



UTILITIES CO.

A Division of MDU Resources Group, Inc.

400 North Fourth Street
Bismarck, ND 58501
(701) 222-7900

April 10, 2007

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

Re: In the Matter of the Advance Determination of Prudence Application of Otter Tail Corporation Case No. PU-06-481

In the Matter of the Advance Determination of Prudence Application of Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.
Case No. PU-06-482

Dear Ms. Jeffcoat-Sacco:

Applicants hereby submit an original and seven (7) copies of this this filing to the North Dakota Public Service Commission in regard to the above referenced matters. Enclosed for filing please find the following documents:

1. Applicants' Motion *In Limine* to Exclude Evidence on Environmental Externality Values;
2. Request to Amend Scheduling Order and;
3. Affidavit of Service.

Please acknowledge receipt by stamping or initialing the duplicate copy of this letter attached hereto and returning the same in the enclosed self-addressed, stamped envelope.

Please contact the undersigned with any further questions or comments you might have regarding this filing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel S. Kuntz', is written over a horizontal line.

Daniel S. Kuntz
Associate General Counsel

Enclosures

cc: Service List

SERVICE LIST

Otter Tail Corporation, Advance
Determination of Prudence
Application

Case No. PU-06-481

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

Case No. PU-06-482

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Corporation, Advance
Determination of Prudence
Application

APPLICANTS' MOTION *IN LIMINE*
TO EXCLUDE EVIDENCE ON
ENVIRONMENTAL
EXTERNALITY VALUES

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

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

MOTION *IN LIMINE*

PLEASE TAKE NOTICE that Applicants Otter Tail Corporation and Montana-Dakota Utilities Co. (collectively "Applicants") move for an Order *in Limine*¹ prohibiting the Dakota Resource Council from presenting any evidence on environmental externality values at the hearing on this matter.

DISCUSSION

Evidence of Environmental Externality Values Must Be Excluded From the Hearing Because the Legislature Has Precluded the Commission from Considering Such Information.

Section 49-02-23 of the North Dakota Century Code provides:

The commission may not use, require the use of, or allow electric utilities to use environmental externality values in the planning, selection, or acquisition of electric resources or the setting of rates for providing electric service. Environmental externality values are numerical costs or quantified values that are assigned to represent either:

¹ A motion *in limine* is a procedural tool to determine in advance of the hearing (or trial) that certain evidence will not be allowed in the record. See, e.g., *Williston Farm Equipment Inc. v. Steiger Tractor, Inc.*, 504 N.W.2d 549 (N.D. 1993).

1. Environmental costs that are not internalized in the cost of production or the market price of electricity from a particular electric resource; or
2. *The alleged costs of complying with future environmental laws or regulations that have not yet been enacted.*

(Emphasis added).

Applicants Otter Tail and Montana-Dakota have just recently litigated two hearings in which the Applicants' proposed Big Stone Unit II was an issue.² In each of those cases, the Dakota Resource Council's proposed expert, Mr. David Schlissel and Synapse Energy Consulting, acted as the primary experts for the environmental groups opposing Applicants and Big Stone Unit II. Mr. Schlissel's principal criticisms in each of those cases, and as we expect here, is over the Applicants' decisions not to utilize a monetized carbon dioxide ("CO₂") value in their respective resource planning processes based entirely on his estimates of the "costs of complying with future environmental laws or regulations that have not yet been enacted." In each case, Mr. Schlissel specifically argued that Applicants should have applied his range of "Low CO₂ Price," "Mid CO₂ Price" and "High CO₂ Price" scenarios.

The language of the statute clearly states that evidence related to environmental externality values, or in Mr. Schlissel's case, the cost of compliance with future regulations, may not be used or required as a basis for the decision in Applicants' application for an Advance Determination of Prudence. As a result, such evidence must, as a matter of law, be precluded. Because intervenor Dakota Resource Council is likely to base its case on Mr. Schlissel's

² *In the Matter of the Application by 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*, Docket No. EL-05-022, in which the South Dakota Public Service Commission issued an order granting the permit on July 21, 2006; and *In the Matter of the Application of Otter Tail Power Company and Others for Certification of Transmission Facilities in Western Minnesota*, OAH Docket No. 12-2500-17037-2, MPUC Docket No. CN-05-619; *In the Matter of Application to the Minnesota Public Utilities Commission for a Route Permit for the Big Stone Transmission Project in Western Minnesota*, OAH Docket No. 12-2500-17038-2, MPUC Docket No. TR-05-1275, in which a decision which is currently pending from the Minnesota Public Utilities Commission.

environmental cost of complying with future CO₂ regulation, it is critical that this issue be decided immediately and before the Dakota Resource Council files its testimony.

This is a significant issue that reaches beyond evidentiary rules. This is not a situation where the Commission has discretion to determine whether information of environmental externality values should or should not be allowed in this proceeding and the proper weight to be given to the information. The statute clearly prohibits such information from being used, required or allowed in making a decision on the reasonableness and prudence of Applicants' application under N.D. Cent. Code 49-05-16.

Because Section 49-02-23 states that the Commission shall not "use, require the use of, or allow" evidence relating to environmental externality values, any evidence on this point is irrelevant and must be excluded under N.D.R.Ev. 402, which provides, "[a]ll relevant evidence is admissible Evidence which is not relevant is not admissible."

The North Dakota Supreme Court has adopted the N.D.R.Ev. 401 definition of relevant evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

State v. Hendrickson, 240 N.W.2d 846, Syllabus ¶ 2 (N.D. 1976). North Dakota's Rules of Evidence apply to proceedings governed under the Administrative Agencies Practices Act. N.D. Cent. Code § 28-32-24(1).

Even if a particular piece of evidence is relevant, it may still be excluded in certain situations. N.D.R.Ev. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence relating to environmental externality values is not information that the Commission can rely on in making the prudency determination required under N.D. Cent. Code 49-05-16. Such evidence would only confuse the issue of costs and unnecessarily extend the time necessary to adequately adjudicate the pending applications. Because the evidence is irrelevant, and will only lead to confusion, it must be excluded.

CONCLUSION

For the above reasons, the Applicants respectfully request that the Hearing Examiner issue an Order *in Limine* directing that the Intervenor will not be permitted to introduce any evidence at hearing regarding environmental externality values.

Dated: April 10, 2007.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of MDU
Resources Group, Inc.

By: 

Daniel S. Kuntz, ID No. 03490

Its: Associate General Counsel

P.O. Box 5650

1200 West Century Avenue

Bismarck, ND 58506-5650

(701) 530-1016

Otter Tail Corporation

By: _____

Bruce Gerhardson, Attorney No. 05577

Its: Associate General Counsel

215 S. Cascade St.,

Fergus Falls, MN 56538-0496

(218) 739-8479

Evidence relating to environmental externality values is not information that the Commission can rely on in making the prudency determination required under N.D. Cent. Code 49-05-16. Such evidence would only confuse the issue of costs and unnecessarily extend the time necessary to adequately adjudicate the pending applications. Because the evidence is irrelevant, and will only lead to confusion, it must be excluded.

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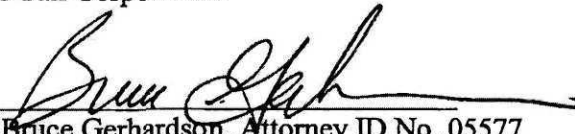
Dated: April 9, 2007.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of MDU
Resources Group, Inc.

By: _____
Daniel S. Kuntz, ID No. 03490
Its: Associate General Counsel
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Otter Tail Corporation

By: 
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Corporation, Advance
Determination of Prudence
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**REQUEST TO AMEND
BRIEFING SCHEDULE**

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

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

On March 9, 2007, Applicants were notified via email of the following briefing schedule for the May 29 – 30 public hearing on Applicants' consolidated Application for Advance Determination of Prudence concerning participation and ownership interest in the Big Stone II Generating Plant:

May 1	Applicants' Briefs and Proposed Orders Staff and Intervenor Testimony
May 15	Applicants' Rebuttal Testimony Staff and Intervenor Briefs and Proposed Orders
May 29 – 30	Public Hearing
June 13	Commission Order

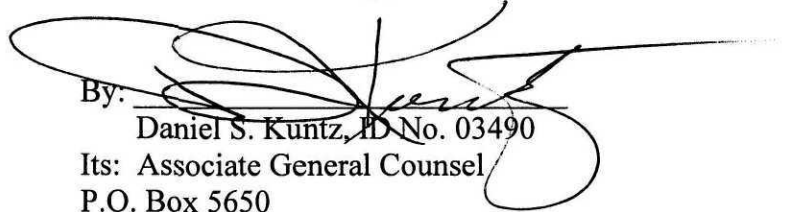
Applicants respectfully request that the briefing schedule be amended so as to allow parties to simultaneously file post-hearing briefs and proposed Findings of Fact, Conclusions of Law, and Order on June 7, 2007. Applicants submit that the parties will be in a much better position, post hearing, to provide a more thorough synopsis of the relevant facts and issues than if briefs are required to be filed before the close of the

record. If granted, parties understand that no briefing will be provided on May 1 or May 15 as indicated in the previous schedule noted above.

Dated: April 10, 2007.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of
MDU Resources Group, Inc.

By: 

Daniel S. Kuntz, ID No. 03490

Its: Associate General Counsel

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Otter Tail Corporation

By: _____
Bruce Gerhardson, Attorney No. 05577

Its: Assistant General Counsel

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Dated: April 9, 2007.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of
MDU Resources Group, Inc.

By: _____
Daniel S. Kuntz, Atty. ID No. 03490
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Otter Tail Corporation

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AFFIDAVIT OF SERVICE

Otter Tail Corporation, Advance
Determination of Prudence
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Case No. PU-06-481

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Application

Case No. PU-06-482

Angela Berger, being sworn, says that on April 10, 2007, a copy of the following documents:

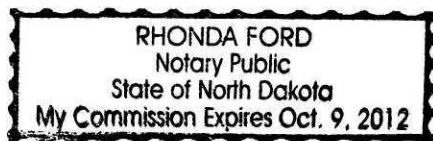
1. Applicants' Motion *in Limine* to Exclude Evidence on Environmental Externality Values;
2. Request to Amend Briefing Schedule;
3. Affidavit of Service


Have been served upon the attached service list via United States Mail.



Angela Berger

Subscribed and sworn to before me this 10th day of April, 2007.





Rhonda Ford, Notary Public
Burleigh County, North Dakota
My Commission Expires: 10/09/2012