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**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

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

Case No. PU-12-767

**BRIEF OF OTTER TAIL POWER COMPANY  
IN SUPPORT OF PETITION TO INTERVENE**

Otter Tail Power Company (Otter Tail) submits the following brief in support of its Petition to Intervene in the matter of the request by Great River Energy (GRE) for a jurisdictional determination that it is not an “electric public utility” in North Dakota under North Dakota Century Code (NDCC) Chapter 49-03, and therefore not required to obtain a certificate of public convenience and necessity (CPCN) to provide electrical distribution service in North Dakota.

Having a substantial interest in this proceeding, Otter Tail submitted its Petition to Intervene to the Public Service Commission (the “Commission”) on October 26, 2012. The Commission has not acted on Otter Tail’s Petition. While the Commission has yet to determine the administrative proceedings necessary to act on GRE’s request, the Commission has indicated its intent to act on the request and to provide GRE a formal answer. Moreover the Commission has taken preliminary steps to gather facts and analyze legal arguments concerning GRE’s position. Given the Commission’s intent to respond to GRE’s request, Otter Tail urges the Commission to act on Otter Tail’s Petition to Intervene.

Otter Tail respectfully contends that any Commission action on GRE’s request, regardless labels, constitutes an adjudicative proceeding and the issuance of an order that must be preceded by a hearing. Otter Tail is entitled to intervene.

**I. The matter before the Commission is an adjudicative proceeding in which GRE has requested the Commission issue an order determining its legal rights to provide electric service to customers in the Spiritwood Energy Park.**

GRE seeks agency action determining its legal right to supply electric service to customers in the Spiritwood Energy Park. GRE's request before the Commission is subject to the North Dakota Administrative Agencies Practice Act, which defines "order" as "any agency action of particular applicability which determines the legal rights, duties, privileges, immunities, or other legal interest of one or more specific persons." N.D.C.C. 28-32-01(7). By responding to GRE's request, the Commission would be acting to determine GRE's legal rights, duties, privileges, immunities, or other legal interests in the Energy Park under N.D.C.C. 49-03. Any decision or guidance offered to GRE will be an order to that effect.

GRE's request for an order makes this matter an "adjudicative proceeding" under the North Dakota Administrative Agencies Practice Act. Under the Act an adjudicative proceeding is "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." N.D.C.C. 28-32-01(1). Any decision-making process used by the Commission to respond to GRE's request meets the definition of "adjudicative proceeding" because it involves an administrative matter resulting in an agency order determining GRE's legal rights.

GRE will likely argue that a jurisdictional determination from the Commission does not constitute an order; that GRE seeks only an informal determination or an advisory opinion. Even if GRE is able to evade the definition of "order", as provided above, any response from the Commission short of an order would carry no legally-enforceable significance. That GRE has asked the Commission for a determination indicates it seeks a determination that carries legal significance. Further, there exists no clear statutory authority for the Commission to issue an

informal determination or advisory opinion. The precedent set by granting an informal guidance or an advisory opinion in the absence of clear statutory authority is best avoided.

**II. Otter Tail is entitled to intervene in this proceeding because it is an interested party with a legal interest that may be substantially impaired if GRE's request is granted.**

The general practices and procedures before the Commission are governed by North Dakota Administrative Code (NDAC) Chapter 69-02. These regulations provide that any party to a Commission proceeding qualifies as an applicant, complainant, petitioner, intervenor, protestant, or respondent, according to the nature of the proceeding and the party's interest. N.D.A.C. 69-02-01-07(1). Because GRE has requested an order from the Commission, it qualifies as a party to a proceeding. Based on the nature of GRE's request, GRE would be considered an "applicant" defined as "a person filing a formal written request with the commission for some right, privilege, or authorization." N.D.A.C. 69-02-01-07(2). GRE has made such a written request to the Commission for a determination as to its right to provide electric service to future customers in the Energy Park.

The Administrative Code provides that any person with a substantial interest in a Commission proceeding may petition to intervene in that proceeding. N.D.A.C. 69-02-02-05. It is appropriate to grant the petition to intervene if the petitioning intervenor has a legal interest that may be substantially affected by the proceeding and the intervention would not unduly broaden the issues or delay the proceeding. Id.

Otter Tail satisfies the standard for intervention. Otter Tail has significant legal interests that will be substantially affected by this proceeding. Specifically, any Commission action to determine GRE's legal rights in the Energy Park will have a direct impact on Otter Tail's legally-established right to serve the property in question. Otter Tail's legal interest is based in part on its Certificate of Public Convenience and Necessity (CPCN) to provide electric service to the

Energy Park. On July 16, 2007, Otter Tail filed an Application of Permanent Authority to extend electric distribution service to Spirit Ethanol in the Energy Park. After Northern Plains Electric Cooperative withdrew its objection to Otter Tail's application, the Commission granted the CPCN as requested on October 24, 2007. In reliance on the CPCN issued by the Commission, Otter Tail made substantial investments in materials and resources to adequately serve the anticipated electrical demands of the Energy Park. Spirit Ethanol was not constructed and the stakeholders in the Energy Park developed alternative plans for the property, including the proposed CHS fertilizer plant. GRE now claims that CHS has made a request for electrical distribution service. GRE presumes that such a request should invalidate Otter Tail's CPCN. There is no record before the Commission supporting GRE's claims. Specifically, GRE has not provided any indication of a valid request or agreement regarding CHS, nor has GRE offered any proposed terms of such an agreement.

The North Dakota Supreme Court has affirmed that the following factors must be considered when determining whether a supplier can provide electric service most effectively under the Territorial Integrity Act (TIA): customer preference, location of lines, reliability of service, the ability of electric providers to serve the area more economically, which supplier sits best qualified to furnish electric service to the site, and which supplier can serve the site without wasteful duplication of services. Application of Otter Tail Power Co., 169 N.W.2d 415. The Commission approved of Otter Tail's ability to satisfy each of these factors when it issued the CPCN to serve Spirit Ethanol. Since then, Otter Tail's ability to serve the property has strengthened. Beyond its purported claim that CHS has requested service, GRE has not demonstrated that it can serve the Energy Park efficiently or reliably. Even if CHS were to make a service request to GRE, such a subsequent differing customer request cannot, and should not,

invalidate a legally-obtained CPCN without due process. If the Commission proceeds to grant the determination requested by GRE, Otter Tail's CPCN to serve the Energy Park would be effectively invalidated without due process.

It is important to note that Otter Tail's CPCN to serve the property remains valid and enforceable under the plain language of the Application of Permanent Authority as approved by the Commission. While the initial customer request was made by Spirit Ethanol, the approved application grants "permanent" authority to provide electric service. To date, Otter Tail has received no indication from the Commission or any other party that its CPCN has been revoked, cancelled, or otherwise invalidated.

Otter Tail's intervention would not unduly broaden the issues or delay this proceeding because Otter Tail's interest in the Energy Park is so closely related to the subject matter of this proceeding that any Commission action on GRE's request would directly affect those interests.

In granting Otter Tail's petition to intervene, the Commission will allow the parties to create a complete factual record through discovery. Such a record is essential for the Commission to make an informed decision. There are many questions and concerns that must be formally addressed. Has CHS made an official request for electrical service from GRE? What is the nature of that request? Do the parties have a contract? What are the terms of the contract? What happens if a tenant of the Energy Park is dissatisfied with GRE's service? What is GRE's ownership interest and rights in the Energy Park? What relationship, if any, exists between the location of the GRE's Spiritwood Station and the proposed services? These are the very types of questions that are normally developed through discovery.

**III. Before the Commission may take agency action on GRE's request, an administrative hearing on the matter is required.**

Without the formal development of a factual record, the Commission is not in a position to adequately assess the claims offered by GRE and reach an ultimate disposition. Because this matter involves an adjudicative proceeding that may result in an order, an administrative hearing is required.

As previously discussed, an adjudicative proceeding is an administrative matter resulting in an agency order after an opportunity for a hearing is provided or required. N.D.C.C. 28-32-01(1). The Administrative Agencies Practice Act requires that agencies comply with hearing procedures in *all* adjudicative proceedings, including those not involving a complaint. N.D.C.C. 28-32-21. Further, the North Dakota Supreme Court has interpreted the Act as requiring a formal hearing whenever an administrative agency acts in a quasi-judicial capacity, unless the parties either agree otherwise or there is no dispute of a material fact. Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692. Here, GRE has requested that the Commission act in a quasi-judicial capacity to determine GRE's legal rights. Several issues of material fact remain unanswered and Otter Tail, as an intervenor, requests a hearing. Because this matter involves an adjudicative proceeding in which the Commission will be acting in a quasi-judicial capacity, the Commission may issue the determination sought by GRE only after providing a formal hearing.

This matter also involves due process considerations with respect to a Commission order affecting Otter Tail's legal interest in the Energy Park. Procedural due process considers whether a constitutionally protected property or liberty interest may be harmed by government action and, if so, whether minimum procedural requirements were met. Morrell v. North Dakota Department of Transportation, 598 N.W.2d 111. The North Dakota Supreme Court has determined that procedural due process requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

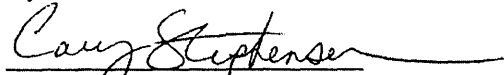
In re S.A.L., 652 N.W.2d 912. Otter Tail has a private interest that would be affected by official action, as previously discussed. Any erroneous deprivation of Otter Tail's interest by failing to allow a hearing on the matter would be substantial. A Commission order granting GRE's request without a hearing would void Otter Tail's CPCN to the harm of Otter Tail's North Dakota ratepayers, who will incur the cost of stranded assets and forego the cost sharing benefits that come from North Dakota load growth.

#### CONCLUSION

Any Commission response to GRE's request for jurisdictional determination would qualify as an agency action to determine GRE's legal rights, duties, privileges, immunities, or other legal interests, thereby constituting an order. A Commission order on this matter would invoke the requirements for adjudicative proceedings and hearings under the Administrative Agencies Practice Act. Because Otter Tail has a legal interest which may be substantially affected by these proceedings, the Commission should grant Otter Tail's Petition to Intervene.

Dated this 17<sup>th</sup> day of December, 2012.

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