

Staff Briefing Papers

Meeting Date August 2, 2018

**Agenda Item 2

Company Otter Tail Power Company

Docket No. **E017/CG-16-1021**

In the Matter of a Complaint by Red Lake Falls Community Hybrid LLC Regarding Potential Purchased Power Agreement Terms and Pricing with Otter Tail Power Company

- Issues
1. Should the Commission grant reconsideration as requested by Red Lake Falls Community Hybrid LLC?
 2. Should the Commission make any other decisions?

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Relevant Documents

Date

Commission Order	May 31, 2018
Red Lake Falls Request for Reconsideration	June 20, 2018
Otter Tail Answer to Reconsideration	July 3, 2018

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I. Statement of the Issues

1. Should the Commission grant reconsideration as requested by Red Lake Falls Community Hybrid LLC?
2. Should the Commission make any other decisions?

II. Background

On December 7, 2016, Red Lake Falls Community Hybrid LLC (Red Lake or Complainant) filed a request for the Commission to resolve a dispute with Otter Tail Power Company (OTP) pursuant to the dispute resolution provisions of Minn. Stat. Section 216B.164, subdivision 5.

At its April 26, 2018 agenda meeting the Commission decided the matter. Its Order was issued on May 31, 2018 and made 4 major decisions:¹

- 1) Established a LEO (Legally Enforceable Obligation) on December 7, 2016;
- 2) Found that the contract length for the project is 20 years.
- 3) Found that the purchase price for energy per MWh is equal to an estimate of the avoided costs based on Otter Tail's 2017 Small Power Production Tariff.
- 4) Found that Con Ed was not a prevailing party and therefore not entitled to a payment of costs, disbursements, or attorney's fees under Minn Stat. §216.164 subd. 5.

III. Reconsideration Petition and Answer

Red Lake requested reconsideration on two topics.

Topic 1: The Avoided Cost Chosen by the Commission: OTP's 2017 Small Power Production Tariff

First, Red Lake stated that given the Commission's LEO establishment as of December 7, 2016, it would be unlawful to give a QF an avoided cost rate calculated after the date of the project's LEO formation. Red Lake stated, "Under applicable federal regulations, Red Lake Falls is entitled to an avoided cost rate calculated using numbers from 2016. (footnote omitted) Instead, the Commission improperly decided to use numbers from 2017 by reasoning that the early 2017 price of energy 'closely corresponds to the time the LEO was established in this matter in December 2016.'"² Red Lake further states that given the LEO date "the project would

¹ Commission Order, Ordering ¶¶ 1-4, pp. 14-15.

² ConEd reconsideration petition at 4.

be entitled to the 2016 Small Power Production Tariff rate, rather than the 2017 Small Power Production tariff.”³

Red Lake further stated that the Commission should rely on both parties’ expert witnesses as they provide the only evidence of avoided cost pricing calculated for this specific project. Finally, at pages 8-9, they stated that the Commission’s decision on avoided cost violates Minn Stat. §216B.164 subd. 1 and its requirement to construct the statute to give “maximum possible encouragement” to small power production.

OTP Answer

OTP disagreed that the 2017 SPP tariff was not an appropriately chosen avoided cost rate. OTP stated that its January 3, 2017 SPP rate filing was made pursuant to Commission rules and were a calculation of OTP’s avoided cost, which is the requirement under PURPA.

OTP further stated that Red Lake is not correct that the Commission must limit itself to OTP’s 2016 rate filing. First, Red Lake is not eligible to provide service under OTP’s SPP tariffs. Thus, the effective date of the OTP SPP tariffs is immaterial. Second, Red Lake provides no basis to conclude that the 2016 SPP filing (submitted 338 days before the LEO date) is a better reflection of OTP’s December 7, 2016 avoided cost than its 2017 filing (submitted 27 days after the LEO date). OTP explains at page 7 of its Answer why there are a number of plain text readings of the statute and SPP tariff that could have easily led to a lower avoided cost rate than the one the Commission chose.

Topic 2: Award of Attorney’s Fees

Red Lake Petition

Red Lake also requests that the Commission reconsider its decision regarding attorneys’ fees and finding that Red Lake is not a prevailing party in this case. Quoting to the language in Minn. Stat. § 216B.164 subd. 5, Red Lake states that the language is strong, it mandates an attorney fee award if a party is prevailing, and Red Lake is a prevailing party. Red Lake states that on two of the three matters Red Lake was unequivocally the prevailing party because the Commission adopted Red Lake’s positions on those matters. On the issue of contract length, Red Lake consistently argued for a 20-year term. On the issue of LEO formation, the Commission similarly adopted Red Lake’s position, finding that the LEO was created in December of 2016. While the Commission did not expressly agree with Red Lake’s recommended rate, the rate determined by the Commission far exceeded OTP’s initial offer.

Finally, Red Lake noted that partial collection of fees is an accepted practice throughout the United States and Minnesota. The company cited to case law supporting partial payment at page 12-13 and suggested that while all of its attorney’s fees should be paid, it was clearly entitled under state statute to two-thirds of its billable hours.

³ Id.

OTP Answer

OTP stated that “[t]here is no basis in law or equity for OTP, a small rural utility, to pay the fees associated with the unreasonable and untenable case presented by one of the largest utilities in the country. The fundamental flaw in Red Lake’s position is only highlighted by the fact that it is made through a request that the Commission change course from the May 31 Order: if Red Lake was truly a prevailing party, no reconsideration would be necessary.”⁴ OTP stated that prevail means “to obtain the relief sought in the underlying action.”

OTP observes that Red Lake asks it be deemed a prevailing party because the May 31 Order reflects some positions it ultimately adopted after its original theories were rejected. Ultimately, the May 31 Order mirrors OTP’s final offer in settlement. Red Lake did not accept this offer, meaning the result of the May 31 Order could not be the “relief sought” by Red Lake or that Red Lake “succeeded in the action.”⁵

OTP further points out that Red Lake attempts to instead focus on individual elements of the case. But the ALJ and Commission both correctly recognized that price and term are interrelated concepts. The price/term combination adopted in the May 31 Order is the same as what was included in OTP’s final offer in settlement. To that extent, OTP could be considered to have prevailed on the price/term issue. See additional arguments on this topic at pp. 13-14 of OTP’s Answer.

Staff Comment

Staff has no comments on the merits beyond those provided by the parties. The parties have adequately briefed the issues and the matter is ready for a decision.

Decision Options

1. Grant the reconsideration requested by Red Lake Falls Community Hybrid.
2. Deny reconsideration.

⁴ OTP Answer at 11-12.

⁵ OTP Answer at 12-13.