



GREAT RIVER
ENERGY®
A Renewable Energy Cooperative

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November 30, 2012

Via Electronic Filing

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

RE: Case No. PU-12-767 - Request for jurisdictional determination that Great River Energy is not an "Electric Public Utility" in North Dakota under N.D.C.C. Chapter 49-03 - Brief in Support of Requested Jurisdictional Determination

Dear Mr. Nitschke,

As was agreed by Otter Tail Power, Great River Energy and Commission staff, please find enclosed GRE's Brief in Support of the Requested Jurisdictional Determination in the above entitled case.

GREAT RIVER ENERGY

Donna L. Stephenson
Associate General Counsel

DLS/jvn
Enclosure

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Request for Jurisdictional Determination)
by Great River Energy that Great River Energy)
is not an “Electric Public Utility” in North Dakota)
under N.D.C.C. Chapter 49-03.)

Case No. PU-12-767

**GREAT RIVER ENERGY’S BRIEF IN SUPPORT OF
THE REQUESTED JURISDICTIONAL DETERMINATION**

I. INTRODUCTION

On October 5, 2012, Great River Energy (“GRE”) filed with the North Dakota Public Service Commission (“Commission”) a request (the “Request”) for a jurisdictional determination that GRE is not subject to the jurisdiction of the Commission as an “Electric Public Utility,” as that term is defined in North Dakota, in connection with providing electric service pursuant to bilateral contracts to a small number of industrial customers located within a planned industrial park. The industrial park, known as the Spiritwood Energy Park, is being developed near Spiritwood, North Dakota, adjacent to GRE’s combined heat and power plant, Spiritwood Station. GRE plans to contribute 451 acres of land that it owns to the industrial park, and seeks to confirm that GRE is not subject to the jurisdiction of the Commission as an Electric Public Utility prior to making the contribution of its land. Under the North Dakota Territorial Integrity Act, GRE is not an Electric Public Utility in connection with its service to the customers in the industrial park because it will not be offering electric service to the general public. Instead, GRE intends to provide electric service exclusively to the limited number of industrial customers that locate in the Spiritwood Energy Park.

This memorandum is intended to assist the Commission in its consideration of the Request by further describing the Spiritwood Energy Park, GRE's role in the development of the Spiritwood Energy Park, GRE's role in attracting tenants to the Spiritwood Energy Park, and why GRE is not subject to the Commission's jurisdiction as an Electric Public Utility. On October 26, 2012, Otter Tail Power ("OTP"), a utility subject to the Commission's jurisdiction as an Electric Public Utility, filed a "petition to intervene" in the case. This brief will also discuss the OTP filing and the obligations concerning Electric Public Utilities applicable to OTP.

II. BACKGROUND

A. Spiritwood Energy Park; Announcement of Proposed Tenants.

GRE's Request follows an announcement earlier this year by Governor Dalrymple and officials of CHS, Inc. ("CHS") that CHS intends to develop a \$1 billion nitrogen fertilizer manufacturing plant and plans to locate the plant in the Spiritwood Energy Park. CHS has been in discussions with GRE and the Jamestown/Stutsman Development Corporation, Inc. ("JSDC"), the owner of 100 acres of property also planned for the industrial park, related to the land and services that GRE, JSDC and Spiritwood Energy Park will provide in support of the CHS project. CHS will not require process steam from Spiritwood Station, but has requested that GRE provide the electric supply for the plant. CHS is the second developer to announce its intent to locate a facility in the industrial park. Dakota Spirit AgEnergy, LLC ("Dakota Spirit"), which is owned by GRE, has announced the development of a biorefinery that will also be located in the industrial park. If the Dakota Spirit project goes forward, the biorefinery will purchase both process steam and electric service from GRE. The two potential projects are the culmination of more than six years of development efforts by GRE in the Spiritwood area.

B. GRE's Interest in Spiritwood Energy Park; Significance to GRE's Spiritwood Station.

In late 2005, the North Dakota Governor's Office contacted GRE to request that GRE assist Cargill Malt Americas ("Cargill") and a developer of a proposed biorefinery in determining the feasibility of constructing a combined heat and power plant near Spiritwood, North Dakota, near Cargill's existing malt plant.¹ Cargill and the biorefinery require process steam to make the products they produce. Cargill was looking for a stable energy solution to keep its malt plant in Spiritwood. Since the inquiry by the Governor's Office, GRE has invested over \$400 million in the construction of Spiritwood Station, partnered with JSDC to initiate the development of the industrial park, and, through Dakota Spirit, is now commencing the development of the biorefinery.² The reason these initiatives are coming together is because they are interrelated. As a combined heat and power plant, Spiritwood Station is intended to supply process steam to customers like Cargill and the Dakota Spirit biorefinery. The industrial park will allow a small number of commercial/industrial concerns to share the costs of transportation, utilities and other necessary services. The various projects are also interrelated for GRE. GRE acquired its 451 acres of land adjacent to Spiritwood Station for the sole purpose of ensuring that occupants of the land would contribute revenue to Spiritwood Station, thereby reducing the plant's cost of producing power. GRE will not permit its real estate to be occupied by tenants that do not purchase process steam and/or electric service from GRE. The CHS project is very large, and if it proceeds, will occupy about half of the 551 acres in the Spiritwood Energy Park. Because CHS will not require process steam from Spiritwood Station, GRE needs CHS to

¹ Cargill's malt plant near Spiritwood is located north of Spiritwood Station and outside of the limits of the proposed Spiritwood Energy Park. It is provided with electric service by OTP (to the best of GRE's knowledge), and GRE's Request does not seek to change the service provider or otherwise affect the service at the Cargill facility.

² The original developer decided to not proceed with the originally planned biorefinery, and instead GRE is now pursuing development of a biorefinery that would similarly use process steam from Spiritwood Station to make biofuels, such as ethanol.

purchase electric service from GRE in order for GRE to allow its real estate to be developed by CHS.

C. Spiritwood Energy Park - Regional Economic Development.

GRE plans to provide electric service only within the confines of the Spiritwood Energy Park, an area of approximately 551 acres. The build-out of the industrial park will also result in economic development in the region surrounding the industrial park. To quote the Jamestown Sun, “There are big things happening in the Spiritwood Energy Park.... [t]hese developments will bring more people here, and more people will need housing, food, education and many other needs. That means that developers must build more homes, grocers and restaurants must be ready for greater demand and schools must prepare for larger classes.”³ The economic development outside the industrial park directly translates into increased retail electric needs, needs that will not be supplied by GRE, but instead by other utilities, presumably OTP and/or Northern Plains Electric Cooperative.

III. ANALYSIS

A. GRE’s Electric Service to the Tenants of Spiritwood Energy Park is Not Subject to the Commission’s Jurisdiction.

The North Dakota Territorial Integrity Act (the “Act”) was enacted by the North Dakota legislature in 1965.⁴ The Act addresses the territorial rights of electric service providers, but not by carving the State into distinct geographic service territories. Instead, the Act places a particular category of public utilities,⁵ termed “Electric Public Utilities,” under the jurisdiction of

³ Jamestown Sun, November 21, 2012.

⁴ The Act amends N.D.C.C. §§ 49-03-01 and 49-03-05.

⁵ N.D.C.C. § 49-01-01.3 defines a “public utility” as “any association, person, firm, corporation, limited liability company, or agency engaged or employed in any business enumerated in this title.” Consequently, it appears that an “electric public utility” is a specific type of “public utility.” The case law interpreting the North Dakota Territorial

the Commission when they extend electric service to new customers, in particular new customers in rural areas. Electric Public Utilities are required to obtain from the Commission a certificate of public convenience and necessity (“Certificate”) prior to extending service to new customers outside the corporate limits of a municipality.⁶ The Act does not impose similar approval obligations on electric suppliers who do not fall under the definition of an Electric Public Utility.

GRE does not meet the definition of an Electric Public Utility, and is consequently not under the jurisdiction of the Commission with respect to the electric supply to customers in the Spiritwood Energy Park. An Electric Public Utility is defined under the Act as a “privately owned supplier of electricity offering to supply or supplying electricity to the general public.”⁷ There is no definition of the term “general public” in the North Dakota Century Code. According to Black’s Law Dictionary, however, the term “public” is defined as “relating or belonging to the entire community, state or nation” or “open or available to all to use, share or enjoy.”⁸ Based on the definition, the term “general public” must mean the public in general. GRE does not offer and is not proposing to offer retail electric service to the public in general. GRE is planning to offer electric service on a bilateral contract basis to a limited number of customers exclusively within the discrete geographic area of the Spiritwood Energy Park. This arrangement is no different than the service GRE has provided to The Falkirk Mining Company (“Falkirk”) facilities that supply coal to GRE’s adjacent Coal Creek Station since 1979. GRE and Falkirk have a unique history and interrelationship similar to that between GRE and the Spiritwood Energy Park. Supplying electricity pursuant to bilateral contracts exclusively to a

Integrity Act can at times be misleading, as the North Dakota courts occasionally use the term “public utility” when the more precise term would be an “electric public utility.”

⁶ See *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414 (N.D. 1967).

⁷ N.D.C.C. § 49-03-01.5.

⁸ Black’s Law Dictionary, p. 995, Abridged Seventh Edition (2000).

very few customers with a unique history and close ties to GRE does not constitute offering electric service to the general public. Consequently, GRE is not an Electric Public Utility.

In addition, and as further described below, the North Dakota Supreme Court has consistently interpreted the term “Electric Public Utility” to mean investor owned utilities, not utilities organized on a not-for-profit basis.⁹ As detailed in the Request, GRE is organized as a not-for-profit electric cooperative.

Because GRE is not an Electric Public Utility, GRE is not subject to the Commission’s jurisdiction when providing electric service to the customers in the Spiritwood Energy Park, and is not required to obtain certificates of public convenience and necessity from the Commission prior to constructing the electric distribution facilities needed to serve the customers in the Spiritwood Energy Park.¹⁰

B. OTP is an Electric Public Utility.

1. Under the North Dakota Territorial Integrity Act, the Commission has jurisdiction over investor owned utilities as “Electric Public Utilities.”

The North Dakota Supreme Court interprets “Electric Public Utility” to mean investor owned utilities, such as OTP. See, Cass County Electric Cooperative, Inc. v. Northern States Power Co., 419 N.W. 2d 181 (N.D. 1988); Montana-Dakota Utilities Co., v. Johanneson, 153 N.W. 2d. 414 (N.D. 1967). In each of these cases, the Court recognized a clear distinction between investor owned utilities and not-for-profit providers of electricity, such as electric

⁹ See, Cass County Electric Cooperative, Inc. v. Northern States Power Co., 419 N.W. 2d 181 (N.D. 1988); Montana-Dakota Utilities Co., v. Johanneson, 153 N.W. 2d. 414 (N.D. 1967).

¹⁰ Similarly, GRE is not required to seek the approval of the Commission for the rates or contract arrangements in connection with the service GRE plans to provide to the tenants in the Spiritwood Energy Park. N.D.C.C. § 49-02-01.1 imposes limits on the Commission’s jurisdiction “as to certain utilities” Specifically, the Commission is not authorized to “make any order affecting rates, contracts, services rendered, adequacy or sufficiency of facilities or the rules or regulations of any...public utility, that is not operated for profit...”

cooperatives. According to the Court, requiring an investor owned utility to secure a Certificate has a legitimate purpose because, in the case of the investor owned utility, “the consumer has absolutely no voice in the operation of the business. It is operated for the private benefit and profit of the stockholders.” On the other hand, in the case of a not-for-profit electric cooperative, the business is under the control of the members of the electric cooperative and “the Legislature, in its wisdom, assumed that such members, who control their own business, would adequately protect their own interest and no control by the Public Service Commission was deemed necessary.”¹¹

2. As an Electric Public Utility, OTP must secure customer-specific, location-specific Certificates prior to extending service to new customers in rural areas.

OTP is an Electric Public Utility and any extension of service to a new customer in a rural area by OTP requires a Certificate from the Commission. OTP (or an affiliate) has been issued Certificates authorizing electric supply to two customers located near, but outside of, the planned Spiritwood Energy Park, including the Cargill facility (to the best of GRE’s knowledge) and GRE’s Spiritwood Station (Commission Case No. PU-07-640). Certificates are customer specific and authorize service at a discrete geographic point. For instance, the Commission’s Order in Case No. PU-07-640 states that “Otter Tail Corporation is issued Certificate of Public Convenience and Necessity No. 5331 authorizing the provision of electric distribution service to Spiritwood Station at a point located in the SW ¼ of Section 22, Township 140N, Range 62W, Stutsman County, North Dakota.”

¹¹ See *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414, 422-423 (N.D. 1967).

3. OTP has not received a customer request for service in the Spiritwood Energy Park; OTP may not have an interest in this proceeding sufficiently substantial to grant OTP's "petition to intervene."

If OTP desired to serve new customers in the vicinity of the Spiritwood Energy Park, as GRE understands the Commission's process, the new customer must first request service from OTP to invoke the jurisdiction of the Commission.¹² After such a request, OTP could proceed to apply for a Certificate from the Commission for the specific requesting customer at the specific requested location. OTP would have the burden of proving that public convenience and necessity requires the issuance of the new Certificate.

To the best of GRE's knowledge, no potential tenant of the Spiritwood Energy Park has requested that OTP provide electric service to the tenant's proposed facility within the industrial park. Without a customer request, OTP does not have the right to apply for a Certificate to extend service to the Spiritwood Energy Park. In fact, without a customer request for service, OTP's right to intervene in the Commission's consideration of GRE's Request is questionable. Under the North Dakota Administrative Code, §69-02-02-05, an intervention may be granted by the Commission if the petitioner "has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding." OTP's October 26, 2012 filing does not state that OTP has a statutory right, and does not describe with specificity a legal interest of OTP that may be substantially affected. Without a customer request for service, OTP does not have a legal interest that may be substantially affected by this proceeding.

¹² Capital Electric Cooperative, Inc. v. Public Service Commission of the State of North Dakota, 534 N.W.2d 587 (N.D. 1995)

C. GRE's planned electric service to the customers in the Spiritwood Energy Park is consistent with the policies underlying the North Dakota Territorial Integrity Act.

As described on the North Dakota Legislative Branch website, the primary purpose of the Act is to “minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities.”¹³ In a case where an Electric Public Utility's request for a Certificate is challenged by another electric service provider, the Commission is required to look to a number of factors before approving the issuance of the Certificate. These factors include customer preference, but customer preference is not the end of the evaluation. There are a number of other factors which must also be considered by the Commission, which in essence all fall under the general category of avoiding wasteful duplication of investment.¹⁴

CHS has requested that GRE provide electric service to the proposed nitrogen fertilizer manufacturing plant. Dakota Spirit, which is owned by GRE, also requests that GRE provide electric service to the proposed biorefinery. The preference of the customers is for service by GRE. In addition, there will be no wasteful duplication of investment in electric distribution facilities if GRE serves the customers that locate in the industrial park.

What follows is a description of the scope of the new electric distribution infrastructure required to serve the new customers in the industrial park:

Spiritwood Energy Park – Electric Infrastructure Requirements.

GRE estimates the initial electric load within the industrial park will be approximately 15-25 megawatts (“MW”). There are no existing electric distribution facilities within the area of the planned industrial park suitable to serve the projected load. To the best of GRE's knowledge,

¹³ <http://www.legis.nd.gov/assembly/55-1997/interim-info/memos/99147.html>

¹⁴ Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974).

the only existing electric service within the proposed boundaries of the industrial park powers a street light.

To provide adequate service for the projected load, new substation facilities and associated distribution lines are required. GRE has determined that there are two efficient ways to serve the industrial park. The first involves an interconnection with a 115 kilovolt (“kV”) transmission line owned by OTP that runs near the industrial park. Under this plan, GRE would be required to tap the transmission line, construct an electric substation and construct the distribution lines needed to extend service from the transmission line to the tenants in the industrial park. The second involves GRE installing an interconnection at the substation owned by GRE at Spiritwood Station. In this case GRE would be required to tap the electric “bus” within the existing substation, install additional facilities in the existing substation and construct the distribution lines needed to extend service to the tenants in the industrial park.

GRE and OTP are both members of the Midwest Independent Transmission System Operator, Inc. (“MISO”). Their respective transmission systems are under the functional control of MISO and subject to the requirements of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”). Consequently, under either scenario, the MISO Tariff will govern the interconnection of GRE’s distribution facilities to the transmission system under the control of MISO. This type of interconnection, a so-called “transmission-to-load” interconnection, is a common practice in MISO. To the extent that GRE’s new distribution facilities and service create additional use of the OTP transmission facilities, OTP will be compensated in accordance with the MISO Tariff.

D. OTP's "Petition to Intervene."

In its "petition to intervene," OTP asserts that if GRE provides service to customers in the Spiritwood Energy Park, (1) OTP's rights under existing Commission-issued Certificates to serve other facilities in the area would be "substantially affected," and (2) GRE is setting a precedent that would allow "numerous other entities to enter North Dakota" to provide "unregulated" electric service, harming OTP's interests and that of the general public. OTP provides no detail or support for its assertions, but will likely attempt to do so in its brief.

First, GRE does not seek to displace any Commission-issued Certificates authorizing OTP to serve customers. GRE recognizes OTP's rights under any existing unrevoked Certificates. GRE's Request will not result in harm to OTP's interests.

In addition, GRE's plan to serve the customers in the Spiritwood Energy Park does not set a precedent for "numerous" entities to "enter" North Dakota to supply "unregulated" electric service. The Territorial Integrity Act has been in place since 1965. The North Dakota Legislature could have adopted a service territory law that established rigid geographic service area boundaries, but it didn't. The Legislature could have imposed the obligation to obtain Certificates for electric service extensions on all public utilities, but it didn't. GRE is not setting a precedent, GRE's planned service complies with the laws established by the North Dakota Legislature.

Even if GRE has set some sort of precedent, that precedent has been in place since GRE starting serving Falkirk in 1979. GRE's electric service to Falkirk has not provoked a flood of "entities" entering the State of North Dakota to supply "unregulated" electric service. Neither will GRE's electric service to the customers in the Spiritwood Energy Park. This is a unique situation in which GRE has expended over \$400 million to construct a combined heat and power

plant, has acquired adjacent land and is working to bring industrial users to that land to ensure stable operating economics for the power plant. Confirmation by the Commission that GRE is not subject to regulation as an Electric Public Utility in this unique situation will not open the floodgates to other entities to cherry pick new industrial load that they have no role in creating.

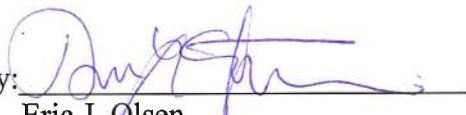
IV. CONCLUSION

For the reasons described in the Request and this brief, GRE requests that the Commission grant GRE's Request for a Jurisdictional Determination that GRE is not an Electric Public Utility and therefore not subject to the Commission's jurisdiction as an Electric Public Utility under N.D.C.C. §49-03 in connection with providing electric service pursuant to bilateral contracts to a small number of industrial customers within the planned Spiritwood Energy Park.

Dated this 30th day of November, 2012.

Respectfully Submitted,

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