

 **MDU RESOURCES**
GROUP, INC.

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December 6, 2012

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

RE: In the Matter of the Request of Great River Energy
For Jurisdictional Determination
Case No. PU-12-767


Dear Mr. Nitschke:

Enclosed for filing in the above-referenced matter is Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. Petition to Intervene and Brief of Montana-Dakota Utilities Co. in Opposition to Great River Energy's Request for Jurisdictional Determination. The original and ten (10) copies of this Petition will be sent by First Class mail.

Also enclosed is an Affidavit of Service.

If you have any questions regarding this filing, please contact me at 701-530-1016 or at dan.kuntz@mduresources.com.

Sincerely,


Daniel S. Kuntz
Associate General Counsel

DSK/djv
Enclosures
cc: Tamie Aberle

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

In the Matter of the Request of
Great River Energy for
Jurisdictional Determination

Case No. PU-12-767

AFFIDAVIT OF SERVICE BY REGULAR MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that she is over the age of 18 years and not a party to this action and, on the 6th day of December, 2012, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

**Montana-Dakota Utilities Co Petition to Intervene
Brief Of Montana-Dakota Utilities Co in Opposition to Great River Energy's
Request For Jurisdictional Determination**

The envelope was addressed as follows:

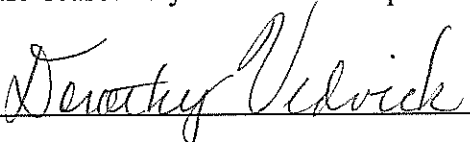
Darrell Nitschke, Executive Secretary
ND Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-1480
Email: dnitschk@nd.gov.

Eric J. Olsen
Vice President and General Counsel
Great River Energy
12300 Elm Creek Boulevard
Maple Grove, MN 55369-4718

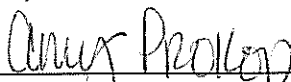
Donna L. Stephenson
Associate General Counsel
Great River Energy
12300 Elm Creek Boulevard
Maple Grove, MN 55369-4718

Bruce Gerhardson
Associate General Counsel
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56537

Each address shown is the respective addressee's last reasonably ascertainable post office address.

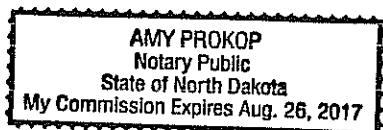


Subscribed and sworn to before me this 6th day of December, 2012.



Notary Public

SEAL



**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**In the Matter of the Request of
Great River Energy for
Jurisdictional Determination**

Case No. PU-12-767

PETITION TO INTERVENE

1. Pursuant to North Dakota Admin. Rules Section 69-02-02-05, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., (“Montana-Dakota”) hereby petitions to intervene in the above-captioned matter. Montana-Dakota has a substantial interest in this proceeding and opposes the relief sought by Great River Energy (“GRE”).
2. Montana-Dakota is a public utility engaged in the provision of retail natural gas and electric distribution service in the State of North Dakota. Montana-Dakota provides retail electric distribution service in North Dakota pursuant to N.D.C.C. § 49-03-01.5 and certificate of public convenience and necessity issued by the North Dakota Public Service Commission.
3. If GRE’s request is granted, it could substantially affect Montana-Dakota’s interests as a supplier of electric service to customers in the State of North Dakota. Granting of the request could set a precedent that would allow entities to provide unregulated electric service to selected customers within the service areas of existing electric service providers to their detriment and the detriment of their customers and the public interest.
4. Montana-Dakota is contemporaneously filing a brief in support of its position in opposition to GRE’s request.

Respectfully submitted this 6th day of December, 2012

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

By: 

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**In the Matter of the Request of
Great River Energy for
Jurisdictional Determination**

Case No. PU-12-767

**BRIEF OF MONTANA-DAKOTA UTILITIES CO IN OPPOSITION TO
GREAT RIVER ENERGY'S REQUEST FOR JURISDICTIONAL DETERMINATION**

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota") submits the following brief in opposition to the request of Great River Energy ("GRE") for a jurisdictional determination that it is not an "electric public utility" in North Dakota under N.D.C.C. Chapter 49-03, and therefore not required to obtain a certificate of public convenience and necessity ("PC&N") to provide electric distribution service in North Dakota. Montana-Dakota has reviewed and concurs in the brief submitted by Otter Tail Power Company ("Otter Tail") in opposition to GRE's request for jurisdictional determination and will not repeat the arguments offered by Otter Tail. Montana-Dakota, however, offers this additional analysis which it believes is relevant to GRE's request.

N.D.C.C. Chapter 49-03 governs both the extension of service by "electric public utilities", as defined by N.D.C.C. § 49-03-01.5, as well as service area conflicts between "electric public utilities" and "rural electric cooperatives" under North Dakota's Territorial Integrity Act. GRE maintains it is not an "electric public utility", and therefore not subject to the PC&N requirements of that chapter because it is organized as a Minnesota cooperative and because it does not intend to serve the general public in North Dakota. Even if the Public Service Commission (the "Commission") determines GRE is not an "electric public utility" as defined in N.D.C.C. § 49-03-01.5, that determination is not conclusive as to whether GRE is allowed to provide the proposed

service, let alone provide it without a certificate of PC&N.

The Commission has general jurisdiction over public utilities which include “Electric utilities engaged in the generation and distribution of light, heat, or power.” N.D.C.C. § 49-02-01. Note that this definition of the Commission’s general jurisdictional is broader than the definition of “electric public utility” under N.D.C.C. Chapter 49-03. Thus, regardless of whether or not GRE is considered an “electric public utility” under N.D.C.C. Chapter 49-03, its proposal to distribute electric power within the Spiritwood Energy Park would nonetheless make it a public utility subject to the general jurisdiction of the Commission under N.D.C.C. Title 49. Although N.D.C.C. § 49-02-01.1 limits the scope of the Commission’s jurisdiction to issue orders affecting rates, contracts, services rendered, adequacy, or sufficiency of facilities operated by nonprofit entities, the limitation is not an exemption from the entirety of the Commission’s jurisdiction under N.D.C.C. Title 49. For example, nonprofit entities are subject to the Commission’s siting jurisdiction under N.D.C.C. § 49-22.

An area in which the Commission’s jurisdiction over nonprofit public utilities is not limited is the commencement of the construction or operation of a public utility plant or system. In 1977, the North Dakota Legislature enacted N.D.C.C. Chapter 49-03.1 which provides at N.D.C.C. § 49-03-01 that “No public utility shall begin construction or operation of a public utility plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation.” Accordingly, any public utility that seeks to begin construction or operation of a public utility plant or system (as opposed to extension of an existing system) after 1997 must obtain a certificate from the Commission that public convenience and necessity requires or will require such construction and operation. The definition of “public utility” under Chapter 49-03.1 is set out at N.D.C.C. § 49-03.1-02:

“Public utility” includes any association, person, firm, corporation, limited liability company, or agency engaged or employed in this state to furnish its product or services to the public generally which is statutorily subject to the jurisdiction of the Commission. The words “public utility” as used in this chapter do not apply to electric public utilities, telecommunications companies that are not incumbent telecommunications companies under Chapter 49-21, or motor carriers of persons or properties for hire.

Therefore, if the Commission determines GRE is not an “electric public utility” subject to Chapter 49-03, GRE is a “public utility” subject to N.D.C.C. Chapter 49-03.1 if it seeks to furnish its product or services to the public generally because it is statutorily subject to the general jurisdiction of the Commission under N.D.C.C. § 49-02-01 for its proposed distribution of electric power.

Although GRE maintains that it only proposes to supply electricity to the commercial and industrial customers located within the Spiritwood Energy Park, it is nonetheless furnishing service to the public generally in that GRE acknowledges it intends to serve all customers within the geographic boundaries of the Spiritwood Energy Park. GRE does not avoid being a public utility subject to the Commission’s jurisdiction by limiting its geographic service area or its class of customers.

The issue is not the number of persons that actually use GRE’s proposed service but whether the service is available to all members of the public who may require the service. UGI Utilities, Inc. v. Pennsylvania Public Utility Commission, 684 A.2d 225, 299 (Pa. Commonwealth Ct. 1996); Griffith v. New Mexico Public Service Commission, 86 N.M. 113, 520 P.2d 269, 271-272 (N.M. 1974). An entity that dedicates its property to public use is furnishing service to the public even though it serves only one or a few customers. Unocal California Pipeline Co. v. Francis M. Conway, 23 Cal.App.4th 331, 335, 28 Cal. Rptr. 2d 429 (1994). GRE states that it intends to construct electric service facilities for customers that locate within the Spiritwood Energy Park and will offer service under contracts to CHS and “any other tenants who desire to locate commercial or industrial

facilities within the geographic boundaries of the Spiritwood Energy Park.” Moreover, GRE intends to supply that service, in whole or in part, from the publicly dedicated MISO transmission system. GRE’s proposal is similar to utility systems and services furnished by developers of subdivisions to serve tenants of the subdivisions which have been determined to be public utilities. Griffith v. New Mexico Public Service Commission, supra. The installation of electric facilities to serve tenants of the energy park is a dedication of facilities for a public use. The tenants of the energy park are members of the general public and GRE is proposing to serve all the tenants that have a need for electric service. That GRE proposes to provide the service under individual contracts to a select class of customers and reserves the right to discriminate in the rates and services provided to those customers does not remove GRE from being a public utility. As quoted approvingly in Iowa State Commerce Commission v. Northern Natural Gas Company, 161 N.W.2d 111, 116 (Ia. 1968) from the dissent in Mississippi River Fuel Corp. v. Illinois Commerce Commission, ILL.2d. 509, 116 N.E.2d 394, 399:

To hold that by restricting its industrial sales to a selected group of the most desirable customers, Mississippi (River Fuel Corp.) can require us to regard such sales as for private use is, in my opinion, to condition the application of the statute upon the willingness of a company to comply with it.

The Commission should not accept GRE’s proposed loophole to North Dakota’s regulatory framework for electric service providers. Adoption of GRE’s position with respect to its request for a jurisdictional determination would operate to severely disadvantage North Dakota’s electric service providers and their customers. GRE’s position would allow any entity to create nonprofit affiliates to offer services to anyone anywhere within the State of North Dakota. Alternatively, any entity, profit or nonprofit, could cherry pick both new and existing commercial and industrial customers from both investor owned and cooperative electric service providers without any Commission

oversight. For the reasons discussed in Otter Tail's brief, this construction of N.D.C.C. Title 49 requested by GRE is not in the public interest.

Montana-Dakota respectfully requests the Commission to deny the jurisdictional determination request of GRE.

Dated this 6th day of December, 2012

Respectfully submitted,


By: _____

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