



Public Service Commission

State of North Dakota

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28 May 2009

Mr. Richard J. Savelkoul
Felhaber Larson Fenton & Vogt
444 Cedar Street, Ste 2100
St Paul, MN 55101-2136

RE: PSC Case No.: PU-08-742
Otter Tail Corporation
Renewable Resource Cost Recovery Rider 2009
Tariff

PSC Case No.: PU-08-862
Otter Tail Corporation
Electric Rate Increase
Application

Mr. Savelkoul:

Thank you for your letter of 13 May 2009 regarding the previously filed Joint Application for Trade Secret Protection.

First of all, I note that your letter was not copied to the other parties to the case. As such, it constitutes an *ex parte* communication, prohibited by N.D.C.C. section 28-32-37(3) and commission rule (Section 69-02-05-11 of the N.D.Admin.Code). Copies of the statute and rule are attached. Also attached is a copy of the letter in question so that the parties now have it.

This is not the first time in these cases that one party has communicated directly with the commission without informing the other parties. *Ex parte* communications are prohibited under North Dakota law and rule. Parties cannot communicate directly or indirectly with the commission on a pending case without notice to other parties and an opportunity for other parties to participate in the communication. Further, under the law, the agency must report willful violations of the *ex parte* prohibitions to disciplinary authorities.

In addition, I understand that PSC advocacy staff counsel is not always copied in on communications. Please understand that advocacy staff is represented by counsel. You are reminded that under the North Dakota Rules of Professional Conduct, if a party is represented by counsel, attorneys must, for the most part, communicate with that counsel, not solely with the party.

Regarding the trade secret issue, it is my opinion that the trade secret protection granted in the order in Case No. PU-08-742 prohibits disclosure, whether or not the potential disclosure is in Case No. PU-08-742 or Case No. PU-08-862. However, a formal protective order or ruling

92 **PU-08-862** Filed: 5/28/2009 Pages: 13
Letter Response to 13 May 2009 Letter and Joint
Application for Trade Secret Protection

67 **PU-08-742** Filed: 5/28/2009 Pages: 13
Letter Response to 13 May 2009 Letter and Joint
Application for Trade Secret Protection

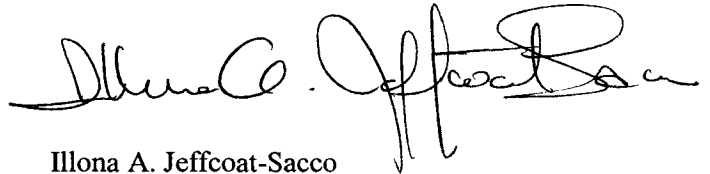
Mr. Richard J. Savelkoul
28 May 2009
Page 2

in Case No. PU-08-862 should also be entered into the docket in that case. I understand that once the continued hearing is convened, the Administrative Law Judge will formally address the matter as part of the hearing procedure. The ruling of the ALJ and the transcript of the hearing should then suffice to formally protect the information in Case No. PU-08-862. If the parties or Judge Wahl have any concerns with this process, please let me know.

I will have your Joint Application docketed to serve as a basis for a formal ruling in Case No. PU-08-862. I am returning to you your first application dated 2 April 2009, which was not docketed.

If you have questions or concerns, please do not hesitate to call or e-mail.

Best regards,

A handwritten signature in black ink, appearing to read "Illona A. Jeffcoat-Sacco". The signature is fluid and cursive, with a large initial "I" and "A".

Illona A. Jeffcoat-Sacco
General Counsel

enclosures

cc/w enclosures:

Jacob C. Hendricks
Bruce Gerhardson
Michael J. Bradley
Richard J. Johnson
Annette Bendish
Al Wahl, ALJ

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BradleyM@moss-barnett.com
JohnsonR@moss-barnett.com
abendish@nd.gov
aljwahl@gmail.com

28-32-37. Ex parte communications.

1. Except as provided in subsections 2 and 4 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.
2. When more than one person is the hearing officer in an adjudicative proceeding, those persons may communicate with each other regarding a matter pending before the panel. An agency head or hearing officer may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
3. Except as provided in subsection 4 or unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending, with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.
4. In an adjudicative proceeding conducted by a hearing officer other than the agency head, counsel for the administrative agency and the agency head, without notice and opportunity for all parties to participate, may communicate and consult regarding the status of the adjudicative proceeding, discovery, settlement, litigation decisions, and other matters commonly communicated between attorney and client, to permit the agency head to make informed decisions. This subsection does not apply after recommended findings of fact, conclusions of law, and orders have been issued, except counsel for the administrative agency and the agency head may communicate regarding settlement and negotiation after recommended findings of fact, conclusions of law, and orders have been issued.
5. If, before being assigned, designated, or appointed to preside in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while presiding, the person, promptly after being assigned, designated, or appointed, shall disclose the communication in the manner prescribed in subsection 6.
6. An agency head or hearing officer in an adjudicative proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.
7. If necessary to eliminate the effect of an ex parte communication received in violation of this section, an agency head or hearing officer in an adjudicative proceeding who receives the communication may be disqualified, upon good cause being shown in writing to the hearing officer or to the agency. The portions of the

record pertaining to the communication may be sealed by protective order issued by the agency.

8. The agency shall, and any party may, report any willful violation of this section to the appropriate authorities for any disciplinary proceedings provided by law. In addition, an administrative agency may, by rule, provide for appropriate sanctions, including default, for any violations of this section.
9. Nothing in this section prohibits a member of the general public, not acting on behalf or at the request of any party, from communicating with an agency in cases of general interest. The agency shall disclose such written communications in adjudicative proceedings.

28-32-38. Separation of functions.

1. No person who has served as investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
2. No person who is subject to the direct authority of one who has served as an investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
3. Any other person may serve as hearing officer in an adjudicative proceeding, unless a party demonstrates grounds for disqualification.
4. Any person may serve as hearing officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification.

28-32-39. Adjudicative proceedings - Findings of fact, conclusions of law, and order of agency - Notice.

1. In an adjudicative proceeding an administrative agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law and the order of the agency based upon its findings and conclusions.
2. If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order. The agency shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.
3. If the agency head, or another person authorized by the agency head or by law to issue a final order, is not presiding, then the person presiding shall issue recommended findings of fact and conclusions of law and a recommended order within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head may adopt the recommended findings of fact and conclusions of law and the recommended order as final. The agency may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order. An administrative agency may adopt rules regarding the review of recommended orders and other procedures for issuance of a final order by the agency. If a recommended order is issued, the agency must serve a copy of any final order issued and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within sixty days after the evidence has been received, briefs filed, and

of what the exhibit purports to show with reference by sheet and line to illustrative or typical example contained in the exhibit. Whenever practicable, documents sponsored by a single witness should be assembled and bound together, suitably arranged, and indexed so that they may be identified and offered as one exhibit. The source of all material contained in any exhibit should be shown.

1. **Copies.** Seven copies of each exhibit must be provided, in addition to a copy for each party.
2. **Prefiling.** The commission may permit or require the filing and serving of exhibits in advance of the hearing in order to enable participants to prepare cross-examination.

History: Amended effective September 1, 1992.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 49-01-07

69-02-05-08. Official notice. The commission may take notice of any fact in its records and files, to which reference is made on the record at the hearing and any fact judicially noticed by the courts of this state. Official notice will be taken without offer or production of that portion of any tariff or schedule which is the subject matter of an order of investigation or suspension.

History: Amended effective September 1, 1992.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 49-01-07

69-02-05-09. Former employees. Except with the written permission of the commission, no former employee of the commission or member of the attorney general's staff assigned to the commission may appear in a representative capacity or as an expert witness on behalf of other parties at any time within six months after severing the employee's or member's association with the commission, nor may the employee or member appear after the six-month period in any proceeding in which the employee or member previously took an active part when associated with the commission.

History: Amended effective September 1, 1992.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 49-01-07

69-02-05-10. Interrogatories to parties. Repealed effective September 1, 1992.

69-02-05-11. Ex parte communications. Ex parte communications, as defined in North Dakota Century Code section 28-32-12.1, are strictly prohibited. Any ex parte written communication to the commission must be filed with the executive secretary of the commission who shall disclose the communications to

the parties and place the communication in a public file associated with the pending proceeding, but separate from the record material upon which the commission can rely in reaching its decision.

History: Effective September 1, 1992.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-12.1, 49-01-07

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

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MAY 13 2009

PUBLIC SERVICE COMMISSION

May 13, 2009

Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
600 East Boulevard, Department 408
Bismarck, ND 58505-0480

RE: In the matter of Otter Tail Power Company's Annual Filing for Renewable Resource Cost Recovery Factor
Case No.: PU-08-742
In the matter of the Application of Otter Tail Corporation for Authority to Increase Rates for Electric Service in North Dakota
Case No.: PU-08-862
Our File No.: 24677.001

Dear Secretary Nitschke:

I am filing this letter to clarify the intent of the Joint Application for Trade Secret Protection filed on April 24, 2009, in Case Nos. PU-08-742 and PU-08-862, in which the Large Industrial Group (LIG) Intervenors and Otter Tail Power Company (OTP) requested trade secret protection over certain information contained in Ms. Kavita Maini's direct testimony, filed on April 6, 2009.

All the information that is the subject of the Application is covered by the Commission's December 17, 2008 Order granting trade secret protection in Case No PU-08-742. However, because Ms. Maini's testimony is being filed in both that case and in Case No. PU-08-862, the Joint Application was filed so as to protect the information in both cases. If staff determines that the Order issued in Case No. PU-08-742 already covers the information in both cases, the joint Application can be deemed withdrawn as redundant. Otherwise, the LIG and OTP request that

90 PU-08-862 Filed: 5/13/2009 Pages: 2
Letter Clarifying Intent of Joint Application for Trade Secret Protection

STP:

Intervenor - Large Industrial Energy Group
R. Savelkoul, FelhaberLarsonFenlon&Vogt

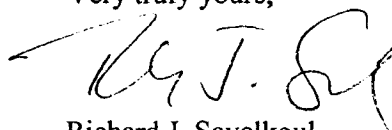
65 PU-08-742 Filed: 5/13/2009 Pages: 2
Letter Clarifying Intent of Joint Application for Trade Secret Protection

Intervenor - Large Industrial Energy Group
R. Savelkoul, FelhaberLarsonFenlon&Vogt

Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
May 13, 2009
Page 2

an Order be issued in Case No. PU-08-862 to ensure that the information is granted trade secret protection in that case.

Very truly yours,

A handwritten signature in black ink, appearing to read "R.J. Savelkoul", written in a cursive style.

Richard J. Savelkoul

RJS:vac

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

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RECEIVED

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PUBLIC SERVICE COMMISSION

April 2, 2009

Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
600 East Boulevard, Department 408
Bismarck, ND 58505-0480

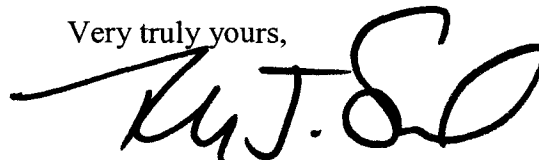
TRADE SECRET DOCUMENT

RE: In the matter of Otter Tail Power Company's Annual Filing for Renewable Resource Cost Recovery Factor
Case No.: PU-08-742
In the matter of the Application of Otter Tail Corporation for Authority to Increase Rates for Electric Service in North Dakota
Case No.: PU-08-862
Our File No.: 24677.001

Dear Secretary Nitschke:

Enclosed is the Large Industrial Group's application for Trade Secret Protection in the above-referenced cases. Also enclosed is an Affidavit of Service. Thank you.

Very truly yours,



Richard J. Savelkoul

RJS:vac
Enclosure
cc: Larry Schedin
Kavita Maini

CERTIFICATE OF SERVICE

Case Title: In the Matter of the Application of Otter Tail Corporation for Authority to Increase Rates for Electric Service in North Dakota	Case No.: PU-08-862 and
In the Matter of the Application of Otter Tail Power Company's Annual Filing for Renewable Resource Cost Recovery Factor	Case No.: PU-08-742

Valerie A. Current certifies that on the ___ day of April, 2009, she served a true and correct copy of the attached **TRADE SECRET DOCUMENT - APPLICATION FOR TRADE SECRET PROTECTION** by placing it in the United States mail with postage prepaid, addressed to the following individuals:

Bruce Gerhardson
Associate General Counsel
Otter Tail Corporation
215 South Cascade Street
P.O. Box 496
Fergus Falls, MN 56538

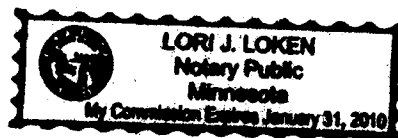
Michael Bradley
Moss & Barnett
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402


Valerie A. Current

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Subscribed and sworn to before me this 2nd day of April, 2009.


Notary Public



**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

<p>Case Title: In the Matter of the Application of Otter Tail Corporation for Authority to Increase Rates for Electric Service in North Dakota; and In the Matter of the Application of Otter Tail Power Company's Annual Filing for Renewable Resource Cost Recovery Factor</p>	<p style="text-align:center">Case No.: PU-08-862 and Case No.: PU-08-742 APPLICATION FOR TRADE SECRET PROTECTION</p>
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COMES NOW, the Large Industrial Group (“LIG”), intervenors in the Otter Tail Corporation, d/b/a Otter Tail Power Company (“OTP”) proceedings captioned above, respectfully moves the Commission for entry of a trade secret protective order under §69-02-09-01 of the North Dakota Administrative Code. The purpose of the requested protective order is to protect against public disclosure of trade secret information as defined by NDCC § 47-25.1-01(4), certain information contained in LIG’s enclosed filing is subject to a Confidentiality Agreement that was entered into with OTP.

1. A general description of the nature of the information sought to be protected.

Information marked as “confidential” or “trade secret” provided by OTP to LIG for purposes of participating in the above-captioned matters.

2. Explanation of why the information derives independent economic value, actual or potential, from not being generally known to other persons.

Pursuant to OTP’s own Application for Trade Secret Protection, OTP indicated, “The information could have economic value to potential vendors, contractors, and suppliers who may desire to supply components of similar projects in which Otter Tail may be involved in the

future. They could use such information against Otter Tail's interest in the course of submitting proposals."

3. An explanation of why the information is not readily ascertainable by proper means by other persons.

Information is marked as "confidential" or "trade secret" and it is LIG's understanding that the confidentiality of the information has been maintained by Otter Tail. The information is not disclosed to the public or to persons other than parties to the Confidentiality Agreement or employees or authorized agents of Otter Tail who need to know the information to fulfill their responsibilities in connection with the project or to third persons pursuant to agreement to maintain the confidentiality of the information.

4. A general description of the persons or entities that would obtain economic value from disclosure or us of the information.

Potential equipment and material vendors, contractors, and other suppliers for similar projects would obtain economic value from disclosure of the costs. Additionally, OTP's customers' confidential information, other resource or generation information is confidential and would likewise gain economic value from disclosure of information contained.

5. A specific description of known competitors and competitors' goods and services that is pertinent to the tariff or rate filing.

See response to No. 4.

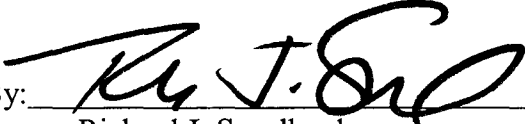
6. A description of the efforts used to maintain the secrecy of the information.

See response to No. 3.

In accordance with §69-02-09-02 of the North Dakota Administrative Code, one copy of the trade secret material is provided in the enclosed sealed envelope which is labeled: TRADE SECRET – PRIVATE.

Respectfully submitted,

FELHABER, LARSON, FENLON & VOGT, P.A.

By:  _____

Richard J. Savelkoul
Minnesota Attorney Reg. No. 0296818
444 Cedar Street, Suite 2100
St. Paul, MN 55101
Telephone: (651) 222-6321

ATTORNEYS FOR LARGE INDUSTRIAL
GROUP