schedule and Motion to Take Administrative Notice; and
an Affidavit of Service.

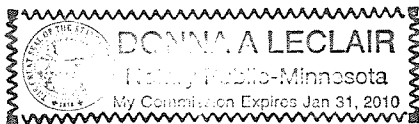
A copy has also been served upon the attached service list via electronic mail and U.S. Mail.



Subscribed and sworn to before me
this 16th day of May, 2008.



Notary Public



STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Corporation, Advance
Determination of Prudence
Application

SERVICE LIST

Montana-Dakota Utilities Co.,
a Division of MDU Resources Group,
Inc., Advance Determination of Prudence
Application

Case Nos. PU-06-481, PU 06-482

Illona Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
State Capitol
Bismarck, ND 58505

Donald R. Ball
Vice President – Regulatory Affairs
Montana-Dakota Utilities Co., a Division of
MCU Resources Group, Inc.
400 N 4th Street
Bismarck, ND 58501

Daniel S. Kuntz
Assistant General Counsel
Montana-Dakota Utilities, Co., a Division of
MDU Resources Group, Inc.
P.O. Box 5650
Bismarck, ND 58506-5650

John W. Breen Jr.
Attorney and Counselor at Law
717 Williams Street
Bismarck, ND 58501-2483

Mark Trechock
Dakota Resource Council
P.O. Box 1095
Dickinson, ND 58602-1095

David Schlissel
Synapse Energy Economics
22 Pearl Street
Cambridge, MA 02139

Carrie La Seur
Plains Justice
319 3rd Street NW
Mount Vernon, IA 52314

Mark Bring
Associate General Counsel
Otter Tail Corporation
215 S. Cascade Street
Fergus Falls, MN 56538-0496