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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.)

PUBLIC SERVICE COMMISSION

Case No. PU-12-767

**GREAT RIVER ENERGY'S SUPPLEMENTAL COMMENTS IN SUPPORT OF
THE REQUESTED JURISDICTIONAL DETERMINATION**

Great River Energy ("GRE") provides these supplemental comments in response to the questions raised by the Commissioners and staff during the Work Session related to this case that was held by the Commission on December 10, 2012. GRE's comments are limited to three subjects. First, the questions raised during the Work Session as to the number of customers that would be considered "sales to the general public," second, the issues raised by Montana-Dakota Utilities Co. ("MDU") in its filing to the Commission on December 6, 2012,¹ and last, the additional comments of Otter Tail Power Company ("OTP") in its filing dated December 17, 2012.²

1. GRE plans to provide electric service to two industrial customers, CHS, Inc. ("CHS") and Dakota Spirit AgEnergy, LLC ("Dakota Spirit").

A question arose during the Work Session as to whether GRE's request to serve commercial/industrial customers within the 551-acre Spiritwood Energy Park was in reality a request to serve the general public in a service area, albeit a very small (551 acres) service area.

¹ Brief of Montana-Dakota Utilities Co in Opposition to Great River Energy's Request for Jurisdictional Determination (Case No. PU-12-767), dated December 6, 2012.

² Brief of Otter Tail Power Company in Support of Petition to Intervene (Case No. PU-12-767), dated December 17, 2012.

That was not GRE's intent. In discussing our plan to provide electric service to the commercial/industrial customers within the Spiritwood Energy Park, our intent was not to establish a service area but to indicate the very limited nature of the service we plan to provide. As we described in our Request for Jurisdictional Determination, dated October 5, 2012 (the "Request") and our Brief, dated November 30, 2012 ("Brief"), our intent is to provide electric service to a very small number of sophisticated customers who locate commercial/industrial facilities within the boundaries of the Spiritwood Energy Park pursuant to bilaterally negotiated long-term contracts. At the time that we made our Request, CHS had only recently announced the proposed development of the nitrogen fertilizer manufacturing plant (the "CHS Plant"). Since that time, the development of the proposed CHS Plant and the proposed Dakota Spirit biorefinery have both progressed.³ These two projects are projected to take up most if not all of the usable space in the industrial park. Due to the progress of the projects and our analysis of the land usage requirements of each, we can clarify that our Request is limited to these two specific projects.⁴ GRE does not plan to serve the general public in the industrial park or anywhere else in North Dakota. GRE plans to serve two customers, the CHS Plant and the Dakota Spirit biorefinery, just as it has served and continues to serve certain of the mining facilities owned by The Falkirk Mining Company adjacent to GRE's Coal Creek Station in Underwood, North Dakota.

³ The online website "Agweek" reports that, during the company's annual meeting December 6-7, 2012, CHS officials stated that the \$1.4 billion nitrogen fertilizer manufacturing plant in Spiritwood is moving forward. See <http://www.agweek.com/event/article/id/20311/>

⁴ There might be sufficient land in the industrial park for a third small commercial or industrial concern, however that is not certain and no such potential tenant has come forward. If there is an additional tenant, or if either of the two specific projects does not proceed, GRE will seek further guidance from the Commission.

2. GRE is not a Public Utility under N.D.C.C. Chapter 49-03.1.

MDU suggests that if GRE is not an “Electric Public Utility” under N.D.C.C Chapter 49-03, that GRE is instead a “Public Utility” under N.D.C.C. Chapter 49-03.1. A Public Utility is required to obtain from the Commission a certificate of public convenience and necessity before beginning “construction or operation of a public utility plant or system.”⁵ GRE does not meet the definition of a Public Utility. For the purpose of N.D.C.C. Chapter 49-03.1, a Public Utility includes “any association, person, firm, corporation, limited liability company, or agency engaged in or employed in this state to furnish its products or services *to the public generally* which is statutorily subject to the jurisdiction of the Commission” [emphasis added]. The North Dakota Supreme Court has expressed the importance of construing together “all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent.”⁶ Just as GRE is not an Electric Public Utility under N.D.C.C. Chapter 49-03 because it is not offering electric service to the general public, GRE is not a Public Utility under N.D.C.C. Chapter 49-03.1 because it is not offering electric service to the public generally.⁷ The analysis in GRE’s Brief concluding that GRE is not an Electric Public Utility equally supports the conclusion that GRE is not a Public Utility for the purpose of requiring a certificate of public convenience and necessity under N.D.C.C. Chapter 49-03.1-01.

MDU cites several cases from Pennsylvania, New Mexico, California and Iowa that discuss what is meant by serving the public in the relevant state. None of the cases cited by MDU provides a convincing argument that GRE will be serving the public generally. For

⁵ N.D.C.C Chapter 49-03.1-01.

⁶ See Cass County Elec. Co-op., Inc. v. Northern States Power Co. 419 N.W.2d 181 (N.D., 1988), at 185.

example, in UGI Utilities, Inc. v. Pennsylvania Public Utilities Commission,⁸ the Court stated, quoting the Pennsylvania Supreme Court: “[T]he test for determining whether utility services are being offered ‘for the public’ is: whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to a limited portion of it, as contradistinguished from *holding himself out as serving or ready to serve only particular individuals*.” [emphasis added]. We do not suggest that this case in any way illuminates North Dakota law, but if it did and in contrast to MDU’s assertions, it supports the position that GRE is not offering service to the public generally, because GRE is holding itself out as serving or ready to serve only particular individuals – the two customers who have requested electric service from GRE and who plan to locate within the industrial park, as we have clarified: the CHS Plant and the Dakota Spirit biorefinery.

3. OTP does not have the right to apply for or receive a certificate of public convenience and necessity to serve the CHS Plant or the Dakota Spirit biorefinery.

In its recently filed additional brief (which is actually a reply brief to GRE’s Brief), OTP attempts to bootstrap its 2007 certificate of public convenience and necessity for the failed Spirit Ethanol project into the geographical right to serve the Spiritwood Energy Park (which did not exist in 2007) and an interest sufficient for intervenor status in the Commission’s consideration of GRE’s Request. OTP’s assertions are inconsistent with North Dakota law, and the PSC should deny OTP’s request to intervene.⁹

⁸ UGI Utilities, Inc. v Pennsylvania Public Utility Commission, 684 A.2d 225, 299 (Pa. Commonwealth Ct. 1996)

⁹ The Commission should similarly deny MDU’s request for intervenor status in this case.

OTP does not have the right to apply for much less receive a certificate of public convenience and necessity to serve the CHS Plant or the Dakota Spirit biorefinery. In Capital Electric Cooperative, Inc., v. Public Service Commission of the State of North Dakota 534 N.W.2d 587 (N.D. 1995) (“Capital Electric”), the Court held that a new customer located outside a municipality must request service from an Electric Public Utility before the Commission can consider whether to issue a certificate of public convenience and necessity to the Electric Public Utility.¹⁰ OTP cannot apply to the Commission to serve the CHS Plant or the Dakota Spirit biorefinery without a request from the new customers. The fact that OTP has existing certificates of public convenience and necessity in the area of the proposed Spiritwood Energy Park is not relevant. For instance, OTP has a long standing certificate to serve the malt plant. That certificate is specific to the malt plant. It provides OTP with the right to serve the malt plant and only the malt plant. It does not confer on OTP the right to serve the area surrounding the malt plant. If it did, OTP would not have needed a separate request and separate application to serve the immediately adjacent Spiritwood Station. In its new brief, and despite the detail contained in GRE’s Brief, OTP vaguely alleges that there are facts in dispute. OTP seeks to mask the only fact that matters – neither the CHS Plant nor the Dakota Spirit biorefinery have requested service from OTP. Without a request, OTP cannot apply to the Commission for a certificate of public convenience and necessity. Without a request, it is not possible to invoke the jurisdiction of the Commission. And without a request, OTP cannot gain the right to provide service to either facility. OTP does not have an interest sufficient for intervenor status in this case, and the Commission should deny OTP’s request.

¹⁰ Capital Electric Cooperative, Inc., v. Public Service Commission of North Dakota 544 N.W.2d 587 (N.D. 1995). This dispute concerned a certificate to provide service to a headbolt heater in a Department of Transportation tractor at a storage shed in Sterling, an unincorporated community in Burleigh County, North Dakota.

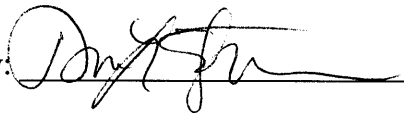
4. Conclusion.

For the reasons described in the Request, GRE's Brief and these supplemental comments, GRE requests that the Commission grant GRE's Request for Jurisdictional Determination that GRE is not an Electric Public Utility under N.D.C.C. Chapter 49-03 and is not a Public Utility under N.D.C.C. Chapter 49-03.1 in connection with providing electric service pursuant to bilateral contracts to the CHS Plant or the Dakota Spirit biorefinery within the planned Spiritwood Energy Park.

Dated this 28th day of December, 2012.

Respectfully Submitted,

GREAT RIVER ENERGY

By: 

Eric J. Olsen
Vice President & General Counsel
12300 Elm Creek Boulevard
Maple Grove, MN 55369
763-445-5201
eolsen@grenergy.com

Donna L. Stephenson
Associate General Counsel
12300 Elm Creek Boulevard
Maple Grove, MN 55369
763-445-5218
dstephenson@grenergy.com