

215 South Cascade Street
PO Box 496
Fergus Falls, Minnesota 56538-0496
218 739-8200
www.otpco.com (web site)

March 10, 2025



Mr. Steve Kahl
Director of Administration/Executive Secretary
North Dakota Public Service Commission
State Capitol
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0408

**RE: Request for Jurisdictional Determination regarding whether a Certificate of Public Convenience and Necessity is required for the Abercrombie Solar Project
Case No. PU-25-
Request for Jurisdiction Determination**

Dear Mr. Kahl

Otter Tail Power Company (Otter Tail Power or Company) submits this Request for a Jurisdiction Determination to the North Dakota Public Service Commission concerning the Company's anticipated Abercrombie Solar Project (Abercrombie Project or Project) located in Richland County, North Dakota.

The issue to which the Company seeks a jurisdictional determination is whether Otter Tail Power is required to secure a Certificate of Public Convenience and Necessity (CPCN) from the Commission in order to construct and operate the Abercrombie Solar Project (Abercrombie Project or Project) in Richland County, North Dakota, when the Company will neither serve North Dakota customers with the Project nor seek or receive cost recovery of any kind from North Dakota customers for the Project.

Introduction & Background

Otter Tail Power intends to construct, own and operate the Abercrombie Project, a 295.1 MW solar energy conversion facility and associated facilities in Abercrombie Township, Richland County, North Dakota. The Project will be located on approximately 3,464 acres of privately owned land under agreement with Otter Tail Power. The Project includes the construction of a 230 kV generation tie (gen-tie) line of approximately 530 feet to facilitate the Project's interconnection to Minnkota Power Cooperative's existing Frontier-Wahpeton 230 kV transmission facility. The Project does not require and does not include the construction of any transmission facilities as defined by North Dakota law. The Abercrombie Project will not conflict with electrical service provided by North Dakota cooperatives. To the contrary, the Company

anticipates receiving temporary service for construction and permanent station service from Cass County Electrical Cooperative, the local incumbent cooperative.¹

The Abercrombie Solar Project has been developed to date as the Flickertail Solar Project by Flickertail Solar Project, LLC (Flickertail), a wholly owned subsidiary of Savion, LLC. On October 30, 2024, Otter Tail Power entered into an Asset Purchase Agreement (APA) with Flickertail to purchase the development assets of the project.² The development assets include existing interconnection rights held by Flickertail.³ Numerous conditions must be satisfied prior to closing of the asset purchase under the APA, including Flickertail obtaining a certificate of site compatibility for the Project from the Commission in Case No. PU 24-351.⁴ A full description of the Project is provided in that docket.

Otter Tail Power seeks this Jurisdictional Determination because of the Company's contractual interest in the Project, which absent unforeseen circumstances will result in the Company acquiring the Project's development assets and proceeding with construction and operation of the solar generation plant. Otter Tail Power seeks this determination now to ensure it can proceed with the Project assuming the Commission approves Flickertail's request for a site certificate. If the Commission approves Flickertail's site certificate application, and it is determined that a CPCN is required in this docket, Otter Tail Power will need to move quickly to secure a CPCN. For the reasons noted below, we believe Commission legal counsel can confidently determine that a CPCN is not required.

Analysis

The Company's assessment is that it would not be necessary to obtain a CPCN because the Project (1) will not serve North Dakota customers and (2) the Project will not be included in Otter Tail Power's North Dakota rate base or otherwise be recovered in rates from North Dakota customers.⁵

N.D.C.C. 49-03-01 provides the following:

¹ Permanent station service is required for an operations and maintenance building and a control house on the Abercrombie site.

² The development assets to be acquired by Otter Tail Power under the APA include but are not limited to: (1) site control & land rights documents (2) permits and governmental approvals (3) material contracts rights including the LGIA, (4) project plans, including conceptual designs and site plans, and (5) project reports & surveys.

³ The above referenced interconnection is to Minnkota Power Cooperative's existing Frontier-Wahpeton 230 kV transmission facility.

⁴ *Flickertail Solar Project, LLC's Application for a Certificate of Site Compatibility for the Flickertail Solar Project in Richland County*, North Dakota Case No. PU-24-351. A hearing on Flickertail's Application has been scheduled for March 24, 2025.

⁵ In not using the Project to serve North Dakota customers the Company is following the Commission's guidance provided in the Company's North Dakota Integrated Resource Plan (NDPSC Case No. PU-21-380). In that proceeding the Commission authorized an Investigation Report that concluded no new renewable resources were necessary to serve North Dakota customers. The Commission later confirmed that this approach is consistent with North Dakota energy policy, and that it applies to new renewable resources sited in North Dakota, where such facilities enjoy a rebuttable presumption of prudence under N.D.C.C. 49-05-16. The Commission reiterated this point in an order dated December 4, 2024, wherein it noted that "the Commission does not support the addition of new wind or solar generation or battery storage through 2030 on behalf of North Dakota customers regardless of where they may be sited, including the potential North Dakota solar project OTP disclosed to the Commission during the October 18, 2024 Informal Hearing." See Order and Guidance on Integrated Resource Plan, December 4, 2024, p. 2.

1. An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation. This section does not require an electric public utility to secure a certificate for an extension within any municipality within which the electric public utility has lawfully commenced operations. If any electric public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions.
2. An electric transmission provider may not begin construction or operation of an electric transmission line interconnecting with an existing electric transmission line owned or operated by an electric public utility without first obtaining a certificate that public convenience and necessity require or will require the construction or operation.

Similarly, N.D.C.C. 49-03-01.1. states the following:

No electric public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation, nor shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, nor shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer.

Based on the relevant clauses of the statute, a CPCN is only needed for an electric public utility to expand its utility plant or system. An electric public utility is “a privately owned supplier of electricity offering to supply or supplying electricity to the general public.”⁶ In this context “general public” refers to North Dakota customers. Otter Tail is an electric public utility under North Dakota law. Therefore, the first prong of the statutory application is met. The question remains as to whether the Abercrombie Project is utility plant for purposes of a CPCN.

⁶ NDCC 49-03-01.5 (2).

In general, a utility plant is such plant owned by a utility that is used to provide electric service to its customers.⁷ The facts and circumstances of the Abercrombie Project do not qualify it as utility plant for purposes of the application of the CPCN statutes. Specifically, Otter Tail Power will not be using the project to serve its North Dakota customers and therefore the plant will not be used and useful for the provision of electric service to our North Dakota customers.

That a CPCN should not be required for the Abercrombie Project is demonstrated by the absurd result that would ensue from the Commission issuing a CPCN. In such a case, the Commission would (1) certify the public convenience and necessity for North Dakota customers will be served by the construction and operation of the plant when (2) the plant will not be used and useful for electric service to North Dakota customers. Simply, in this circumstance, Otter Tail is not an electric public utility expanding its utility plant and therefore requiring a CPCN. Here, Otter Tail Power is an electric public utility owning a solar project on an essentially merchant basis and should be treated as such.

The Abercrombie Project is much like Minnesota Power's Bison Wind projects in Oliver and Morton County, North Dakota.⁸ For these projects Minnesota Power sought and obtained a Certificate of Site Compatibility. There is no record of the Commission requiring or Minnesota Power seeking a CPCN. This is consistent with the Company's research which failed to identify any instance where a generation conversion facility not serving North Dakota customers obtained a CPCN in addition to a Certificate of Site Compatibility.

Importantly, the Commission still retains full jurisdiction and oversight over the Project under NDCC Chapter 49-22. The Commission, through the issuance of a Certificate of Site Compatibility retains full authority to ensure that the Abercrombie Project is operated and decommissioned in a safe and efficient manner and that the Project is respectful of landowner rights. This means that the Commission is not relinquishing any regulatory control with respect to the Project should it not issue a CPCN.

The Company has not identified a prior instance where an electric public utility that serves North Dakota customers has sought to construct and operate a generation plant in North Dakota that will not serve or be paid for by North Dakota customers. The nearest analogy identified by the Company concerns regional transmission projects that the Commission determined required a CPCN. In Case No. PU-401-99-586 and Case

⁷ North Dakota Law does not define "utility plant." Other jurisdictions have interpreted the phrase to refer to property that provides power to consumers. *See, e.g., Niles v. Chicago*, 558 N.E.2d 1324, 1332 (Ill. Ct. App. 1990) ("The rate base consists of the value of the utility plant -- *the actual property used and useful in serving the customers.*") (emphasis added); *Wash. Gas Light Co. v. Pub. Serv. Com.*, 450 A.2d 1187, 1215 n.38 (D.C. 1982) (A regulated company's balance sheet segregates the "utility plant" assets (including land), which are "used and useful" in serving the public, from the company's other assets -- called "nonutility property" -- which are carried on the books, most commonly, as investments."). North Dakota courts often look to other jurisdictions in the absence of North Dakota case law. *Lund v. Swanson*, 2021 ND 38, ¶ 18, 956 N.W.2d 354, 362. Moreover, limiting "utility plant" to infrastructure serving the North Dakota public may additionally shield the PSC from exerting unconstitutional extraterritorial jurisdiction. *See SCS Carbon Transp. LLC v. Malloy*, 2024 ND 109, ¶ 7, 7 N.W.3d 268, 273 (requiring courts to interpret statutes "to avoid constitutional infirmities"); *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 908 (D. Minn. 2014) (invalidating as extraterritorial a statute that regulated the behavior of power suppliers *outside* the state's geographic bounds).

⁸ Bison Wind 1 Project, NDPSC Case No. PU-09-151; Bison 2 Wind Project, NDPSC Case No. PU-11-057; Bison Wind Project 3, NDPSC Case No. PU-11-162; Bison 4 Wind Project, NDPSC Case No. PU-13-127.

No. PU-2280-00-200 (collectively the Rugby Line case) Commission legal counsel opined that the construction of electric transmission lines by Xcel Energy and Otter Tail Power outside their respective retail service areas for purposes of regional grid reliability required a CPCN even when the projects had already been issued a Corridor Certificate and a Route Permit. The issue at hand, however, was whether the CPCN statutes applied to new transmission projects that do not result in an investor-owned utility's expansion of its retail electric service.⁹ Under those facts, it was clear that the transmission lines were utility plant in that they would be used and useful for the provision of electric service, and that the costs of the transmission lines would be recovered from North Dakota customers through the respective utility's rates as a return on and return of rate base. The question there was if a CPCN was required because the transmission lines were not considered an extension of distribution plant to serve customers. The outcome of this case was ultimately codified in NDCC 49-03-01(2) almost twenty years after the Rugby Line case was decided.

The difference between Rugby Line case and the Abercrombie Project are significant. The Abercrombie Project does not involve the construction of any transmission lines in North Dakota which would clearly require a CPCN. The Abercrombie Project is not proposed for any regional benefit purposes. Most importantly the Abercrombie Project will not be part of Otter Tail Power's North Dakota rate base or otherwise paid for by North Dakota customers, which was not the case in the Rugby Line case. Said differently, the transmission line at issue in the Rugby Line case was clearly utility plant; here, the Abercrombie Project is not.

That a CPCN is not applicable to the Abercrombie Project is also evident from the issues the Commission normally examines in CPCN proceedings. The primary question addressed by the Commission in CPCN applications for plant additions is whether public convenience and necessity will be served by the utility's ownership and operation of the facilities. That question is ill-suited to a plant that will neither serve North Dakota customers nor be paid for by North Dakota customers. This is why merchant generators and other utilities that own generation in North Dakota but do not serve North Dakota customers do not require a CPCN. Further, it is not clear what Otter Tail Power would need to demonstrate to obtain a CPCN since there are no need, service or cost issues to consider precisely because the Project will neither serve nor be paid for by North Dakota customers.

Likewise, the Project will not result in the expansion of the Company's retail service area in North Dakota, and therefore there are no issues that the Commission typically evaluates in service area disputes between an investor-owned utility and an electrical cooperative. This is demonstrated by the following assessment of the ten factors the Commission evaluates in cases where a utility expansion of service conflicts with a cooperative's electric service:

1. ***From whom does the customer prefer electric service?*** This is not applicable. No customer has requested the construction of the Project.
2. ***What electric suppliers are operating in the general area?*** Not applicable. The Project does not provide direct retail service in competition with any other retail electric suppliers in the area.

⁹ See Need for Certificates of Public Convenience and Necessity, Harvey to Rugby, Case No. PU-401-99-586 and Rugby to Canadian Border, Case No. PU-2280-00-200, August 26, 2003.

3. ***What electric supply lines exist within a two-mile radius of the location to be served and when were they constructed?*** Not applicable. The Project do not provide retail service in North Dakota.
4. ***What customers are served by electric suppliers within at least a two-mile radius of the location to be served?*** Not applicable. The Project will not provide retail service to customers in North Dakota.
5. ***What are the differences, if any, between the electric suppliers available to serve the area with respect to reliability of service?*** Not applicable. The Project does not serve any North Dakota customers there is nothing to compare between electrical suppliers.
6. ***Which of the available electric suppliers will be able to serve the location in question more economically and still earn an adequate return on its investment?*** Not applicable. The Project does not provide retail service to North Dakota customers, and the Company will not be seeking a return on its investment from North Dakota customers.
7. ***Which supplier's extended electric service would best serve orderly and economic development of electric service in the general area?*** Not applicable. The Project does not extend the Company's retail electric service.
8. ***Would approval of the application result in wasteful duplication of investment or services?*** Not applicable. This factor examines and compares competing service between parties, and because the Project is not serving North Dakota customers there is nothing to compare.
9. ***Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?*** Not applicable. The project does not serve North Dakota retail load, and the siting of the Project is such that it will not be part of any municipality.
10. ***Will the service by either of the electric suppliers in the area unreasonably interfere with the service or system of the other?*** Not Applicable. The Company is not seeking to extend it North Dakota retail service.

Conclusion

The Company respectfully submits that a CPCN is not required for Otter Tail Power to construct, own and operate the Abercrombie Project in Richland County, North Dakota. As noted above, Otter Tail Power will not use the Abercrombie Project to serve North Dakota customers and North Dakota customers will bear none of the cost of the Abercrombie Project. The project will not become part of the Company's North Dakota rate base, nor will the Company recover any part of the project through a rider or the Company's North Dakota fuel clause.

To require a CPCN in these circumstances could lead to absurd and contradictory results as noted above. Importantly the foregoing of a CPCN does not diminish the Commission's full jurisdiction and oversight over the Project under NDCC Chapter 49-22. Therefore we respectfully request a determination that a CPCN is not required for Otter Tail Power to construct and operate the Abercrombie Project.

Mr. Kahl
March 10, 2025
Page 7

An electronic copy of this filing is being sent to you at ndpsc@nd.gov. Please contact me at cstephenson@otpc.com or (218) 739-8956 if you have any questions regarding this filing. Copies have been sent to you via USPS

Sincerely,

/s/ CARY STEPHENSON
Cary Stephenson
Associate General Counsel

kaw
Enclosures
By electronic service
c: Service List