

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Otter Tail Corporation,
Advance Determination of
Prudence Application**

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

**MEMORANDUM IN OPPOSITION TO
APPLICANTS' MOTION TO STRIKE
PORTIONS OF DIRECT TESTIMONY
OF DAVID SCHLISSEL FILED ON
BEHALF OF INTERVENORS**

CASE NOS. PU-06-481, PU-06-482

DISCUSSION

Relevant documents and orders in the record on this question include:

- 1. Applicants' Motion in Limine filed April 10, 2007;**
- 2. Intervenors' Memorandum in Opposition to the Motion in Limine, filed April 17, 2007;**
- 3. Intervenors' Supplemental Brief Filed in Opposition to Applicants Motion in Limine, filed April 23, 2007**
- 4. ND PSC Advocacy Staff Memorandum on Applicants' Motion In Limine, filed April 23, 2007.**
- 5. Judge Wahl's Order Granting Motion in Limine dated April 24, 2007;**
- 6. Judge Wahl's Order Upon Motion to Strike dated June 22, 2007; and**
- 7. Applicants' Motion to Strike filed April 15, 2008.**

Applicants' April 15, 2008 motion to strike returns us to well-traveled ground. A year ago the parties in this docket filed motions and briefing on the question of what portions of Mr. Schlissel's testimony might be excluded by the terms of NDCC § 49-02-23, the "environmental externalities" statute, which states:

49-02-23. Consideration of environmental externality values prohibited.

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. 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.**

Intervenors have argued from the beginning of this proceeding that this statute is not applicable to this proceeding, that the statute is unconstitutional, and that the statutory definition of “environmental externalities” does not apply to the proffered testimony. In 2007 a compromise was reached by which the proffered testimony of David Schlissel was filed in full, enabling the Intervenors to create a record of their proffered testimony and giving Applicants an opportunity to move to exclude portions of the testimony if they chose. A record was thus created of the proffered testimony, portions of which were stricken from consideration in the hearing by Judge Wahl’s June 22, 2007 order.

Applicants have chosen once again to use a Motion to Strike, based on NDCC § 49-02-23, to exclude specific material, relevant proposed testimony of Intervenors’ expert witness. This year like last year, Intervenors have not ignored the order of the Administrative Law Judge, but have chosen to submit all relevant testimony to allow Judge Wahl to rule in advance on specific exclusions of testimony to make the hearing of the matter more efficient and to create the appropriate record of any testimony excluded. The proposed testimony must be included in the record regardless of the final ruling on its admissibility, to preserve a complete record in case of appeal. Intervenors request that Judge Wahl rule on this matter prior to the hearing to allow the fullest preparation for all parties. Should Judge Wahl choose to strike any portion of the

Schlissel testimony, Intervenors seek to preserve the evidentiary question and testimony for the Commission's ultimate review.

ARGUMENT

Intervenors reiterate their arguments in opposition to the motions in limine and to strike filed by Applicants in April 2007. Intervenors hereby incorporate by reference all previously filed arguments in opposition to exclusion of portions of Mr. Schlissel's testimony on the basis of NDCC § 49-02-23. With reference to the current motion to strike, Intervenors submit the following arguments.

1. The testimony of expert witness David Schlissel should not be excluded based on the plain language of NDCC § 49-02-23.

Significant highlighted portions of the proffered testimony do not involve "numeric costs or quantified values." Intervenors object to the exclusion of the following sections on the grounds that the plain language of NDCC § 49-02-23 bars only numeric costs and quantified values, the conclusion reached by Judge Wahl in his June 22, 2007 order, which denied in part Applicants' motion to strike:

- Page 11 lines 15-17;
- Page 40 lines 20-21;
- Page 55, lines 11-12;
- Pages 56, lines 1-7;
- Page 61, lines 8-29;
- Page 68, lines 9-13, 17-20;
- Page 70, lines 14-15;
- Page 74, lines 18-25;

- Page 75, lines 8-12; and
- Page 77, right three columns of Table 6, and line 7.

2. The Schlissel testimony should not be excluded where it merely references Applicants' previous testimony and is not offered as expert opinion.

Applicants have moved to strike portions of the Schlissel testimony that merely reference or summarize Applicants' testimony in this docket or in Minnesota proceedings on this project. Schlissel does not submit this testimony to support the proposition that certain carbon prices should be considered, but to characterize the general prudence of Applicants' planning activities with regard to Big Stone II according to current legal requirements in all venues, a relevant and admissible line of argument. The following lines should be admitted into evidence as reference or summary of Applicants' own statements with regard to planning activities that are relevant to a prudency determination, not offered as Mr. Schlissel's own opinion:

- Page 49, lines 24-29;
- Pages 50-54;
- Page 55 through line 10;
- Page 73, lines 14-15;
- Page 78, lines 25-26; and
- Page 79, lines 1-11, 26-29.

3. Applicants are estopped from objecting to numeric costs and quantified values of potential carbon regulation in Mr. Schlissel's testimony because Applicants include numeric costs and quantified values of potential carbon regulation in their own supplemental testimony.

At several points in their supplemental testimony and supporting exhibits, Applicants have used numeric costs and quantified values for potential carbon regulation. Applicants are therefore estopped from objecting to Intervenors' use of same. In particular, OTP/MDU Exhibit 326 and 327 present the results of the Applicants' economic analyses that reflect CO2 costs. To allow Applicants alone to make such references to relevant evidence in support of their prudence claims would unfairly disadvantage Intervenors and constitute grounds for appeal. *See, e.g.*, Greig Supplemental Testimony at 3; OTP/MDU Exhibit 327, pp. 4-8; Crowley Supplemental Testimony at 15; and Uggerud Supplemental Testimony at 5.

4. Applicants are seeking to strike portions of Mr. Schlissel's testimony that do not address CO2 costs

- Page 11, lines 16 and 17 – Materials that Applicants seek to strike are broader than the words “CO2 prices.”
- Page 68, lines 9, 10, and 12-13 – Applicants seek to strike entire sentence, most of which does not address future CO2 prices.
- Page 74, lines 18-25 – portion of testimony that Applicants seek to strike only mentions in one short phrase “Synapse CO2 price forecasts.” The rest of the material does not address CO2 prices but instead describes other analyses conducted by Synapse in the Minnesota PUC CON Dockets.
- Page 75, Table 5, 5th and 7th Rows – Applicants seek to strike results of Synapse analyses that increased cost of Big Stone II Project but did not include any CO2 costs.
- Page 75, lines 4-5 and 6-7 – Applicants seek to strike results of Synapse analyses that increased cost of Big Stone II Project but did not include any CO2 costs.

- Page 75, lines 8-9 - Applicants seek to strike results of Synapse analyses that increased cost of Big Stone II Project but did not include any CO2 costs.
- Page 77, Table 6 – Applicants seek to strike columns 4 and 5 which present results of Synapse analyses which reflect 10% higher Big Stone II capital cost but no CO2 costs.

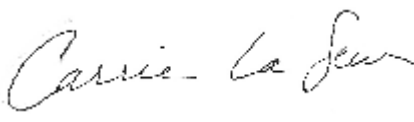
CONCLUSION

For the above reasons, the Intervenors request an order from Judge Wahl denying Applicants' Motion to Strike portions of David Schlissel's supplemental testimony. Intervenors request that they be allowed to introduce all relevant evidence in the Application for Advance Determination of Prudence proceeding before the Commission. In the event that Judge Wahl should order any portion of the Schlissel testimony stricken, Intervenors seek to preserve the evidentiary question and testimony for the Commission's ultimate review.

Dated: April 18, 2008

Respectfully submitted,

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