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June 26, 2009

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Comments of the Office of Energy Security of the Minnesota Department of Commerce**
Docket No. E017/M-09-656

Dear Dr. Haar:

Attached are the comments of the Office of Energy Security (OES) of the Minnesota Department of Commerce in the following matter:

Otter Tail Corporation d/b/a Otter Tail Power Company's Petition for Approval of Standstill Agreement with Cascade Investment, LLC.

The petition was filed on June 1, 2009 by:

Bruce Gerhardson
Associate General Counsel
Otter Tail Corporation
215 South Cascade Street
PO Box 496
Fergus Falls, MN 56538-0496

The OES recommends **approval** and is available to answer any questions the Commission may have.

Sincerely,

/s/ EILON AMIT
Statistical Analyst

EA/jl
Attachment



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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE OFFICE OF ENERGY SECURITY

DOCKET NO. E017/M-09-656

I. SUMMARY OF PROPOSAL

On June 1, 2009, Otter Tail Corporation d/b/a Otter Tail Power Company (OTP, Otter Tail or the Company) filed its petition for approval of a Standstill Agreement between Otter Tail and Cascade Investment, LLC (Cascade). Cascade is an affiliate of Otter Tail as defined by Minnesota Statute section 216B.48, subd. 1, since more than five percent of Otter Tail's voting securities are owned by Cascade.

OTP files its Standstill Agreement with Cascade pursuant to Minn. Stat. §216B.48 (Relations With Affiliated Interest). The main purpose of the Agreement is to allow Cascade to increase its ownership position in OTP above 10 percent, but restrict Cascade's ownership position in OTP to no more than 20 percent.

II. BACKGROUND OF THE PETITION

Minn. Stat. §302A.011, subd. 49 states:

Subd. 49. **Interested shareholder.** (a) "Interested shareholder," when used in reference to any issuing public corporation, means any person that is (1) the beneficial owner, directly or indirectly, of ten percent or more of the voting power of the outstanding shares entitled to vote of the issuing public corporation or (2) an affiliate or associate of the issuing public corporation that, at any time within the four-year period immediately before the date in question, was the beneficial owner, directly or indirectly, of ten

percent or more of the voting power of the then outstanding shares entitled to vote of the issuing public corporation.

Currently, Cascade owns about 9.6 percent of the outstanding common shares of OTP. Therefore, Cascade is very likely to become an "Interested Shareholder" of OTP in the near future. Any interested shareholder is subject to certain restrictions in dealings with the corporation for a period of four years. Minn. Stat. §302A.673, subd. 1 states these restrictions. For example, the interested shareholder is not permitted to enter into certain "business combinations" with the corporation which includes, among other things, transactions that involve certain share exchanges and share issuances, merger, and certain sales.

Minn. Stat. §302A.673 permits a corporation, upon request from a shareholder interested in acquiring 10 percent or more of the outstanding shares, to form a committee of members of the corporation's board of directors to consider approving the transaction which would result in the shareholder passing the 10 percent threshold. If the committee approves the transaction, Minn. Stat. §302A.673 statutory restrictions on the shareholder do not apply. In response to Cascade's request to Otter Tail, Otter Tail's Board of Directors formed such a committee and the committee approved Cascade procuring shares that would increase its interest over 10 percent, provided that Cascade agreed to enter into the Standstill Agreement that is the subject of this filing.

III. SUMMARY OF THE CONTRACT

The main purposes of the Contract are:

1. To allow Cascade to own more than 10 percent of OTP's common shares, without the statutory restrictions stated in Minn. Stat. §203A.673.
2. To restrict Cascade from increasing its ownership of OTP's common share to over 20 percent, or joining in any group or voting trust, or participating in any proxy solicitation relating to OTP for at least four years.

The filing states that the Contract between OTP and Cascade became effective on May 1, 2009. There is no specific date for termination of the contract. Instead, the Contract specifies several events, each of which, if it occurs, would trigger a termination of the Contract. These conditions are detailed in Section 6(c) of the Contract.

IV. OES ANALYSIS

A. *FILING REQUIREMENTS*

In Docket No. E,G999/CI-98-651,¹ the Commission provided minimum filing requirements for all affiliated-interest filings that are consistent with Minn. Rule 7825.2200B. This docket also requires that within 30 days of executing a contract or arrangement with an affiliate, the utility must make a filing that includes the following information:

1. A heading that identifies the type of transaction.
2. The identity of the affiliated parties in the first sentence.
3. A general description of the nature and terms of the agreement, including the effective date of the contract or arrangement and the length of the contract or arrangement.
4. A list and the past history of all current contracts or agreements between the utility and the affiliate, the consideration received by the affiliate for such contracts or agreements, and a summary of the relevant cost records related to these ongoing transactions.
5. A descriptive summary of the pertinent facts and reasons why such contract or agreement is in the public interest.
6. The amount of compensation and, if applicable, a brief description of the cost allocation methodology or market information used to determine cost or price.
7. If the service or good acquired from an affiliate is competitively available, an explanation must be included stating whether competitive bidding was used and, if it was used, a copy of the proposal or a summary must be included. If it is not competitively bid, an explanation must be included stating why bidding was not used.
8. If the arrangement is in writing, a copy of that document must be attached.
9. Whether, as a result of the affiliate transaction, the affiliate would have access to customer information, such as customer name, address, usage or demographic information.
10. The filing must be verified.

¹ *In the Matter of a Commission Investigation into Procedures for Reviewing Public Utility Affiliated Interest Contracts and Arrangements, ORDER INITIATING REPEAL OF RULE, GRANTING GENERIC VARIANCE, AND CLARIFYING INTERNAL OPERATION PROCEDURES* (September 14, 1998).

Section III of OTP's filing discusses these ten filing requirements. Based on its review of the information provided by OTP in Section III of its filing, the OES concludes that the instant filing meets all the Commission's filing requirements.

B. STATUTORY REQUIREMENTS

As amended in 1993, the Minnesota "affiliated-interest" statute provides:

No contract or agreement, including any general or continuing agreement, providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right, or thing, or for the furnishing of any service, property, right or thing, other than those above enumerated, made or entered into after January 1, 1975 between a public utility and any affiliated interest . . . is valid or effective unless and until the contract or arrangement has received the written approval of the commission.

Minn. Stat. §216B.48, subd. 3 (Emphasis added).

This statute provides two tests (the reasonableness and public-interest tests) for the Commission to apply to affiliated-interest contracts:

The commission shall approve the contact or arrangement . . . only if it clearly appears and is established upon investigation that it is reasonable and consistent with the public interest. . . The burden of proof to establish the reasonableness of the contract or arrangement is on the public utility.

Minn. Stat. §216B.48, subd. 3.

As a result, Otter Tail has the burden of proof to establish the reasonableness of the Agreement, and the Commission shall approve the proposal only if the agreement is reasonable and consistent with the public interest.

Based on Minn. Stat. §216B.48, the Commission should approve the contract between OTP and Cascade if it is reasonable and not counter to the public interest. Below is the OES's analysis of the reasonableness of the contract and its impact on the public interest.

The OES's analysis focuses on the impact of the contract on OTP's ratepayers. The contract deals with the relationship between the Company and its shareholders and has no direct impact on OTP's ratepayers. The contract does not impose any additional cost on OTP's ratepayers and does not have any impact on the regulated operations of OTP. Therefore, the OES concludes that the contract is not counter to the interest of OTP's ratepayers. The other affected parties are OTP

(and their shareholders) and Cascade (and their shareholders). Since the contract is a voluntary contract between two willing parties (OTP and Cascade), it is clear that this contract is beneficial to both parties. In particular, the contract allows OTP and Cascade to enter into beneficial transactions which, absent the contract, would not be permitted under Minn. Stat. §302A.673. The contract also limits Cascade's ownership share of OTP to no more than 20 percent. This provision limits Cascade power to influence OTP's decisions. This limiting provision further benefits OTP's ratepayers, because Cascade's main focus, unlike OTP, is not likely to be OTP's ratepayers. Based on the analysis above, the OES concludes that the contract is both reasonable and not counter to the public interest.

C. OTHER ISSUES

There are two other issues that must be discussed: 1) the effective date of the contract and 2) the potential restructuring of OTP into a holding company. Below is the OES discussion of these two issues.

1. The Effective Date of the Contract

OTP proposes the effective date of the contract to be May 1, 2009. In general the OES does not support a retroactive effective date because such approvals may result in unnecessary complications. However, in this particular case, since there are no costs to the ratepayers associated with this contract and no other complications that may arise because of the retroactive effective date, the OES has no objections to the proposed effective date of May 1, 2009.

2. Restructuring of OTP

At present, OTP has a pending application to become a holding company. If the proposed restructuring is consummated, then Cascade would enter into a new standstill agreement with New Otter Tail (the restructured company). Once the new Standstill Contract is executed, the current Standstill Contract would be automatically terminated (Section 4 of the Contract).

The OES concludes that this provision of the Contract is appropriate and simply notes that the new contract, if materialized, would have to be approved by the Commission as well.

V. OES CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

Based on its review and analysis of OTP's petition, the OES concludes that:

1. The filing complies with the filing requirement under Minnesota Rule 7825.200B;
2. The filing complies with the filing requirements under the September 14, 1998 Commission Order (Docket No. E,G499/CI-98-651); and

3. The Contract between OTP and Cascade is reasonable and is not counter to the public interest.

B. RECOMMENDATION

Based on its analysis of the Contract and based on its conclusions above, the OES recommends that the Commission approve the Contract between OTP and Cascade.

/jl

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, 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 Office of Energy Security
Comments**

Docket No. E017/M-09-656

Dated this **29th** day of **June, 2009**

/s/Sharon Ferguson

E017/AI-09-656

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