

June 19, 2017

**PUBLIC DOCUMENT**

Daniel P. Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, Minnesota 55101-2147

RE: **PUBLIC Comments of the Minnesota Department of Commerce, Division of Energy Resources**  
Docket No. E017/M-17-279

Dear Mr. Wolf:

Attached are the **PUBLIC** comments of the Minnesota Department of Commerce, Division of Energy Resources (Department) in the following matter:

Otter Tail Power Company's Petition for Approval of the Merricourt Wind Project.

The Petition was filed on April 11, 2017 by:

Cary Stephenson  
Associate General Counsel  
Otter Tail Power Company  
215 South Cascade Street  
Fergus Falls, Minnesota 56538-0496

The Department recommends that **Otter Tail Power Company provide in reply comments the application of certain statutes and rules to this petition and provide more information on the Project's environmental risk exposure to ratepayers.** The Department intends to review the Company's reply comments and provide final recommendations to the Minnesota Public Utilities Commission.

Sincerely,

/s/ DOROTHY E. MORRISSEY  
Financial Analyst

DEM/lt  
Attachment



## Before the Minnesota Public Utilities Commission

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### PUBLIC DOCUMENT

#### Comments of the Minnesota Department of Commerce Division of Energy Resources

Docket No. E017/M-17-279

#### I. BACKGROUND

On April 11, 2017, pursuant to Minn. Stat. §216B.1645, Otter Tail Power Company (OTP or the Company) submitted a petition to the Minnesota Public Utilities Commission (Commission) requesting approval of OTP's investment in a proposed 150-MW Merricourt wind generation project (Merricourt Project) located in McIntosh and Dickey Counties in North Dakota.

Prior to this petition, in OTP's 2013 Integrated Resource Plan, or IRP, (Docket E017/RP-13-961), the Commission issued an Order Approving Plan with Modifications and Setting Requirements for Next Resource Plan on December 5, 2014 (13-961 Order) authorized OTP to obtain up to 300 MW of wind in the 2017-2021 timeframe, if cost-effective and to the extent consistent with reliable system operation.<sup>1</sup> More recently, in OTP's 2016 IRP (Docket E017/RP-16-386), the Commission issued an Order Approving Plan with Modifications and Setting Requirements for Next Resource Plan on April 26, 2017 (16-386 Order) approved a five-year action plan for the addition of resources including the addition of 200 MW of wind in the 2018-2020 timeframe.<sup>2</sup>

#### II. SUMMARY OF FILING

The Merricourt Project is proposed to be an OTP-owned wind generation facility through a turn-key transaction, developed and constructed by the subsidiaries of EDF Renewable Energy, Inc. (EDF). The Merricourt Project would consist of seventy-five (75) 2.0-MW Vestas wind turbine generators with an aggregate nameplate capacity of 150 MW. The Merricourt Project is expected to be placed in service in 2019, in advance of the December 31, 2020 deadline required to capture the 100 percent federal production tax credit benefits. OTP indicated that, with the addition of the Merricourt Project, approximately 28 percent of OTP's total retail energy (system wide) will be generated by renewable generating resources.

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<sup>1</sup> [Commission 13-961 Order.](#)

<sup>2</sup> [Commission 16-386 Order.](#)

OTP requested that the Commission:

1. Determine that the Merricourt Project qualifies for application towards OTP's renewable energy objectives and obligations under Minn. Stat. §216B.1691;
2. Approve OTP's proposed investment in the 150-MW Merricourt Project, pursuant Minn. Stat. §216B.1645; and
3. Authorize future recovery for the Merricourt Project through OTP's Renewable Resource Cost Recovery Rider, subject to Commission review and approval of specific costs to be presented in a future petition under Minn. Stat. §216B.1645, subd. 2a.

OTP stated that its proposed Merricourt Project is a prudent, reasonable and low cost generation addition that aligns with the resource additions authorized by the Commission in the Company's recent IRP dockets; and that the Merricourt Project would provide OTP's customers the double benefit of meeting both their energy needs and renewable energy obligations.

### III. DEPARTMENT ANALYSIS

#### A. *PROJECT ELIGIBILITY AS RENEWABLE ENERGY TECHNOLOGY*

Minn. Stat. §216B.1691, subd. 1 defines an eligible energy technology as one that,

**Generates electricity from the following renewable energy sources:** (1) solar; **(2) wind**; (3) hydroelectric with a capacity of less than 100 megawatts; (4) hydrogen, provided that after January 1, 2010, the hydrogen must be generated from the resources listed in this paragraph; or (5) biomass, which includes, without limitation, landfill gas; an anaerobic digester system; the predominantly organic components of wastewater effluent, sludge, or related by-products from publicly owned treatment works, but not including incineration of wastewater sludge to produce electricity; and an energy recovery facility used to capture the heat value of mixed municipal solid waste or refuse-derived fuel from mixed municipal solid waste as a primary fuel. [**emphasis added**]

Since the proposed Merricourt Project is a wind generation facility, the Minnesota Department of Commerce, Division of Energy Resources (DOC or Department) concurs that it qualifies as an eligible energy technology that can count towards the Minnesota Renewable Energy Standard (RES) requirements set forth in Minn. Stat. §216B.1691.

**B. OTP's COMPLIANCE WITH THE RENEWABLE ENERGY STANDARD**

Wind-generated energy may be counted toward the renewable energy standard outlined in Minn Stat. §216B.1691, subd. 2a. Paragraph (a) of this subdivision applies to OTP which reads in part:

(a) [...] each electric utility shall generate or procure sufficient electricity generated by an eligible energy technology to provide its retail customers in Minnesota, or the retail customers of a distribution utility to which the electric utility provides wholesale electric service, so that at least the following standard percentages of the electric utility's total retail electric sales to retail customers in Minnesota are generated by eligible energy technologies by the end of the year indicated:

- |     |      |             |
|-----|------|-------------|
| (1) | 2012 | 12 percent  |
| (2) | 2016 | 17 percent  |
| (3) | 2020 | 20 percent  |
| (4) | 2025 | 25 percent. |

OTP indicated that it currently satisfies its renewable energy standard from energy produced by owned generation facilities and through Purchased Power Agreements (PPA).<sup>3</sup> OTP's renewable energy resources consist of the following:

Renewable Resource	Nameplate Capacity	Docket
<b>OTP-owned:</b>		
Langdon	50.5 MW	E017/M-08-119
Ashtabula Wind	48.0 MW	E017/M-08-1055
Luverne	49.5 MW	E017/M-09-883
<b>PPAs:</b>		
Edgeley	20.5 MW	E017/M-03-970
Langdon	19.5 MW	E017/M-08-131
Other smaller sources	5 MW	not listed

Although OTP currently satisfies its RES, OTP's renewable biennial compliance report (Docket E999/PR-16-83) reflects that the Company expects to remain compliant up through 2025 with its current renewable portfolio. Beyond 2025, OTP expects it will not have sufficient renewable energy credits to satisfy its RES obligations. The Commission's 16-386 Order statement acknowledged OTP's need for additional renewable energy:

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<sup>3</sup> Petition, page 7.

With the addition of 200 MW of wind, the Company will be on track to meet the Renewable Energy Standard, which requires a public utility – such as Otter Tail – to generate or procure, by 2025, 25 percent of its total retail electric sales using renewable energy technologies.

In these recent reporting and IRP dockets, OTP has demonstrated a need for additional renewable energy resources.

*C. APPROVAL OF INVESTMENT IN THE PROPOSED MERRICOURT PROJECT*

The Department assessed OTP's request for approval of its investment in the Merricourt Project in light of the requirements of relevant statutes, rules and Commission Orders.

*1. Minn. Stat. §216B.1645 Power Purchase Contract or Investment*

OTP indicated that it seeks approval of the Merricourt Project pursuant Minn. Stat. §216B.1645. Subdivision 1 of this statute reads, in part [emphasis added]:

Subdivision 1. Commission authority.

**Upon the petition of a public utility, the Public Utilities Commission shall approve or disapprove power purchase contracts, investments, or expenditures entered into or made by the utility to satisfy the wind and biomass mandates contained in sections 216B.169, 216B.2423, and 216B.2424, and to satisfy the renewable energy objectives and standards set forth in section 216B.1691 including reasonable investments and expenditures made to:**

(1) transmit the electricity generated from sources developed under those sections that is ultimately used to provide service to the utility's retail customers, including studies necessary to identify new transmission facilities needed to transmit electricity to Minnesota retail customers from generating facilities constructed to satisfy the renewable energy objectives and standards, provided that the costs of the studies have not been recovered previously under existing tariffs and the utility has filed an application for a certificate of need or for certification as a priority project under section 216B.2425 for the new transmission facilities identified in the studies; ...

The Department concurs that the proposed Merricourt Project would help OTP satisfy the Company's renewable energy obligations set forth in Minn. Stat. §216B.1691.

2. *Minn. Stat. §216B.243 Certificate of Need for Large Energy Facility*

Minn. Stat. §216B.243. Subdivision 2 reads:

Subd. 2. Certificate required.

No large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the commission pursuant to sections 216C.05 to 216C.30 and this section and consistent with the criteria for assessment of need.

OTP stated that the Merricourt Project is being built in North Dakota, and therefore it is exempt from the certificate of need statute, Minn. Stat. §216B.243. The Department agrees.

3. *Minn. Stat. §216B.50 Restrictions on Property Transfer and Merger*

Minn. Stat. §216B.50. Subdivision 1 reads [emphasis added]:

Subdivision 1. Commission approval required.

No public utility shall sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000, or merge or consolidate with another public utility or transmission company operating in this state, without first being authorized so to do by the commission. Upon the filing of an application for the approval and consent of the commission, the commission shall investigate, with or without public hearing. The commission shall hold a public hearing, upon such notice as the commission may require. **If the commission finds that the proposed action is consistent with the public interest, it shall give its consent and approval by order in writing.** In reaching its determination, the commission shall take into consideration the reasonable value of the property, plant, or securities to be acquired or disposed of, or merged and consolidated.

This section does not apply to the purchase of property to replace or add to the plant of the public utility by construction.

This instant docket was not filed pursuant to Minn. Stat. §216B.50, nor Minn. Rule 7825.1800. When the Company was asked in an information request about the relevance of this statute and rule to this petition, OTP did not believe either applies to the Merricourt Project, referencing the two agreements it has with EDF: (1) the Asset Purchase Agreement (APA), and (2) the Turnkey Engineering, Procurement, and Construction agreement (TEPC).<sup>4</sup>

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<sup>4</sup> DOC Information Request No. 1 included as Attachment A to these comments.

OTP reasoned that under the APA, OTP would buy the development assets from EDF (*i.e.*, permits, land and land rights, and the Production Tax Credit (PTC) safe harbor turbines, which in the aggregate would not qualify as a “plant as an operating unit or system” under Minn. Stat. §216B.50, Subd. 1.

Further, OTP explained that under the TEPC agreement, OTP engages EDF to construct a generation facility for OTP. OTP reasoned that the turnkey contract refers to the scope of EDF’s work and the allocation of risk under the agreement; which differs from asset purchase and sale arrangements where one party transfers existing plant or system to another. In its response to DOC IR No. 1, OTP stated, “To apply Minnesota Statute §216B.50 to the TEPC agreement may require application of the statute to many construction and design/build agreements, which in Otter Tail’s view is beyond the scope and purpose of the statute.”

OTP’s final remarks stated:

[A]pplying Minnesota Statute §216B.50 to the Merricourt Project is of no benefit to ratepayers, which should be considered when construing the scope of the statute. The Merricourt Project reflects the execution of Otter Tail’s Integrated Resource Plans that have been reviewed and approved by the Commission. The current docket and any subsequent requests for recovery under Otter Tail’s renewable resource rider provide the Department and the Commission full opportunity to examine the reasonableness and prudence of specific project costs. Overlaying Minnesota Statute §216B.50 on the Merricourt Project is neither necessary nor beneficial in view of the existing and anticipated dockets related to the Merricourt Project.

In a discussion with the Department, OTP indicated that this petition was modelled after its prior petitions with similar requests for the addition of wind generation facilities of which none were filed, nor approved pursuant to Minn. Stat. §216B.50:

- E017/M-09-883 Luverne Wind Project – jointly developed by OTP and NextEra (formerly known as FPL Energy). Commission Order issued January 27, 2010.
- E017/M-08-1055 Ashtabula Project – jointly developed by OTP and FPL Energy (now known as NextEra). Commission Order issued June 16, 2009.
- E017/M-08-119 Langdon Wind – FPL Energy developed Langdon Wind Energy Center which was subdivided into three smaller projects. Petition stated that OTP developed and constructed the 40.5 MW portion which it owns. Commission Order issued August 15, 2008.

However the Department notes that in more recent petitions filed by other utilities similarly contracting for and investing in turnkey-type facilities or selling asset components initially acquired for a generation facility, the Commission has applied this statute when considering the utilities' activity; for example:

- Commission Order issued December 13, 2013 in Docket No. E002/M-13-603, involving an agreement wherein Xcel Energy (Xcel) acquired a wind farm (Pleasant Valley) to be developed by RES Americas ;
- Commission Orders issued April 16, 2013 and July 1, 2013 in Docket No. E,G001/AI-12-792, involving Interstate Power and Light Company's (IPL) wind development assets purchase and sale agreement with Franklin County Wind, LLC; and
- Commission Order issued August 18, 2014 in Docket No. E,G001/PA-13-788 involving IPL's transfer of wind generation development assets and components to affiliate Franklin County Wind, LLC.

The Department concludes that the Merricourt Project would likewise be subject to Minn. Stat. §216B.50 and Minn. Rule 7825.1800. Therefore, the Department requests OTP in reply comments to (1) request approval of this petition pursuant to Minn. Stat. §216B.50; and (2) comply with, or reason any requested variance to, Minn. Rule 7825.1800 - *Filing Requirements for Petitions to Acquire Property*, or (3) explain the differentiation between each of the other petitions with more recent utility transactions (listed above) wherein the Commission applied Minn. Stat. §216B.50 with the proposed Merricourt Project's agreements and support why Minn. Stat. §216B.50 is not applicable to the Merricourt Project.

Minn. Rule 7825.1800 reads, in part:

7825.1800 FILING REQUIREMENTS FOR PETITIONS TO ACQUIRE PROPERTY.

Petitions for approval to acquire property shall contain one original and three copies of the following information, either in the petition or as exhibits attached thereto:

[...]

- B. Petitions for approval of a transfer of property shall be accompanied by the following: all information as required in part [7825.1400](#), items A to J; the agreed upon purchase price and the terms for payment and other considerations.
- C. A description of the property involved in the transaction including any franchises, permits, or operative rights, and the original cost of such property, individually or by class, the depreciation and amortization reserves applicable to such property, individually or by class. If the original cost is unknown, an estimate shall be made of such cost. A detailed description of the method and all supporting documents used in such estimate shall be submitted.



D. Other pertinent facts or additional information that the commission may require.

*D. APPROVAL OF INVESTMENT IN PROPOSED MERRICOURT PROJECT*

*1. Consistency with Integrated Resource Plan*

In OTP's 2016 IRP (Docket E017/RP-16-386), the Company projected a growing capacity deficit beginning in 2017, which also coincides with the planned 2021 retirement of the Company's Hoot Lake Plant. The Commission's 16-386 Order approved the proposed five-year action plan, which included the addition of 200 MW of wind in the 2018 to 2020 timeframe. However, approval of a specific project would not occur under the resource planning statute [Minn. Stat. §216B.2422]; rather, the purpose of the resource planning process is to identify a future need and probable least-cost generic resources to fulfill that need (size, type and timing of resource need).

In this petition for approval of a specific project, the Department concludes that the proposed 150 MW Merricourt Project and its projected 2019 in-service period aligns with the 16-386 approved energy resource additions and implementation period.

*2. Analysis of Wind Resource Alternatives*

OTP stated that upon the extension of the Production Tax Credit by Congress, the Company undertook a solicitation process to probe the market for wind projects and assess project options. OTP received ten proposals from six developers ranging from 99-MW power purchase agreements to 200-MW build-transfer arrangements with ultimate OTP ownership.

The Company stated that it took into account multiple factors in evaluating projects including:

- (i) cost of wind energy to OTP customers;
- (ii) indication of site commitment;
- (iii) status of generation interconnection request;
- (iv) location of interconnection and impact of delivery to OTP customer including potential project curtailment;
- (v) project permitting status;
- (vi) anticipated commercial operation date to ensure utilization of the tax incentives;
- (vii) evidence of wind turbine supply;
- (viii) anticipated reliability of proposed equipment;
- (ix) evidence of wind resource; and
- (x) developer's experience in developing wind farms.

To compare the proposals, OTP calculated an estimated levelized cost of energy (LCOE) for varied project life sensitivities. The results showed that the turnkey, build-transfer 150 MW Merricourt Project proposal had the lowest LCOE. The proposed Merricourt Project, consisting of seventy-five (75) 2.0-MW Vestas wind turbine generators, has an expected energy output of 666,000 megawatt hours (MWh) annually at a net capacity rate of **[TRADE SECRET DATA HAS BEEN EXCISED]**. The Company's calculated LCOE for the proposed Merricourt Project is **[TRADE SECRET DATA HAS BEEN EXCISED]** which includes **[TRADE SECRET DATA HAS BEEN EXCISED]** for OTP's share of a total estimated **[TRADE SECRET DATA HAS BEEN EXCISED]** in transmission interconnection costs, under the APA with EDF.<sup>5</sup> The Department requested and reviewed OTP's resulting LCOE's of the ten proposals for the 25-year period and confirms that the proposed Merricourt Project had the lowest LCOE.<sup>6</sup>

Once an initial option was selected, OTP stated that it conducted additional modelling to confirm the prudence of moving forward with the turnkey Merricourt proposal; this evaluation projected a \$112 million cost savings over the 25-year Merricourt Project life when compared to making energy and capacity purchases over the same period, under all sensitivities.

The Department concludes that OTP's process for selecting the Merricourt Project appears to be reasonable and agrees with OTP's conclusion that the proposed Merricourt Project would reduce customers' exposure to energy market volatility by displacing MISO market purchases.

### *3. Cost of the Proposed Merricourt Project*

OTP's estimated total capital costs for the proposed Merricourt Project is **[TRADE SECRET DATA HAS BEEN EXCISED]**.

Besides considering a project's capital costs, the Department also considers a project's levelized cost of energy (LCOE) per MWh. The LCOE is a more comprehensive measure of the cost estimate to ratepayers and provides a better comparison when evaluating the reasonableness of a proposed project compared to other projects. OTP's estimated LCOE for the Merricourt Project of **[TRADE SECRET DATA HAS BEEN EXCISED]** was the lowest LCOE and includes OTP's share of a threshold amount for interconnection costs.

The Commission has approved three other utility-owned wind projects for OTP. The following table summarizes the estimated LCOE and total capital cost per kW measures presented in the dockets seeking approval for each of these wind projects, including the proposed Merricourt Project.

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<sup>5</sup> Trade Secret response to DOC Information Request No. 2 and 7.

<sup>6</sup> Trade Secret response to DOC Information Request No. 2 included as Attachment B.

OTP-Owned Wind Project	Nameplate (MW)	Estimated LCOE per MWh	Estimated Capital Cost per kW nameplate	Est. Net Capacity Factor <sup>7</sup>	Docket No. E017/
Langdon	40.5	[TRADE SECRET DATA HAS BEEN EXCISED]			M-08-119
Ashtabula Wind	48.0				M-08-1055
Luverne	49.5			n/a	M-09-883
<i>Merricourt - Proposed</i>	<i>150.0</i>			<i>50.7%</i>	<i>M-17-279</i>

As shown in the table, the expected capital expenditures per kW nameplate capacity and the levelized cost of energy for the proposed Merricourt Project are lower as compared to OTP's other Commission-approved wind projects. Among the many factors, the decline in LCOE is due in part to the improved net capacity output.

*E. MERRICOURT PROJECT RISKS*

*1. Interconnection Risk*

The Merricourt Project interconnection request is in the study phases at MISO as part of MISO's August 2016 study group, therefore, the interconnection costs are not fully known at this time. OTP estimates that MISO's initial identification of necessary network upgrades will be available by November 2017. Though the precise costs of the upgrades that MISO may require is not known at this time, OTP stated that the possible transmission interconnection costs could range from **[TRADE SECRET DATA HAS BEEN EXCISED]**. To mitigate interconnection risks, provisions were included in the APA to provide for automatic termination of the agreement if interconnection costs exceed **[TRADE SECRET DATA HAS BEEN EXCISED]**, unless one of the parties provides notice that it will pay the exceedance. The estimated total capital costs for the Merricourt Project include OTP's share of this threshold amount. OTP stated that it continues to work closely with EDF on other potential opportunities to reduce transmission costs. The Department concludes that OTP's interconnection risk mitigation approach is reasonable.

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<sup>7</sup> Although the Merricourt net capacity factor is not trade secret, for the Langdon and Ashtabula Wind projects, the Department calculated the net capacity factor using trade secret data and schedules found in the initial filing of these projects' notated dockets.

## 2. *Production Tax Credit Risk*

The federal Production Tax Credit (PTC) is being phased down and out; however developing wind generation projects could preserve the 100 percent PTC benefit level if, (1) construction began, or at least 5 percent of project of costs were incurred, prior to January 1, 2017 and (2) these same projects are in service by December 31, 2020. The LCOE for the proposed Merricourt Project assumed a 100 percent PTC benefit level.

OTP's contract with EDF required EDF to meet the 5-percent safe harbor threshold for 100 percent PTC level by acquiring a certain number of turbines from Vestas by December 31, 2016, which OTP stated was met by EDF. Additional terms of the agreement require EDF to indemnify OTP if PTC representations and warranties are breached; this protection is backed by a guaranty issued by EDF's parent, EDF Energy Nouvelles S.A.. These contractual requirements include, (1) an opinion from a qualified tax attorney that the project will qualify for 100 percent of the PTC as a condition to closing the transaction,<sup>8</sup> and (2) liquidated damages<sup>9</sup> if project is not timely constructed. The Department confirmed that the PTC liquidated damages reasonably compensates OTP for reduced PTC benefits should construction delay cause the PTC benefit level to drop.<sup>10,11</sup>

## 3. *Commercial Risk*

OTP and EDF executed an Asset Purchase Agreement (APA) under which Otter Tail will purchase the development assets of the Project at a set cost of \$34.7 million. The APA costs include the 5-percent safe harbor wind turbines for 100% production tax credit preservation, as well as site procurement, permits and contract costs necessary for completion of the project.

OTP and EDF also executed a corresponding Turnkey Engineering, Procurement, and Construction (TEPC) agreement, where EDF will construct the Project on a turnkey basis at a set cost of \$200.5 million, paid in installments benchmarked to certain project milestones. EDF is responsible to take all the steps necessary to provide OTP with a fully developed Project, including obtaining all of the necessary land rights, ensuring that the Project qualifies for PTCs, and obtaining all permits necessary for the Project to be implemented.

The remaining balance of the project's **[TRADE SECRET DATA HAS BEEN EXCISED]** total capital cost estimate consists of OTP's direct costs in the amount of **[TRADE SECRET DATA HAS BEEN EXCISED]**, of which **[TRADE SECRET DATA HAS BEEN EXCISED]** is attributed to OTP's share of the threshold interconnection costs. OTP conducted capital sensitivities and that analysis

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<sup>8</sup> Article 7 to APA contract.

<sup>9</sup> Article 6 to TEPC Agreement.

<sup>10</sup> Trade Secret response to DOC Information Request No. 12.

<sup>11</sup> Article 11 of the TEPC and Section 9.4(e) of the APA.

concluded that the proposed Merricourt Project remained prudent even at a capital cost of **[TRADE SECRET DATA HAS BEEN EXCISED]**.

OTP indicated that it believes the fixed-price contracts with EDF substantially place cost overrun risk on EDF, mitigating many of the commercial risks associated with development and construction of a major infrastructure project.

During the project development and construction phase, should EDF default and terminate the contract prior to delivery of the completed wind farm, OTP may be forced to obtain more costly replacement power than the project's estimated cost of power. However, in the event EDF defaults, OTP's contracts permit the Company to step in, assume turbine supply and plant agreements, and construct the project itself.<sup>12</sup>

If the Commission does not approve the proposed Merricourt Project, OTP has the right to terminate the APA and end its involvement in the Project. OTP incurred a nonrefundable signing milestone payment of **[TRADE SECRET DATA HAS BEEN EXCISED]**.

The Department concludes that OTP has reasonably mitigated the commercial risk associated with the proposed Merricourt Project.

#### 4. *Environmental Risks*

The Department requested information specific to avian issues of the Merricourt Project site and how these issues were addressed. In its response to DOC IR No. 6, OTP stated that it had investigated the risks prior to moving forward with the project and designed covenants and conditions within the APA to protect OTP.<sup>13</sup> The developer, EDF, formulated avian avoidance and minimization measures to protect bird and bat species, incorporating U.S. Fish and Wildlife Service (USFWS) Land-Based Wind Energy Guidelines. Such measures include, but are not limited to, pre- and post-construction studies, installation of bird-flight diverters and monitoring the wind farm during migration seasons.

The Department noted that within the agreements, it appeared that EDF would not be obtaining an incidental take permit or habitat conservation plan for the Merricourt Project from USFWS due to the avoidance and minimization measures commitment EDF made with USFWS.<sup>14</sup> The Department requests that OTP in reply comments explain potential consequences and environmental cost risks to ratepayers for the Merricourt Project and its operation absent having an incidental take permit or habitat conservation plan.

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<sup>12</sup> Article 13 of the TEPC Agreement.

<sup>13</sup> DOC Information Request No. 6 included as Attachment C.

<sup>14</sup> Section 4.12(b) of the APA.

#### IV. PROJECT QUALIFICATION FOR RECOVERY THROUGH A RENEWABLE RESOURCE RIDER

##### A. STATUTORY PROVISION

OTP requested Commission authorization to include the costs of the Merricourt Project in a Renewable Rider in a future petition under Minn. Stat. §216B.1645, subd. 2a, subject to Commission review and approval. The Company's Renewable Rider is currently set to zero.<sup>15</sup> OTP indicated that it anticipates filing a Renewable Rider update to seek recovery of certain Merricourt Project expenses by September 1, 2018.

A renewable rider cost recovery mechanism is permitted under Minn. Stat. §216B.1645. The statute reads in part, as follows:

##### **216B.1645 POWER PURCHASE CONTRACT OR INVESTMENT.**

Subdivision 1. Commission authority. **Upon the petition of a public utility, the Public Utilities Commission shall approve or disapprove power purchase contracts, investments, or expenditures entered into or made by the utility to satisfy the wind and biomass mandates contained in sections 216B.169, 216B.2423, and 216B.2424, and to satisfy the renewable energy objectives and standards set forth in section 216B.1691,[...]**

Subd. 2. Cost recovery. **The expenses incurred by the utility over the duration of the approved contract or useful life of the investment and expenditures made pursuant to section 116C.779 shall be recoverable from the ratepayers of the utility, to the extent they are not offset by utility revenues attributable to the contracts, investments, or expenditures. Upon petition by a public utility, the commission shall approve or approve as modified a rate schedule providing for the automatic adjustment of charges to recover the expenses or costs approved by the commission under subdivision 1, which, in the case of transmission expenditures, are limited to the portion of actual transmission costs that are directly allocable to the need to transmit power from the renewable sources of energy. The commission may not approve recovery of the costs for that portion of the power generated from sources governed by this section that the utility sells into the wholesale market.**

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<sup>15</sup> OTP's existing wind facilities costs were rolled into base rates and the Company's Renewable Rider was set to zero once authorized deferred costs included in the rider were fully recovered; Docket Nos. E017/GR-10-239 and E017/M-12-708.

Subd. 2a. Cost recovery for utility's renewable facilities. **(a) A utility may petition the commission to approve a rate schedule that provides for the automatic adjustment of charges to recover prudently incurred investments, expenses, or costs associated with facilities constructed, owned, or operated by a utility to satisfy the requirements of section 216B.1691, provided those facilities were previously approved by the commission under section 216B.2422 or 216B.243, or were determined by the commission to be reasonable and prudent under section 216B.243, subdivision 9. For facilities not subject to review by the commission under section 216B.2422 or 216B.243, a utility shall petition the commission for eligibility for cost recovery under this section prior to requesting cost recovery for the facility. [...]**

As pointed out earlier, OTP's proposed Merricourt Project is not subject to a certificate of need (Minn. Stat. §216B.243), nor was this specific facility reviewed under OTP's IRP filing (Minn. Stat. §216B.2422). Therefore, OTP seeks eligibility determination for cost recovery under Minn. Stat. §216B.1645, subd. 2a (a).

Also discussed earlier, OTP needs to add renewable energy sources to its current renewable portfolio in order to remain compliant with renewable energy obligations. The Department agrees that the Merricourt Project qualifies as an eligible investment that will help OTP satisfy its renewable requirements set forth in Minn. Stat. §216B.1691. The Department also agrees that the proposed Merricourt Project offered the lowest levelized cost of energy of the ten proposals OTP received and therefore appears to be reasonably prudent. Therefore, the Department concludes that the Merricourt Project qualifies for cost recovery under Minn. Stat. §216B.1645, subd. 2a.

## *B. OTHER RIDER RECOVERY CONSIDERATIONS*

### *1. Jurisdictional Allocation*

OTP serves customers in three jurisdictions – Minnesota, North Dakota and South Dakota. The Minnesota jurisdictional allocation of OTP's electric utility services is approximately 53 percent; thus approximately 53 percent of the Merricourt Project costs and its associated renewable energy credits would be allocated to Minnesota ratepayers.

### *2. Tax Issues*

#### *a. PTC*

OTP proposed to flow the Merricourt Project's Production Tax Credit benefits to ratepayers as PTCs are earned. The expected PTCs would be reflected on a monthly basis to offset the

revenue requirement. This is the same approach used by OTP for its Langdon and Ashtabula wind facilities. The renewable rider tracker will true-up projected revenue requirements with actual revenue requirements, inclusive of any differences in the projected and actual PTC benefits.

*b. NDITC*

Although the Merricourt Project is located in North Dakota, the North Dakota investment tax credit incentive for wind energy device installation is not available because construction did not commence prior to January 1, 2015.

*c. ADITL (Rate Base)*

Accumulated Deferred Income Tax liabilities (ADITL) result from the difference between straight-line depreciation, which is required under Minnesota Rule 7825.0800 for ratemaking purposes, and accelerated depreciation, which is allowed for tax purposes. Since ratepayers pay income taxes based on straight-line depreciation and the utility pays income taxes based on accelerated depreciation, this timing difference is reflected in ADITL balances. Moreover, since ratepayers are essentially prepaying income taxes before the taxes are due to the Internal Revenue Service (IRS), ratepayers have traditionally received an ADITL credit, which reduces rate base, to compensate ratepayers for the prepayment of income taxes. This overall approach is generally referred to as deferred tax accounting.

Minnesota utilities, including OTP, have recently argued in riders and rate cases that the Internal Revenue Service (IRS) requires the proration of ADITL balances for ratemaking purposes that use forecasted test periods.<sup>16</sup> The proration of ADITL balances generally results in lower ADITL balances for ratemaking purposes, which increases rate base and increases the proposed annual revenue requirements to be recovered from ratepayers in riders and rate cases that use forecasted test periods.

The Department notes that there is a difference in how one can approach prorated ADITL balances in rider rate petitions as opposed to base rate setting. Riders have subsequent true-up calculations based on historical actuals, whereas rate cases do not. The Department's position is that if prorated ADITL is used in determining forecasted revenue requirements for the renewable rider, then when calculating tracker true-ups in subsequent filings, the actual ADITL must be employed when determining the actual revenue requirement (of the now-historic period). Alternatively, the Department has recommended use of historic test periods for rider revenue requirement determination to resolve prorate ADITL concerns. Since OTP expects its first renewable rider for the Merricourt Project would not be filed until September

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<sup>16</sup> OTP has requested a private letter ruling on the prorate ADITL issue, particularly on rate case final rates and interim rate refunds when using a projected test year.



2018, the Department anticipates the prorated ADITL issue with respect to riders' tracker true-up may be resolved by then. If not, the use of a historical period remains available to resolve the issue.

3. *OTP Internal Costs and Capital Cost Recovery in Riders*

a. *Internal Costs*

The Department notes that the Commission has a history of excluding recovery of internal capitalized costs in rider mechanisms. The Merricourt Project's total capital cost estimate includes OTP's direct costs. Of these direct costs, a sum of **[TRADE SECRET DATA HAS BEEN EXCISED]** is estimated for internal management costs.<sup>17</sup> Therefore, should the Commission approve the proposed Merricourt Project, the Department recommends that the Commission direct OTP in its future rider recovery petition, to adjust the total capital costs by removing the internal capitalized costs when determining the return on, and the recoverable capital through, the renewable rider mechanism.

b. *Capital Costs*

In other petitions, the Commission has placed a "soft" cap on a project's recoverable capital costs allowed to be included in rider recovery mechanisms, limiting the rider-recoverable amount to the project's capital cost estimates presented in resource approval filings.<sup>18</sup> The capital cost cap in the rider is considered "soft" because the Commission did not necessarily make a determination to disallow capital cost overruns, but rather permitted the utility to make its case for recovery of a project's excess capital costs within a future rate case petition. This approach has been used to hold utilities accountable for their cost estimates. The total capital cost estimates largely influence the comparative levelized cost of energy measure relied upon when selecting the resource to pursue. In addition, approval of projects in such proceedings, such as this instant petition, should not constitute a "blank check" for cost recovery in riders.

The Department recommends that the capital costs recoverable through a rider be limited to **[TRADE SECRET DATA HAS BEEN EXCISED]** plus the allowance for funds used during construction (AFUDC) that accrued prior to the onset of rider recovery, less **[TRADE SECRET DATA HAS BEEN EXCISED]**. In addition, the Department recommends that any capital cost overruns, although they may be considered for inclusion in a future rate case, should not be treated or accounted for as deferred amounts for future rate recovery.

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<sup>17</sup> Trade Secret response to DOC Information Request No. 7.

<sup>18</sup> For example, [Commission Order issued April 7, 2010](#) in Docket No. E002/M-09-1048 and [Commission Order issued March 10, 2014](#) in Docket No. E015/M-13-103.

## **V. AFFILIATE INTERESTS**

In its August 15, 2008 Order approving OTP's Renewable Rider in Docket No. E017/M-08-119, the Commission ordered:

At the time a project is filed for approval OTP shall either specifically identify the affiliates indirectly involved, and to what extent, in the chosen project, or certify that no affiliates are involved.

In response to DOC Information Request No. 14, OTP stated that there are no affiliates involved with the Merricourt Project. OTP further explained that Otter Tail Corporation sold the assets of DMI Industries, Inc., its subsidiary that manufactured towers for wind turbines, and exited the wind tower manufacturing business in November 2012.

## **VI. CONCLUSION AND RECOMMENDATIONS**

The Department concludes the following:

- the proposed Merricourt Project qualifies as an eligible energy technology that can count towards the Minnesota Renewable Energy Statute ("RES") requirements set forth in Minn. Stat. §216B.1691;
- OTP has demonstrated a need for additional renewable energy resources;
- the proposed Merricourt Project would help OTP satisfy the Company's renewable energy obligations set forth in Minn. Stat. §216B.1691 in a cost-effective manner;
- the proposed Merricourt Project, being built in North Dakota, is exempt from the certificate of need statute, Minn. Stat. §216B.243;
- the proposed Merricourt Project appears to be subject to Minn. Stat. §216B.50 and Minn. Rule 7825.1800, however the petitioner initially responded that review under this statute and rule is not needed, therefore the Department requests OTP's reply comments on this matter;
- the proposed 150 MW Merricourt Project and its projected 2019 in-service period aligns with the Commission's 16-386 Order;
- the proposed Merricourt Project had the lowest LCOE of the ten proposals obtained by OTP;
- the proposed Merricourt Project would reduce customer's exposure to energy market volatility by displacing MISO market purchases;
- OTP has reasonably mitigated interconnection risk, PTC risk and commercial risk; however, additional information from OTP is needed to fully understand ratepayer exposure to environmental risks;

- the proposed Merricourt Project option appears to be reasonably prudent and qualifies for cost recovery under Minn. Stat. §216B.1645, subd. 2a;

The Department requests that OTP in reply comments (1) request approval of this petition pursuant to Minn. Stat. §216B.50; and (2) provide information to comply with, or justify any requested variance to, Minn. Rule 7825.1800 - *Filing Requirements for Petitions to Acquire Property*, or (3) explain the differentiation between each of the other petitions with more recent utility transactions (listed above) wherein the Commission applied Minn. Stat. §216B.50 with the proposed Merricourt Project's agreements and support why Minn. Stat. §216B.50 is not applicable to the Merricourt Project.

The Department also requests that OTP in reply comments explain potential consequences and environmental cost risks to ratepayers for the proposed Merricourt Project and its operation absent having an incidental take permit or habitat conservation plan with the USFWS.

The Department will submit its final recommendations after review of OTP's reply comments. However, should the Department's final recommendation support approval of the proposed Merricourt Project, the Department expects to also recommend that the Commission:

- direct OTP in its future rider recovery petition, to adjust the total capital costs by removing the internal capitalized costs when determining the return on, and the recoverable capital through, the renewable rider mechanism;
- cap the capital costs recoverable through a rider to the estimated Merricourt Project's total capital cost, adjusted by adding the allowance for funds used during construction (AFUDC) that accrued prior to the onset of rider recovery, and removing OTP's capitalized internal costs; and
- direct that any capital cost overruns omitted from rider recovery should not be treated as deferred amounts for future rate recovery.

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OTTER TAIL POWER COMPANY  
Docket No: E017/M-17-279

Response to: Minnesota Department of Commerce  
Analyst: Dorothy Morrissey  
Date Received: 04/28/2017  
Date Due: 05/08/2017  
Date of Response: 05/08/2017  
Responding Witness: Brad Tollerson, VP Planning & Strategy

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Information Request:

Please review the Commission's December 14, 1998 *Order Finding Jurisdiction and Approving Property Transfer* in Docket No. E017/PA-98-1345 and provide the Company's position on the application of Minnesota Statute § 216B.50 and Minnesota Rules 7825.1800 to the proposed Merricourt Project turn-key transaction.

Attachments: 0

Response:

Otter Tail does not believe that Minnesota Statute § 216B.50 and Minnesota Rules 7825.1800 apply to the Merricourt Project. Minnesota Statute § 216B.50 provides in relevant part:

Subdivision 1. **Commission approval required.** No public utility shall sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000, or merge or consolidate with another public utility or transmission company operating in this state, without first being authorized so to do by the commission. Upon the filing of an application for the approval and consent of the commission, the commission shall investigate, with or without public hearing. The commission shall hold a public hearing, upon such notice as the commission may require. If the commission finds that the proposed action is consistent with the public interest, it shall give its consent and approval by order in writing. In reaching its determination, the commission shall take into consideration the reasonable value of the property, plant, or securities to be acquired or disposed of, or merged and consolidated. This section does not apply to the purchase of property to replace or add to the plant of the public utility by construction.

Under the Asset Purchase Agreement (APA) between Otter Tail and EDF, Otter Tail will buy the development assets of the Merricourt Project assuming certain conditions are satisfied. These

assets include permits, land and land rights, and the turbines acquired by EDF to satisfy 5% safe harbor for production tax credits. These assets, even in the aggregate, would not qualify as “plant as an operating unit or system” as under Minnesota Statute § 216B.50, Subd. 1.

Under the Turnkey Engineering, Procurement, and Construction agreement (TEPC), Otter Tail engages EDF to construct a wind generation facility on behalf of Otter Tail. TEPC costs include EDF’s provision of the balance of the turbines, balance of plant construction, the collector substation, and the O&M building.

While one may argue that Otter Tail will acquire “a plant as an operating unit or system” under the TEPC, this situation differs significantly from Docket No. E017/PA-98-1345 and the traditional application of Minnesota Statute § 216B.50. The key distinction is that the TEPC is an agreement where OTP has hired EDF to construct a generation facility for OTP. The turnkey aspect of TEPC refers to the scope of EDF’s work and the allocation of risk under the agreement. This differs from asset purchase and sale arrangements where one party transfers existing plant or system to another. To apply Minnesota Statute § 216B.50 to the TEPC may require application of the statute to many construction and design/build agreements, which in Otter Tail’s view is beyond the scope and purpose of the statute.

Finally, applying Minnesota Statute § 216B.50 to the Merricourt Project is of no benefit to ratepayers, which should be considered when construing the scope of the statute. The Merricourt Project reflects the execution of Otter Tail’s Integrated Resource Plans that have been reviewed and approved by the Commission. The current docket and any subsequent requests for recovery under Otter Tail’s renewable resource rider provide the Department and the Commission full opportunity to examine the reasonableness and prudence of specific project costs. Overlaying Minnesota Statute § 216B.50 on the Merricourt Project is neither necessary nor beneficial in view of the existing and anticipated dockets related to the Merricourt Project.

**PUBLIC DOCUMENT – NOT PUBLIC (OR PRIVILEGED) DATA HAS BEEN  
EXCISED**

Response to Information Request MN-DOC-002  
Page 1 of 1

OTTER TAIL POWER COMPANY  
Docket No: E017/M-17-279

Response to: Minnesota Department of Commerce  
Analyst: Dorothy Morrissey  
Date Received: 04/28/2017  
Date Due: 05/08/2017  
Date of Response: 05/08/2017  
Responding Witness: Randy Synstelien, Principal Resource Planner

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Information Request:

Topic: Alternative proposals evaluation  
Reference(s): Petition, pp. 10-11

Please provide the Company's analysis and the supporting data of the ten wind project proposals evaluated. Include the inputs and assumptions used to calculate the estimated Levelized Cost of Energy (LCOE) for each proposal and perform the risk (non-price) analysis. Please indicate whether transmission costs were included in the calculated LCOE estimates.

Attachments: 1

Attachment 1 to DOC-IR-2-Levelized-Cost-comparison\_ PUBLIC.pdf

Response:

Attachment 1 to IR MN-DOC-002, designated as trade secret and non-public data, contains the LCOE comparison for the ten proposals OTP evaluated. There were six PPA proposals, three full OTP ownership proposals, and one proposal that had 50% OTP ownership and 50% PPA.

Transmission costs were included in LCOE estimates for the OTP ownership proposals. Transmission costs were also included in LCOE estimates of all but Proposal 3a of the PPA proposals. Transmission costs were also included in LCOE estimates for the 50% OTP ownership and 50% PPA proposal.

OTP has taken reasonable efforts to maintain the secrecy of the information marked as PROTECTED DATA in Attachment 1, which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use (the "Protected Data"). The Protected Data is therefore "trade secret information" and "nonpublic data" under Minn. Stat. § 13.37.

...PROTECTED DATA

OTTER TAIL POWER COMPANY  
Docket No: E017/M-17-279

Response to: Minnesota Department of Commerce  
Analyst: Dorothy Morrissey  
Date Received: 04/28/2017  
Date Due: 05/08/2017  
Date of Response: 05/08/2017  
Responding Witness: Randy Synsteliën, Principal Resource Planner

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Information Request:

Topic: Avian Issues  
Reference(s): Xcel Energy's April 13, 2011 Letter in Docket M-08-1437

Please provide a discussion on the current status of the avian concerns and issues associated with the Merricourt Project site, a subject issue that contributed to Xcel Energy's decision to terminate its pursuit of wind generation development of same region. Please explain how this issue is addressed within the agreements between the Company and EDF. Please also discuss how avian concerns associated with this region may impact the proposed-facility's operating provisions and potential generation output.

Attachments: 0

Response:

Before moving forward with the Project, the Company engaged in significant due diligence to identify potential risks and seek ways to mitigate those risks. Potential environmental risks included avian impacts. Based upon its investigation, the Company determined that risk could be mitigated by actions EDF is contractually obliged to undertake.

EDF made a number of affirmative representations, warranties, and covenants in the Asset Purchase Agreement. Several of these relate to avian issues and are designed to protect OTP. There are also several avian-related circumstances under which OTP's obligation to close the asset purchase is conditioned, or whereby OTP has the right to terminate the agreement prior to closing.



Moreover, EDF has formulated a draft Bird and Bat Conservation Strategy (BBCS) with avoidance and minimization measures and best management practices to protect bird and bat species. At least 30 days prior to the closing date on the purchase of the development assets, EDF is contractually obliged to submit the final version of the BBCS to the U.S. Fish and Wildlife Service (USFWS). USFWS's discussion of a BBCS is advisory only and the BBCS is not approved or disapproved by USFWS. Moreover, it does not constitute a federal agency action subject to NEPA or any other federal law or regulation. Since 2011, the USFWS has issued Land-Based Wind Energy Guidelines (WEG), and a Programmatic Environmental Impact Statement (PEIS) was developed between the Western Area Power Administration and USFWS for wind energy development in the Upper Great Plains Region. The Project's BBCS will incorporate elements of the WEG and PEIS, including:

- The Project will conduct several pre-construction and post-construction studies to assess impacts to bird and bat species. The results of these studies will be used to determine a possible need for additional protective measures as part of an adaptive-management process.
- Specific to whooping cranes, no whooping crane fatalities at wind farms have been documented and the Project is outside of the area where 85 percent of whooping crane sightings have occurred. No confirmed whooping crane sightings have occurred within the project area. However, avoidance and minimization measures will include:
  - Placing bird-flight diverters on top of power lines within one mile of suitable stopover habitat.
  - Training workers to identify and report whooping crane sightings.
  - Monitoring the wind farm during migration seasons. Turbines and/or construction activity will be stopped within two miles of a sighting, and the sightings will be reported to the USFWS.
- Regarding Piping Plover, no piping plover fatalities at wind farms have been documented. To date, studies have not shown nesting habitat for the species within the project area. However, avoidance and minimization measures will include:
  - Training workers to identify and report piping plover sightings.
  - Implementing a three-mile buffer from turbines for any known critical piping plover habitat.
  - Locating access roads, transmission lines, and other project facilities away from known critical piping plover habitat.

## **CERTIFICATE OF SERVICE**

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

**Minnesota Department of Commerce  
Public Comments**

**Docket No. E017/M-17-279**

**Dated this 19<sup>th</sup> day of June 2017**

**/s/Sharon Ferguson**

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Christopher	Anderson	canderson@allete.com	Minnesota Power	30 W Superior St  Duluth, MN 558022191	Electronic Service	No	OFF_SL_17-279_M-17-279
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes	OFF_SL_17-279_M-17-279
Ray	Choquette	rchoquette@agp.com	Ag Processing Inc.	12700 West Dodge Road PO Box 2047 Omaha, NE 68103-2047	Electronic Service	No	OFF_SL_17-279_M-17-279
Ian	Dobson	Residential.Utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_17-279_M-17-279
James C.	Erickson	jericksonkbc@gmail.com	Kelly Bay Consulting	17 Quechee St  Superior, WI 54880-4421	Electronic Service	No	OFF_SL_17-279_M-17-279
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280  Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_17-279_M-17-279
Bruce	Gerhardson	bgerhardson@otpc.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_17-279_M-17-279
Bryce	Haugen	bhaugen@otpc.com	Otter Tail Power Company	215 S Cascade St P.O. Box 496 Fergus Falls, MN 56538	Electronic Service	No	OFF_SL_17-279_M-17-279
Shane	Henriksen	shane.henriksen@enbridge.com	Enbridge Energy Company, Inc.	1409 Hammond Ave FL 2  Superior, WI 54880	Electronic Service	No	OFF_SL_17-279_M-17-279
James D.	Larson	james.larson@avantenergy.com	Avant Energy Services	220 S 6th St Ste 1300  Minneapolis, MN 55402	Electronic Service	No	OFF_SL_17-279_M-17-279

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_17-279_M-17-279
Kavita	Maini	kmains@wi.rr.com	KM Energy Consulting LLC	961 N Lost Woods Rd Oconomowoc, WI 53066	Electronic Service	No	OFF_SL_17-279_M-17-279
Andrew	Moratzka	andrew.moratzka@stoel.com	Stoel Rives LLP	33 South Sixth St Ste 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_17-279_M-17-279
Larry L.	Schedin	Larry@LLSResources.com	LLS Resources, LLC	332 Minnesota St, Ste W1390 St. Paul, MN 55101	Electronic Service	No	OFF_SL_17-279_M-17-279
Cary	Stephenson	cStephenson@otpc.com	Otter Tail Power Company	215 South Cascade Street Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_17-279_M-17-279
Randy	Synsteliem	rsynsteliem@otpc.com	Otter Tail Power Company	215 S Cascade St Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_17-279_M-17-279
Stuart	Tommerdahl	stommerdahl@otpc.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_17-279_M-17-279
Daniel P	Wolf	dan.wolf@state.mn.us	Public Utilities Commission	121 7th Place East Suite 350 St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_17-279_M-17-279