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October 5, 2017



Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101-2147

**RE: In the Matter of Otter Tail Power Company's Petition for Approval of the Merricourt Wind Project - Docket No. E017/M-17-279
Reply Comments**

Dear Mr. Wolf:

Otter Tail Power Company (Otter Tail) hereby submits Reply Comments to the Minnesota Public Utilities Commission (Commission) in the above referenced matter.

Otter Tail has electronically filed this document with the Commission and is serving a copy on all persons on the official service list for this docket. A Certificate of Service is also enclosed. If you have any questions regarding this filing, please contact me at 218-739-8956 or at cstephenson@otpc.com.

Sincerely,

/s/ CARY STEPHENSON
Cary Stephenson,
Associate General Counsel

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Enclosures
By electronic filing
c: Service List

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matt Schuerger	Commissioner
Katie Sieben	Commissioner
John Tuma	Commissioner

**In The Matter of Otter Tail
Power Company's Petition
For Approval of Merricourt Wind Project**

Docket No. E017/M-17-279

REPLY COMMENTS

I. INTRODUCTION

Otter Tail Power Company, (Otter Tail) respectfully submits the following Reply Comments to the Response Comments filed by the Minnesota Department of Commerce, Division of Energy Resources (Department) on August 16, 2017.

II. BACKGROUND

On April 11, 2017, Otter Tail filed a Petition for Approval of the Merricourt Wind Project (Merricourt Project or Project) seeking: (i) approval of an investment in 150 megawatts (MW) of wind generation to be constructed in McIntosh and Dickey Counties, North Dakota; (ii) determination that the Merricourt Project is qualified for application towards Otter Tail's renewable energy objective (REO) and renewable energy standard (RES) obligations; and (iii) authorization of future cost recovery for the Merricourt Project through Otter Tail's Renewable Resources Cost Recovery Rider (Renewable Rider), subject to Commission review and approval of specific costs to be presented by Otter Tail in a future petition under Minn. Stat. § 216B.1645, subd. 2a.

On June 19, 2017, the Department filed Comments with the following conclusions:

- 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 customers' 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;¹

The Department requested that in Otter Tail's reply the Company seek approval of the Merricourt Project pursuant to Minn. Stat. §216B.50 and provide information to comply with, or justify any requested variance to the filing requirements of Minn. Rule 7825.1800. Alternatively, the Department asked Otter Tail to further explain why Minn. Stat. §216B.50 is not applicable to the Merricourt Project in view of other petitions and more recent utility transactions wherein the Commission applied Minn. Stat. §216B.50. The Department also asked Otter Tail to 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.² The Department also made several recommendations, including limiting rider recovery of the Merricourt Project to the project's estimated total capital cost, and directing that any capital cost overruns omitted from rider recovery should not be treated as deferred amounts for future rate recovery.³

On July 7, 2017, Otter Tail filed Reply Comments addressing the points raised by the Department. Otter Tail stated that should the Commission determine that Minn. Stat. §216B.50

¹ Comments of the Minnesota Department of Commerce, Division of Energy Resources, Docket No. E017/M-17-279, June 19, 2017, pp. 17-18.

² Id. at 18.

³ Id.

applies to the Merricourt Project, the Company requests approval under the statute as well as a variance from the filing requirements associated with the statute. Otter Tail also noted its disagreement with the Department's recommendation that rider recovery be limited to the Merricourt Project's estimated capital costs, explaining that the nature of general interconnection costs makes it reasonable to recover those costs through the Renewable Rider even if they exceed the Merricourt Project's initial estimate.

On August 16, 2007 the Department filed Response Comments, recommending that the Commission:

- Determine that 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;
- Determine that the proposed Merricourt Project, being built in North Dakota, is exempt from the certificate of need statute, Minn. Stat. §216B.243;
- Determine that the proposed Merricourt Project is subject to Minn. Stat. §216B.50 and find that the project is in the public interest;
- Grant OTP's requested variance to the filing requirements of Minn. Rules 7825.1800(B) and Minn. Rules 7825.1400 items (A)-(J);
- Determine that the proposed Merricourt Project qualifies for cost recovery under Minn. Stat. §216B.1645, subd. 2a and cap the total capital costs allowed for recovery through the rider mechanism to [omitted]⁴, the total project cost provided by OTP which resulted in the lowest Levelized Cost of Energy alternative, plus Allowance for Funds Used During Construction (AFUDC), less the capitalized internal costs;
- Direct that any Merricourt project capital and capital-related costs excluded from the rider recovery mechanism, including the return of and return on these excluded capital costs, shall not be treated as deferred amounts held for future rate recovery;
- Require periodic informational reports on the Merricourt project's Bird and Bat Conservation Strategy minimization and mitigation activity undertaken, including the related impact on Merricourt's operation during the first ten years of operation (the first ten twelve-month periods). These reports should be provided 30 days after the end of each of the first two years (*i.e.*, first two 12-month periods) of operation, and 30 days after the end of each five-year (60-month) interval of operation of the first ten years; and require OTP to file with the Commission any post-construction avian fatality surveys conducted during the first two years of operation; and
- Adopt effective dates for OTP's Renewable Resource Cost Recovery rider rate to be set at the end of the test year period to alleviate harm to ratepayers that arises from prorated Accumulated Deferred Income Tax.⁵

⁴ Otter Tail has omitted the estimate total project cost which was designated trade secret information. That figure is provided in the trade secret version of the Department August 16, 2017 Response Comments.

⁵ Response Comments of the Minnesota Department of Commerce, Division of Energy Resources, Docket No. E017/M-17-279, August 16, 2017, p. 10.

III. OTTER TAIL RESPONSE

Otter Tail agrees with and supports the Department's recommendations that the Merricourt Project qualifies as an eligible energy technology that can count towards the Minnesota Renewable Energy Statute (RES) requirements, and that the Merricourt Project is exempt from the Minnesota's certificate of need statute. Notwithstanding Otter Tail's arguments regarding the applicability of Stat. §216B.50, the Company supports the Department's recommendations that the Commission approve the Merricourt Project under that statute as being in the public interest, and correspondingly that the Commission grant a variance to the filing requirements of Minn. Rules 7825.1800(B) and Minn. Rules 7825.1400 items (A)-(J).

Since the Department and Otter Tail agree that the Merricourt Project should be approved under Stat. §216B.50, determining scope of the statute's construction exception is not necessary to issuance of an order in this docket. The Commission could reasonably conclude that the Merricourt project is sufficiently similar in nature to Xcel's Build-Own-Transfer agreements to which the Commission recently applied Minn. Stat. §216B.50.⁶ In doing so, the Commission need not go so far as to adopt the Department's position that the statute's construction exception is limited to construction that replaces or adds to facilities already owned by the utility.⁷ In Otter Tail's view, the Commission should decline adopting the Department's interpretation of the statute's construction exception, or defer the question to a docket with facts better suited to resolution of that question. The Department's interpretation of the exception has the potential to introduce significant compliance uncertainty into utility operations. Furthermore, adoption of the Department's analysis may produce significant unanticipated consequences, such as proliferation of petitions under Minn. Stat. §216B.50 seeking approval of unremarkable construction projects that have until now been considered outside of the statute's scope.

Under the Department's analysis, all construction projects over \$100,000 that do not clearly replace or add to an existing facility could require approval under Minn. Stat. §216B.50. The Department's interpretation may require Commission approval for the construction of facilities such

⁶ *In the Matter of the Petition of Xcel Energy For Approval of The Acquisition Of Wind Generation From The Company's 2016-2030 Integrated Resource Plan*, Docket E002/M-16-777.

⁷ "When taking into account the prior form of this clause and the stated legislative purpose tied to its modification, the Department interprets that this particular clause is intended to apply to existing plant already owned by the petitioning utility." Response Comments of the Minnesota Department of Commerce, Division of Energy Resources, August 16, 2017, Docket No. E017/M-17-279, pp. 3-4.

as a new pole shed used for equipment storage, a new garage used for vehicle maintenance, a new meter testing shop, a new substation, and even a new distribution line. Moreover, the lack of clarity as to when construction replaces or adds to an existing facility creates significant regulatory uncertainty. Otter Tail does not believe the legislature intended such a result or that utility operations, regulatory oversight or the public interest would be improved by requiring Commission review and approval of such matters under Minn. Stat. § 216B50. All such projects will still require a demonstration that they were conceived and executed on prudently when the utility requests inclusion in rate base and therefore, exclusion from the scope of the statute does not take them out of Commission purview.

The Department's analysis rests on its interpretation of 2005 legislation that expanded Minn. Stat. §216B.16 and modified Minn. Stat. §216B.50. According to the Department, the "stated reasoning behind these legislative changes was to permit transfer of transmission assets and operation to transmission companies, and did not convey that such enactment was to relieve the utility from seeking Commission approval to add new generation fleet via construction as being in the public interest."⁸

The 2005 legislative changes do not directly address the scope of the construction exception, and the Department's analysis assumes that the initial version of the statute expressly limited the construction exception to additions to, or the replacement of, an existing facility owned by the petitioning utility. In Otter Tail's view, a more reasonable interpretation is that the legislature intended to exempt from Minn. Stat. §216B.50 a utility constructing its own plant, with the term "plant" used in the broad, accounting (uniform system of accounts) categorically sense, commonly used by utilities when referencing net plant in service. This interpretation of the term "plant" is consistent with the way the Department and the Commission have previously construed the term as it is used in the first sentence of the statute.⁹ The Department's analysis applies a different meaning to the term "plant" in the phrase "[t]his section does not apply to the purchase of property to replace or add to the plant of the public utility by construction." There, rather than referring to a

⁸ Id. at 4.

⁹ The first sentence of §216B.50 subdivision 1 provide that "[n]o 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."

category of assets, the Department construes it to refer to a specific, existing facility. Under Minn. Stat. §645.08, words are to be construed according to their common meaning, and technical words are construed according to their special meaning. It follows that a term used twice within a statute should be construed consistently in both instances where context does not explicitly warrant different constructions.

The foregoing is bolstered by the fact that Minn. Stat. §216B.50 as initially adopted in 1974 is part of the chapter addressing Commission controls on utility financial activities and business practices. Minn. Stat. §216B.48 concerns utilities' relationships with affiliates and affiliated interests. Minn. Stat. §216B.49 addresses Commission oversight of utilities issuing securities. Minn. Stat. §216B.50 concerns restrictions on property *transfers and mergers*. The focus of Minn. Stat. §216B.50 is on transfers that risk creating inappropriate inter-utility gain or loss. Exempting utility construction is consistent with this focus. The Department's approach risks making Minn. Stat. §216B.50 a quasi-prudency or quasi-certificate of need review for a utility's own construction projects. This is neither the purpose of the statute nor is it necessary. Any significant construction project will be subject public interest/prudency review under other statutes¹⁰, and if nothing else, when the utility seeks recovery of the construction project in rates.

To conclude, this discussion of the scope of applicability of Minn. Stat §216B.50 should not be an impediment to approval of the Merricourt project, as no party is arguing project should be denied approval under the statute. However, as explained herein, if the Commission were to determine that the Minn. Stat §216B.50 applies to the project under the Department's interpretation, it may create a new compliance obligation for many projects to which it should not apply. Therefore, Otter Tail requests that the Commission either decide that Minn. Stat §216B.50 does not apply to the Merricourt Project, or decide that the statute applies, but not in the manner that increases the scope of the statute as may be the case under the Department's analysis.

IV. CONCLUSION

Based on the foregoing, Otter Tail respectfully requests the Commission to approve the Merricourt Project as requested in Otter Tail's filings in this docket.

¹⁰ Other statutes include Minn. Stat. §216E.03 Designating Sites & Routes; Minn. Stat. §216.24 Construction of Major Facility- Filing Plans; Minn. Stat. §216B.243 Certificate of Need for Large Energy Facility; and Minn. Stat. §216B.243 Environmental Projects-Advance Determination of Prudence.

Dated: October 5, 2017

Respectfully Submitted,

OTTER TAIL POWER COMPANY

By: /s/ CARY STEPHENSON

Cary Stephenson

Associate General Counsel

Otter Tail Power Company

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Fergus Falls, MN 56538-0496

218-739-8956

CERTIFICATE OF SERVICE

**RE: In the Matter of Otter Tail Power Company's Petition for Approval of the
Merricourt Wind Project
Docket No. E017/M-17-279**

I, Kim Ward, hereby certify that I have this day served a copy of the following, or a summary thereof, on Daniel P. Wolf and Sharon Ferguson by e-filing, and to all other persons on the attached service list by electronic service or by First Class Mail.

**Otter Tail Power Company
Reply Comments**

Dated this **5th** day of **October, 2017**.

/s/ KIM WARD
Kim Ward, Regulatory Filing Coordinator
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