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EL00-002
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JAN 27 2000

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

OTTER TAIL
Power Company

January 25, 2000

Mr. William Bullard, Director
South Dakota Public Utilities Commission
State Capitol
500 East Capitol Street
Pierre, SD 57501-5070

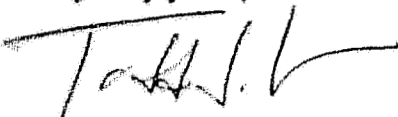
**Re: In the Matter of Otter Tail Power Company's Request
to File an Energy-Only Lighting Tariff**

Dear Mr. Bullard:

Pursuant to South Dakota Codified Laws Section 49-34A-25 and Administrative Rules of South Dakota Part 20:10:13:08, enclosed for filing please find ten (10) copies of Otter Tail Power Company's Petition for Approval of a Departure of its Fuel Clause Adjustment Tariff.

Please let me know if you have any questions with respect to this matter.

Very truly yours,



Todd J. Guerrero
Associate General Counsel
TJG:dm

Enclosures

EL 00-002

RECEIVED

JAN 27 2000

STATE OF SOUTH DAKOTA
BEFORE THE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

In the Matter of Otter Tail Power Company
for Approval of a Departure of its Fuel Clause
Adjustment Tariff

Docket No.

PETITION OF OTTER TAIL POWER COMPANY

1. INTRODUCTION.

Pursuant to South Dakota Codified Laws Section 49-34A-25 and Administrative Rules of South Dakota ("ARSD") Part 20:10:13:08, Otter Tail Power Company hereby petitions the South Dakota Public Service Commission for permission to depart from the specific wording of Otter Tail's Fuel Adjustment Clause, Rate Schedule M-605, to allow the pass-through of litigation expenses that have resulted in ratepayer savings.

2. GENERAL FILING INFORMATION.

Pursuant to ARSD Part 20:10:01:02:03, Otter Tail provides the following general information:

A. Name, Address, and Telephone Number of Utility.

Otter Tail Power Company
215 South Cascade Street
P. O. Box 496
Fergus Falls, MN 56538-0496
(218) 739-8200

B. Name, Address, and Telephone Number of Utility Attorney.

Todd J. Guerrero
Otter Tail Power Company
215 South Cascade Street
P. O. Box 496
Fergus Falls, MN 56538-0496
(218) 739-8350

C. Date of Filing.

This petition is being filed on January 26, 2000.

D. Law Controlling the Processing of the Filing.

South Dakota statutes and related rules do not establish an explicit deadline for Commission action. Otter Tail requests an expedited and informal proceeding, including any variances that may be necessary pursuant to ARSD Part 20:10:13:08.

E. Title of Utility Employee Responsible for Filing.

Bernadeen Brutlag
Manager, Regulatory Services
Otter Tail Power Company
215 South Cascade Street
P. O. Box 496
Fergus Falls, MN 56538-0496
(218) 739-8289

3. DESCRIPTION OF FILING.

A. Background.

This petition arises out of a dispute over the pricing provisions of a 35-year coal supply agreement ("Agreement") that governs the purchase of lignite coal by the owners of the Coyote Power Plant from the Knife River Coal Company. Owners of the plant include Otter Tail.

Northwestern Public Service, and the Northern Municipal Power Agency ("Owners").¹ The plant, located in Beulah, North Dakota, is a 400-megawatt, mine-mouth power plant, meaning that it takes its coal directly and exclusively from Knife River's adjacent Beulah Mine. The Owners began taking regular deliveries under the Agreement in May 1981 when the plant began commercial operation.

At issue in the litigation was the price of coal as fixed under the Agreement. The Owners sought relief from the Agreement's pricing adjustment provisions that required the prices to remain "fair and equitable" throughout its term. To guarantee this promise the Agreement, among other things, requires that the price of coal be compared to prices in similar coal "agreements under generally similar mining conditions."

After extensive negotiations failed, the Owners pursued a claim in North Dakota District Court in November 1995. The matter was referred to arbitration, which commenced in September 1996.

By Order dated March 26, 1999, the arbitration panel agreed that the price charged for coal by Knife River was not fair and equitable. In accordance with the Agreement's adjustment provisions, the panel reduced the price beginning with the fourth quarter of 1996 (to coincide with the start of arbitration) through the first quarter of 1999 (to coincide with the March decision). The panel also required the parties to propose revisions to the Agreement to reduce the future price of coal and minimize the risk of future pricing disputes.

On August 6, 1999, the panel adopted revised adjustment provisions (reduced the price of future deliveries) and awarded damages to the Owners in the amount of \$5,901,776, with interest

¹ Montana-Dakota Utilities Co. ("MDU") is also a partial owner in the plant, and is the parent company of Knife River. MDU did not join the Owners in its claim against Knife River.

from March 26, 1999. The damages represented the difference between the price of coal as reduced by the panel and the actual price of coal charged by Knife River from the fourth quarter of 1996 through the first quarter of 1999.

On September 1, 1999, Knife River remitted to Otter Tail \$2,741,773, which represented Otter Tail's share of damages in accordance with its fuel usage at the Coyote Plant. On December 21, 1999, Knife River remitted to Otter Tail \$142,399, for post-judgment interest on the award, bringing Otter Tail's total award to \$2,884,172.

In addition to the damage award, the reduced prices for future coal deliveries also mean future fuel savings to Otter Tail ratepayers of approximately \$750,000 for each of the remaining seventeen years of the Agreement, for a net present value savings of \$10,500,000. Both the \$2.8 million damage award and the future savings will inure to ratepayers through the fuel adjustment clause. All told, the litigation will benefit Otter Tail's ratepayers by some \$13,200,000.

Since the outset of the litigation through December 21, 1999, Otter Tail incurred \$1,240,870 as its share of litigation expenses, primarily for outside attorneys and experts.

B. Request for Departure of the Fuel Clause Tariff.

In this petition Otter Tail seeks to net its \$1.2 million in arbitration expenses against its \$2.8 million damage award and to pass the remaining \$1.6 million through the fuel adjustment clause as a credit to ratepayers. The question to be decided is whether it is equitable for ratepayers to bear the burden of expenses from which they clearly have benefited.

Section 49-34A-25 of the South Dakota Codified Laws provides, among other things, that the "public utilities commission shall permit a public utility to file rate schedules containing provisions for the automatic adjustment of charges for public utility service in direct relation

to . . . the delivered costs of fuel used in the generation of electricity" Otter Tail's fuel adjustment rate schedule, Rate Designation M-60S, provides that the cost of fuel shall include, among other things, "the utility's share of the expense of fossil fuel, as recorded in Account 151² [of FERC's Uniform System of Accounts], used in jointly-owned or leased plants." Under Administrative Rule Part 20:10:13:08, the Commission retains the right to waive any departure from the particular construction of any tariff schedules filed by a utility. Because litigation expenses are not included in Account 151 and, therefore, generally not recoverable through the fuel adjustment clause, departure from that tariff is necessary.

The purpose of the fuel adjustment clause (FAC) is to keep utilities whole with regard to changes in the cost of fuel. It allows utilities to pass through to ratepayers increases or decreases in the cost of fuel without having to make separate rate filings that reflect each change in fuel cost and without having to obtain prior approval from the regulatory commissions of each change in fuel cost. *See e.g., Kansas City Power & Light*, 51 FERC ¶ 61,285 (1990).

Like Otter Tail's fuel clause tariff, FERC's fuel adjustment clause also is drawn narrowly to restrict recovery of costs through fuel clauses to the cost of "fossil fuel . . . consumed in the utility's own plants, and the utility's share of fossil . . . fuel consumed in jointly owned or leased plants." 18 C.F.R. § 35.14(a)(2)(i). The rule further expressly provides that "[t]he cost of fossil fuel shall include no other items other than those listed in Account No. 151 of the Uniform System of Accounts" 18 C.F.R. § 35.14(a)(6).

² Account 151, titled "Fuel Stock," provides: This account shall include the book cost of fuel on hand. Items (1) Invoice price of fuel less any cash or discounts; (2) Freight, switching, demurrage, and other transportation charges, not including, however, any charges for unloading from the shipping medium; (3) Excise taxes, purchasing agents' commission, insurance, and other expenses directly assignable to cost of fuel; (4) Operating, maintenance, and depreciation expenses and ad valorem taxes on utility-owned transportation equipment used to transport fuel from the point of acquisition to the unloading point; and (5) Lease or rental costs of transportation equipment used to transport fuel from the point of acquisition to the unloading point.

Because the FAC regulations are drawn narrowly, the prevailing policy, absent a waiver, is that only those costs that fall expressly within Account 151 will be allowed to be passed through the FAC. Litigation expenses are not among the items listed in Account 151 and are not directly assignable to the cost of fuel. *Minnesota Power & Light v. Federal Energy Regulatory Commission*, 852 F.2d 1070, 1073 (8th Cir. 1988); *Indianapolis Power & Light Company*, 49 FERC ¶ 61,040 (1989). Commissions seek to enforce the FAC in order to protect its integrity and prevent abuses. See, e.g., Order Varying Rule, *In re Minnesota Power & Light*, M.P.U.C. Docket No. E-015/M-89-42, at 3 (1989) (“Without strict interpretation of the costs included in Account 151, the types of expenses that companies could try to flow through the fuel adjustment clause would increase”). Commissions particularly are steadfast where the utility has passed the expenses through the FAC and only asked for permission later (i.e., ask for a retroactive waiver).

However, where utilities are able to demonstrate that the litigation resulted in savings to ratepayers, and where the utility seeks approval from the regulatory commission before it flows non-Account 151 expenses through the FAC, waivers to the rule are proper so that ratepayers can help bear costs of litigation. *In re Minnesota Power & Light*, M.P.U.C. Docket No. E-015/M-89-42, *Minnesota Power & Light*, 45 FERC ¶ 61,369 (1988), following remand by the D.C. Circuit, 852 F.2d 1070. In effect, where the utility is able to show a net benefit to ratepayers (i.e., the difference between the savings to ratepayers and the expenses incurred) a waiver is appropriate. In the case of the federal rule FERC has dubbed this its ongoing “benefits” test. See e.g., *Kentucky Utilities Company*, 45 FERC ¶ 61,409.

It is unclear whether this Commission has been presented with this issue. Decisions rendered by other commissions, however, are instructive. For instance, in *Minnesota Power* the utility incurred significant coal and rail litigation expenses from 1979-1985 in an effort to reduce

fuel costs. During that period the utility regularly included the expenses in Account 151 and flowed them through the FAC -- without seeking departure. The Minnesota Commission repeated its expectation that utilities are to adhere strictly to the FAC rules. Nonetheless, because it found the utility's expenses reasonable and that "the benefits of the litigation were passed on to ratepayers," the Minnesota Commission granted the departure. It even applied the waiver retroactively (i.e., did not require refunds). Order Varying Rule, Docket No. E-015/M-89-42, at 3-4 (attached). *Minnesota Power* also put Minnesota utilities on formal notice "that expenses that are not specified clearly in USOA Account 151 must be proposed to the Commission prior to flowing these expenses through the [FAC]." (Emphasis added).³ Another case permitting pass-through of litigation costs is *Southwestern Public Service Co.*, Case No. 2731 (N.W. Oct. 24, 1997) (also attached). Southwestern was involved in litigation with its coal supplier over the minimum quantity of coal that it was obligated to purchase. The litigation resulted in \$2 million of net savings to ratepayers. The New Mexico Commission determined that the litigation costs could be recovered through the fuel adjustment clause over one year.

With this petition Otter Tail is seeking limited departure so that it may flow its Knife River litigation expenses through its fuel adjustment tariff. Since receiving the \$2.8 million damage award, Otter Tail has placed the proceeds in (Uniform System of Accounts) Account 242 - Miscellaneous Current and Accrued Liabilities. This is a deferred revenue account. The account balance is accruing interest monthly, calculated at the average investment rate Otter Tail earns on its temporary cash investments. In other words, Otter Tail has not passed any of the

³ This is consistent with the FERC rule as well, under which a company seeking waiver of the FAC must do so ahead of time. *Northern States Power Co.*, 58 FERC ¶ 61,119 *reh. denied*, 59 FERC ¶ 61,033 (1992); *Montaup Electric Co.*, 50 FERC ¶ 61,149 (1990).

award, or any offset for litigation costs, through the FAC and will not until such time as the Commission has acted on this petition.⁴

The litigation involved in this instance clearly has benefited ratepayers. Taking into consideration the following three factors -- the arbitration award (related to past fuel overcharges), future fuel savings, and litigation costs -- Otter Tail ratepayers will see fuel savings of approximately \$13,200,000, roughly ten percent of which will inure to South Dakota ratepayers. The question is whether it is equitable to require Otter Tail's ratepayers to bear the burden of expenses from which they clearly have benefited. We believe it is.

C. Proposed Effective Date.

As noted, in addition to South Dakota, Otter Tail is seeking waiver of the FAC rules from the respective commissions in Minnesota, North Dakota, and from the FERC. After receiving decisions from all jurisdictions, Otter Tail then will need to determine the appropriate jurisdictional allocations for the FAC pass through. What Otter Tail seeks in this petition is departure of the FAC for purpose of being allowed to pass through its litigation costs. After receiving each of the jurisdictional decisions, Otter Tail proposes that any actual pass through will be done on the basis of a compliance filing that identifies the exact amount allocated to each jurisdiction. Thus, Otter Tail seeks an effective date of FAC pass through as of the date set forth in the compliance filing, most likely in the first or second quarter of 2000.

⁴ Otter Tail is filing similar petitions on this matter with the Minnesota Public Utilities Commission, the North Dakota Public Utilities Commission, and the FERC. We intend to wait until receiving orders from each of the jurisdictions before making any disposition of the award. In the event the commissions' treatment is inconsistent, a method will need to be determined for allocating the amounts among the several jurisdictions. In this event, Otter Tail suggests using the E2 Energy Factor from its actual year 1998 cost of service study. This factor is based on total kWh sales adjusted for line losses to the generation level and is used to allocate base energy costs in the cost of service study.

4. THE PROPOSED DEPARTURE IS IN THE PUBLIC INTEREST.

The South Dakota rules set forth no substantive criteria to evaluate a request for departure. However, Otter Tail believes that granting a limited departure pursuant to ARSD Part 20:10:13:08 is consistent with the public interest for the following reasons:

- (1) Strict enforcement of the tariff would impose an excessive burden upon Otter Tail;
- (2) Granting the departure would not adversely affect the public interest; and
- (3) Granting the departure would not conflict with any standard imposed by law.

A. Strict Enforcement of the Tariff Would Impose an Excessive Burden.

Strict enforcement of the tariff would impose an excessive and unreasonable burden on Otter Tail and its shareholders. Without departure, Otter Tail will be denied the ability to recover reasonably incurred fees and expenses that have resulted in a significant savings to Otter Tail ratepayers. Without departure, the benefits of the litigation will flow solely to the ratepayers and the costs will be incurred solely by the shareholders of Otter Tail. In similar cases, other commissions have found that not granting departure would impose an excessive burden on the utility because it would be unable to recover reasonably incurred costs. The same rationale applies with equal force here.

B. Granting the Departure Does Not Adversely Affect the Public Interest.

Granting the departure as requested does not adversely affect the public interest. The public interest is adequately protected because the savings that resulted from the litigation will be passed to ratepayers.

Another component of the public interest is the concerns of shareholders of rate-regulated public utilities. The prevailing policy is that departures are appropriate where the benefits of the

litigation outweigh its costs and where the utility seeks prior approval. Both of these are true here. By granting Otter Tail's request, ratepayers' and shareholders' interests are upheld.

Allowing recovery of litigation costs in this instance further promotes the public interest because it will act to encourage utilities to continue to take reasonable and prudent steps to mitigate ratepayer costs. A contrary ruling, on the other hand, will subvert the public interest because it will act as a disincentive for utilities to pursue legitimate claims on behalf of ratepayers.

C. Departure does not Conflict with Standards Imposed by Law.

Granting departure is consistent with the purpose of the FAC, which is to keep utilities whole with regard to changes in the cost of fuel. Otter Tail is not aware of any conflict that a departure would create. Indeed, the law, as outlined above, expressly contemplates departure.

5. CONCLUSION.

For the foregoing reasons, Otter Tail respectfully requests that the Commission allow Otter Tail a limited departure of its fuel adjustment tariff, as requested herein.

Dated: January 25, 2000

OTTER TAIL POWER COMPANY

By: _____



Todd J. Guerrero
Otter Tail Power Company
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P. O. Box 496
Fergus Falls, MN 56538-0496
(218) 739-8350

Attorney for Otter Tail Power Company

NEXT

DOCUMENT (S)

BEST IMAGE

POSSIBLE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beemiller
Cynthia A. Kiddinick
Norma McKenna
Robert J. O'Keefe
Darrel L. Peterson

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Minnesota Power & Light
Company's Compliance Filing Relating to
Certain Expenses Included in the Fuel
Adjustment Clause

ISSUE DATE: April 26, 1989

DOCKET NO. E-015/M-89-42

ORDER VARYING RULE

PROCEDURAL HISTORY

Between 1978 and 1985, Minnesota Power and Light Company (MP) included litigation expenses in excess of \$1 million in its fuel adjustment clause, thereby passing them on to ratepayers. The Company spent more than \$200,000 on a total company basis between 1978 and 1981 in unsuccessful efforts to recover \$12.5 million of Montana coal severance taxes. In addition, from 1979 to 1985 MP spent more than \$900,000 challenging a proposed Burlington Northern tariff increase. This litigation resulted in a \$7.6 million refund from Burlington Northern. Also, court proceedings in Minnesota resulted in a reduction of coal freight costs of \$45 million from 1979 to 1983 and \$12 million annually after 1983.

MP stated that all the freight savings were flowed through to ratepayers through the fuel adjustment clause. From 1978 to 1985 MP included the litigation expenses in the Uniform Systems of Accounts (USOA) Account 151, Fuel Stock, to flow them through to wholesale and retail ratepayers through the fuel adjustment clause.

On May 21, 1987, the Federal Energy Regulatory Commission (FERC) issued its Order on Accounting Practices, 39 FERC Para. 61,192 (1987), ~~rehearing denied~~, 40 FERC Para. 61,042 (1987). That Order disallowed the inclusion of litigation expenses in Account 151 and denied recovery of the expense through the wholesale fuel adjustment clause. Refunds were required in the FERC jurisdiction. FERC denied MP's request for waiver of the retroactive application of FERC's findings.

On March 1, 1988, the Commission issued its Findings of Fact, Conclusions of Law and Order in the Company's general rate case, Docket No. E-015/GR-87-223, and directed that the litigation expense issue be addressed in a separate proceeding. In its Order After

Reconsideration issued on May 16, 1988, the Commission stated that it would address the litigation expense issue following the decision of the U.S. Court of Appeals.

On August 1, 1988 the U.S. Court of Appeals affirmed FERC's interpretation of Account 151 and remanded to FERC its decision to deny a waiver of the retroactive application of FERC's interpretation of Account 151. Minnesota Power & Light Company v. FERC, 852 F.2d 1070 (8th Cir. 1988).

On September 14, 1988 the Commission granted MP a time extension for its compliance filing until 45 days after FERC's Order on Remand.

On December 6, 1988, FERC issued its Order on Remand, 45 FERC Para. 61,369 (1988), which waived the retro-active application of its interpretation of Account 151 and the fuel adjustment clause.

On December 23, 1988, MP made its general rate case compliance filing. MP asked that the Commission either accept the accounting treatment granted by FERC, or grant a waiver or variance of the Commission's rules, thereby authorizing MP's prior collection of litigation expenses through the fuel adjustment clause in Minnesota.

The Department of Public Service (DPS or the Department) filed its comments on January 23, 1989 recommending that the Commission grant MP's variance request. The Residential Utilities Division of the Office of the Attorney General (RUD-OAG) filed its comments on January 24, 1989 supporting MP's variance request.

FINDINGS AND CONCLUSIONS

The Commission must decide whether to adopt the FERC's interpretation of USOA Account 151. Then the Commission must decide whether to grant a variance of its accounting and fuel adjustment clause rules which would allow Minnesota Power to retain the Minnesota portion of its litigation expenses which it recovered from ratepayers through the fuel adjustment clause from 1978 through 1985.

Minn. Rules, parts 7825.0200 through 7825.0400 adopt the FERC's Uniform System of Accounts as the Minnesota system of accounts. Minn. Rules, parts 7825.2390 through 7825.3000 provide for the fuel adjustment clause. Minn. Rules, part 7825.2400, subp. 8 defines the Cost of Fossil Fuel as those costs withdrawn from Account 151.

USOA Account 151, 18 C.F.R. Part 101 (1988), allows for costs as follows:

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.
3. Excise taxes, purchasing agents' commissions, insurance and other expenses directly assignable to cost of fuel.
4. Operating, maintenance and depreciation expenses and ad valorem taxes on utility-owned transportation equipment used to transport fuel from the point of acquisition to the unloading point.
5. Lease or rental costs of transportation equipment used to transport fuel from the point of acquisition.

MP had included its litigation expenses under the third category.

The Commission finds that the costs included in Account 151 are critical to the integrity of the fuel adjustment clause. The Commission agrees with and adopts the FERC's interpretation of costs to be included in Account 151. The Commission finds that the costs included in Account 151 must be narrowly construed because these costs are automatically passed onto ratepayers. Without a strict interpretation of the costs included in Account 151, the types of expenses that companies could try to flow through the fuel adjustment clause would increase. The Commission puts utilities on notice that expenses that are not specified clearly in USOA Account 151 must be proposed to the Commission prior to flowing those expenses through the fuel adjustment clause.

The Commission will now address MP's variance request.

The Commission may grant a variance to any of its rules upon finding that the following conditions apply:

1. Enforcement of the rules would impose an excessive burden upon the applicant or others affected by the rule;
2. Granting of the variance would not adversely affect the public interest; and
3. Granting of the variance would not conflict with standards imposed by law.

Minn. Rules part 7830.4400.

The Commission is sympathetic to MP's position. The Commission notes that the FERC interpretation of litigation costs under Account 151 is a new interpretation and retro-active

application could be burdensome and inequitable. The Commission believes that MP's arguments for including litigation expenses in Account 151 were reasonable and made in good faith. The benefits of the litigation were passed on to ratepayers. The Commission finds that enforcing Minn. Rules, parts 7825.2400 would impose an excessive burden on MP because it would be unable to recover reasonably incurred costs. The Commission further finds that granting this variance would not adversely affect the public interest because savings that resulted from the litigation have been passed to ratepayers. Finally the Commission finds that granting this variance would not conflict with standards imposed by law. Neither the FERC nor the Court has required the Company to refund the litigation expenses that were included in the fuel clause adjustment and the Company has agreed to seek prior regulatory approval in the future for similar matters. The Commission concludes that the requirements of Minn. Rules, part 7830.4400 have been met and will vary Minn. Rules, part 7825.2400.

ORDER

1. The Commission hereby grants a variance of Minn. Rules, part 7825.2400 to allow MP to include the litigation expenses at issue in the fuel adjustment clause and to require no refund of the amounts collected.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennep
Executive Secretary

(S E A L)

43RD DECISION of Level 1 printed in FULL format.

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PUBLIC UTILITIES REPORTS - FOURTH SERIES

NEW MEXICO

Re Southwestern Public Service Company

Case No. 2731

New Mexico Public Utility Commission

SLIP OPINION

October 24, 1997

SYNOPSIS:

Before Shirley, chairman, Rivera, commissioner, and Herrmann, hearing examiner.

BY THE COMMISSION:

FINAL ORDER APPROVING RECOMMENDED DECISION

THIS MATTER comes before the New Mexico Public Utility Commission ("Commission") upon the Recommended Decision of the Hearing Examiner issued by William J. Herrmann on October 2, 1997. The Commission having considered that Recommended Decision and the record in this case, and being fully informed of the premises, adopts the following as its Final Order in this case.

STATEMENT OF THE CASE

We accept and adopt the Hearing Examiner's Statement of the Case through the time of issuance of the Recommended Decision on October 2, 1997. The Recommended Decision filed by the Hearing Examiner is attached hereto as Exhibit 1. Pursuant to NMPUC Rule 110.134(a), the deadline for Exceptions to the Recommended Decision was October 15, 1997. No Exceptions have been filed in this matter.

DISCUSSION

We have reviewed the Recommended Decision and conclude that no changes should be made to the recommendations of the Hearing Examiner. We therefore accept and adopt the Hearing Examiner's Discussion, Findings and Conclusions, and Ordering Paragraphs, as the Discussion, Findings and Conclusions, and Orders of the Commission.

THE COMMISSION FINDS AND CONCLUDES:

1. The foregoing statements, discussion and analysis are hereby adopted as Findings and Conclusions of the Commission.

2. The Commission has jurisdiction over the parties and the subject matter in this case, and the Recommended Decision of the Hearing Examiner is well-taken and should be adopted.

3. The findings and conclusions contained in the Recommended Decision of the Hearing Examiner, attached hereto as Exhibit 1, are incorporated by reference as if fully set forth herein, and are ADOPTED, APPROVED, and ACCEPTED as Findings and Conclusions of the Commission.

IT IS THEREFORE ORDERED:

A. The Orders contained in the Recommended Decision of the Hearing Examiner as set forth in Exhibit 1, attached hereto and incorporated by reference as if fully set forth herein, are ADOPTED, APPROVED, and ACCEPTED as Orders of the Commission.

B. The Recommended Decision of the Hearing Examiner is ADOPTED, APPROVED, and ACCEPTED in its entirety.

C. This Order is effective immediately.

D. A copy of the Order shall be served on all parties to this case or their counsel and upon all persons on the service list for NMPUC Case No. 2731, as indicated by the attached Certificate of Service.

E. This Docket is closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 24th day of October, 1997.

SEAL

RECOMMENDED DECISION OF THE HEARING EXAMINER

Pursuant to NMPUC Rule 110.133, William J. Herrmann, Hearing Examiner in this case, presents the following Recommended Decision to the New Mexico Public Utility Commission ("Commission").

STATEMENT OF THE CASE

Applicant Southwestern Public Service Company ("Southwestern") filed an Application for Approval of Continued Use of its Fuel and Purchased Power Adjustment Clause Pursuant to NMPUC Rule 550 on September 6, 1996. Accompanying that Application was the testimony and exhibits of Brenda J. Holland, Bennie Weeks and Henry P. Janhsen.

On September 17, 1996, the New Mexico Industrial Energy Consumers filed a Motion for Leave to Intervene and Request for Discovery.

The Commission issued an Order Suspending Fuel Clause on October 1, 1996. Among other things, that Order suspended Southwestern's Fuel and Purchased Power Cost Adjustment Clause ("FPPCAC") until further order of the Commission, and directed that Southwestern's existing FPPCAC remain in effect until further order of the Commission.

PUBLIC UTILITIES REPORTS 4TH, SLIP OPINION

On December 4, 1996, the Commission issued a Memorandum designating and appointing William J. Herrmann, as the Hearing Examiner in this case.

The Hearing Examiner issued an Order Setting Pre-hearing Conference on February 28, 1997. After the pre-hearing conference, the Hearing Examiner issued a Procedural Order on March 12, 1997. That Order required: Southwestern to publish a notice of this proceeding in newspapers of general circulation in every New Mexico county where Southwestern provides service; intervention motions to be filed by May 5, 1997; the direct testimony of the Commission Staff ("Staff") and Intervenor to be due by no later than June 6, 1997; rebuttal testimony to be filed by no later than June 30, 1997; and the scheduling of a hearing for July 23, 1997, at 10:00 a.m.

The Attorney General of New Mexico ("AG") filed a Motion for Leave to Intervene and Request for Discovery Responses on March 21, 1997.

On April 9, 1997, Southwestern filed four Affidavits of Publication attesting that the required Notice to Customers was published beginning March 23, 1997, and ending March 27, 1997, in four separate newspapers of general circulation covering every New Mexico county served by Southwestern.

Southwestern filed a Motion for Leave to File Supplemental Testimony on May 6, 1997. That Motion sought permission to file supplemental testimony to bring Southwestern's direct case up to date, and requested through its supplemental testimony that Southwestern's FPPCAC balancing account include the fuel-related payment Southwestern made to Thunder Basin Coal Company ("Thunder Basin") on April 1, 1997, at the conclusion of litigation between Southwestern and Thunder Basin regarding Southwestern's contractual coal purchase obligations. The proposed Supplemental Testimony of Brenda J. Holland, Bennie Weeks and Harry Johnson was filed with Southwestern's Motion.

On June 6, 1997, Staff filed an unopposed Motion for Extension of Time in which to file its direct and rebuttal testimony. The Hearing Examiner granted Staff's Motion by his Order of June 9, 1997. The deadline for Staff and Intervenor direct testimony was extended to June 27, 1997, and the deadline for rebuttal testimony was extended to July 11, 1997.

Staff filed the Direct Testimony of Dennis Gee on June 27, 1997. No testimony was filed by NMIEC or the AG.

The hearing on the merits of Southwestern's Application commenced as scheduled at 10:00 a.m. on July 23, 1997. During the hearing, the Hearing Examiner entered an oral ruling finding that Southwestern's Motion for Leave to File Supplemental Testimony was unopposed, and granting that Motion. The following appearances were entered at the hearing:

For Southwestern: Jeffrey L. Fornaciari, Esq. Hinkle, Cox, Eaton, Coffield & Hensley Santa Fe, NM

For NMIEC: Steven S. Michel, Esq. Santa Fe, NM

For Staff: Cydney Beadle Salazar, Esq. Chief Staff Counsel Santa Fe, NM

No one appeared for the AG who was excused.

PUBLIC UTILITIES REPORTS 4TH, SLIP OPINION

Page 36

For Southwestern, the Direct and Supplemental Testimony of Brenda J. Holland, the Direct and Supplemental Testimony of Bennie Weeks, the Direct Testimony of Henry P. Janhsen, and the Supplemental Testimony of Barry Johnson were offered and admitted into evidence. For Staff, the Direct Testimony of Dennis Gee was offered and admitted into evidence. Except for Mr. Janhsen, whose appearance was waived by stipulation, each of the foregoing witnesses appeared at the hearing and stood for cross-examination.

DISCUSSION

Southwestern is a public utility that furnishes retail electric service to customers in New Mexico and three other states. In this case, Southwestern has applied for Commission approval of Southwestern's continued use of its FPAC pursuant to Rule 550. Southwestern's last continuation filing came in NMPUC Case No. 2542, which was resolved by a Stipulation approved by the Commission.

In that Stipulation, Southwestern agreed that its next continuation filing would address:

(i) whether Southwestern's fuel and purchased power policies and practices assure that power is generated and purchased at the lowest reasonable cost;

(ii) whether material variations in the fuel and purchased power expenditures during the period since Southwestern's most recent continuation filing were reasonable; and

(iii) whether any new or amended fuel and purchased power contracts or revisions of any existing fuel and purchased power contracts were reasonable.

In Case No. 2542, Southwestern agreed that all fuel and purchased power costs collected during the period from September 30, 1993, through the date of the filing in this case (i.e., September 6, 1996), would be subject to NMPUC Rule 550.14. In the Stipulation in that case, Southwestern also agreed to request in its next continuation filing a fixed annual fuel and purchased power adjustment factor rather than a monthly factor. In the Commission's Order Approving Stipulation, however, the Commission encouraged the parties to the Stipulation to consider filing alternative fuel and purchased power adjustment factors. *Id.*, at 4.

In accordance with the Stipulation and the Commission's Final Order Approving Stipulation, Southwestern's Application in this case requests an FPAC with a fixed annual adjustment factor or, alternatively, requests an FPAC with a monthly adjustment factor as currently administered by Southwestern. Should the Commission approve the fixed annual adjustment factor proposed by Southwestern, then Southwestern also requests that variances be granted from the portions of NMPUC Rules 550.8(a) and (b), 550.9(a) through (c), and 550.11 that would otherwise require Southwestern to calculate a monthly fluctuating fuel adjustment factor for customer billings. Southwestern would nonetheless continue reporting such calculations on a monthly basis, including any over or under collections and interest calculations as described in Section 8 of the Stipulation in Case No. 2542. Southwestern Exhibit 1 (Holland Direct) at Schedule B-N-1, Page 1 through 3.

In Section 8 of the Stipulation, the parties to the Stipulation indicated a

preference for a fixed annual fuel factor. As far as the record in this case indicates, that preference has not changed. Staff has also recommended Commission approval of an FPPCAC with a fixed annual adjustment factor. Staff Exhibit (Gee Direct), at 11, lines 3-6. In making that recommendation, Staff witness Gee testified that Southwestern's continuation filing has complied with the purposes stated in Rule 550.2 n1 and has met the requirements of Rules 550.12 n2 and 550.13, n3 id., at 4-10.

Southwestern's request in this case that continued use of its FPPCAC be approved with a fixed annual adjustment factor is reasonable, supported by the other participants and the record herein, is in the public interest and should be approved. Consistent with the stipulation of the participants herein (see Hearing Transcript ("Transcript"), at 65, lines 18-21), Southwestern's use of a fixed annual adjustment factor should begin on January 1, 1998. Approval of Southwestern's fixed annual adjustment factor should not be construed as precedent-setting in any way. Southwestern, any interested parties, Staff and the Commission will be free to propose different alternatives in Southwestern's next continuation filing.

In its Supplemental Testimony, Southwestern proposed a revised fixed annual adjustment factor of .002287. This proposed revision would recover the costs based on the litigation between Southwestern and Thunder Basin regarding the dispute concerning minimum quantities of coal that must be purchased under their long-term coal contract. Southwestern Exhibit 2 (Holland Supplemental), at 8, lines 5-8 and 16; Transcript at 7, lines 18-22. The New Mexico retail share from January 1995 through March 1997 is \$ 3.6 million. The remaining monthly expenses will be included in FERC Account No. 501 - Fuel for April through December 1997. Southwestern proposes to recover the January 1995 through March 1997 Thunder Basin amount over one year and if the recovery period were extended to longer than one year, then Southwestern would propose the addition of interest at the prime rate as of the date of the Commission's Final Order in this case. Transcript (Holland) at 16, lines 7-10, 17, lines 1-8, and 22, lines 15-21. However, Southwestern witness Holland testified that a recovery period of longer than a year would be inconsistent with the treatment the Thunder Basin amounts have received in other jurisdictions. Transcript (Holland), at 17, lines 12-19.

Southwestern witness Johnson says that the net savings for Southwestern's customers over the three-year period covered by the contractual dispute is approximately \$ 8,868,472. New Mexico's share of these net savings is approximately \$ 1,921,798, based on New Mexico customers being approximately 5.6% of the retail customers on Southwestern's system. Southwestern Exhibit 5 (Johnson Supplemental Direct), at 9, lines 16-18, and 11, lines 8-11, and Attachment RJ-51. Southwestern has agreed to adjust the Account 501 - Fuel in the proposed annual factor calculation that was supplied in the supplemental testimony of Mr. Holland, for the Thunder Basin amount of \$ 5.6 million that will be collected from April through December 1997.

Staff supports Southwestern's proposed recovery of the Thunder Basin litigation amounts. Mr. Gee, citing the testimony of Mr. Johnson that is referenced above, testified that "even with consideration of the judgment payment to Thunder Basin, [Southwestern's] actions have resulted in significant savings to its customers. Staff Exhibit 1 (Gee Direct), at 11, lines 11-13. Mr. Gee also points out that disallowance of the Thunder Basin litigation costs, "especially when such actions result in net savings to customer, would serve as

a disincentive to [Southwestern] and other utilities to undertake necessary actions to lower fuel costs." Id., at 12, lines 1-3. Lastly, Staff's opinion is that Southwestern does not need a variance from Commission rules in order to pass the Thunder Basin costs on to its customers through the FPPCAC because these costs resulted in savings to Southwestern's customers, and because the Federal Energy Regulatory Commission ("FERC") allowed Southwestern to treat these costs as fuel costs under FERC Account 501-Fuel. Id., at 12, lines 13-20, and 11, lines 1-3.

The Commission agrees that Southwestern's Thunder Basin litigation costs resulted in net savings to its customers and are genuine fuel costs in accordance with NMPEC Rule 510.2(a) (which requires Class A electric utilities such as Southwestern to follow the FERC Uniform System of Accounts), and FERC Account 501. As a result, Southwestern should be authorized to use its FPPCAC to pass-through to its New Mexico retail customers the Thunder Basin litigation costs that are allocable to those customers. Southwestern's FPPCAC should be revised accordingly, allowing Southwestern recovery of those costs. This determination shall not be construed to create a precedent regarding the characterization of fuel related litigation costs in future cases.

Finally, the Commission takes administrative notice of the Final Order in NMPEC Case No. 2678, in which among other things, the Commission ordered Southwestern to pass New Mexico's proportionate share (i.e., \$ 6 million) of Southwestern's merger savings on to its New Mexico customers via the FPPCAC over a five-year period. That pass-through was to start thirty (30) days after the merger was consummated following Securities and Exchange Commission approval. The merger between Southwestern and Public Service Company of Colorado closed on August 1, 1997, of which the Commission also takes administrative notice. Southwestern has agreed that if the merger was completed before January 1, 1998, it would incorporate the merger savings in a revised fuel factor. Transcript at 45, lines 22-25, and 66, line 1. Southwestern's proposed annual fixed FPPCAC should be adjusted to reflect the pass-through of merger savings as required by the Final Order in Case No. 2678.

In order to reflect the matters described above, Southwestern proposed the following modifications to the revised fixed annual adjustment factor of .002287 which was filed with the supplemental testimony:

(a) a decrease in Account 501 - Fuel of \$ 5.6 million to adjust for Thunder Basin costs that will be collected from April through December 1997.

(b) a decrease in the balancing account of \$ 1.2 million per year for five years, which is the pass through to customers of the merger savings established by the Commission's Order in Case No. 2678.

Based on these modifications, Southwestern's fixed annual adjustment factor approved pursuant to NMPEC Rule 550 in this case shall be .001626. See attached Schedule A which illustrate Southwestern's calculation of the fixed annual adjustment factor that is approved in this case.

The Hearing Examiner recommends that the Commission FIND and CONCLUDE as follows:

PUBLIC UTILITIES REPORTS 4TH, SLIP OPINION

1. Southwestern is a public utility as defined in the Public Utility Act, 1978, Section 62-1-1, et seq., it is certified and authorized to conduct public utility service within the State of New Mexico, and it is subject to the jurisdiction of the Commission.

2. Due and timely notice of these proceedings and the subject matter of these proceedings have been given in accordance with the Public Utility Act and PUC Rules and Regulations.

3. Southwestern's Application to continue use of its FPPCAC with a fixed annual adjustment factor is unopposed, is in the public interest, and should be approved.

4. Commission approval of Southwestern's fixed annual adjustment factor should have no precedential effect. Southwestern, any interested parties, Staff and the Commission will be free to propose different FPPCAC alternatives in Southwestern's next continuation filing.

5. The requested variance from Rules 550.8(a) and (b), 550.9(a) through (c), and 550.11 are appropriate and reasonable, and therefore such variances should be granted by the Commission.

6. It is reasonable and in the public interest for Southwestern to receive Commission authorization to pass New Mexico's share of the Thunder Basin litigation costs on to Southwestern's New Mexico customers through its FPPCAC. Southwestern's recovery period for the January 1995 - March 1997 portion of these costs should not exceed one year. The remaining monthly expenses will be included in PERC Account No. 501 - Fuel for April through December 1997.

7. Southwestern's proposed fixed annual FPPCAC, which shall commence on January 1, 1998, should be adjusted for its pass-through of Thunder Basin litigation costs as provided in this Order, and for Southwestern's pass-through of its merger savings pursuant to the Commission's Final Order in Case No. 2678.

8. The Commission has jurisdiction over the parties and the subject matter of this case.

The Hearing Examiner recommends that the Commission ORDER as follows:

A. Southwestern's Application to continue use of its FPPCAC with a fixed annual adjustment factor is approved. Southwestern shall commence the use of its fixed annual adjustment factor on January 1, 1998. Until that time, Southwestern shall continue its use of fixed monthly adjustment factor.

B. Commission approval of Southwestern's fixed annual adjustment factor shall have no precedential effect. Southwestern, any interested parties, Staff and the Commission are free to propose different FPPCAC alternatives in Southwestern's next continuation filing.

C. Southwestern's requested variances from Rule 550.8(a) and (b), 550.9(a) through (c), and 550.11 are granted.

D. Southwestern is granted approval and authorization to pass the New Mexico's proportionate share of the January 1995 through March 1997 portion of the Thunder Basin litigation costs on to Southwestern's New Mexico

PUBLIC UTILITIES REPORTS 4TH, SLIP OPINION

participation of customers through its FPPCAC for a period not to exceed one year.

H. Southwestern's proposed fixed annual factor shall be adjusted for inclusion of its pass-through of the January 1995 through March 1997 Thunder Basin litigation costs as provided by this Order, and for inclusion of Southwestern's pass-through of its merger savings pursuant to the Commission's Final Order in Case No. 2678. Such adjustments shall take effect with the January 1998 billing cycle.

I. This Order is effective immediately.

J. Copies of this Order shall be served on all counsel of record.

K. This Docket is closed.

ISSUED at Santa Fe, New Mexico this nd day of October, 1997.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

Recommended Decision of the Hearing Examiner, issued October 2, 1997, was mailed first class, postage prepaid, to each of the following: Charles F. Noble, Esq. Assistant Attorney General Post Office Drawer 1508 Santa Fe, NM 87504-1508 Jeffrey L. Fornaciari, Esq. Post Office Box 2668 Santa Fe, NM 87504-2068 Steven Michel, Esq. 368 Hillside Avenue Santa Fe, NM 87501

and hand-delivered to: Cydney Beadles Salazar, Esq. Staff Counsel NM Public Utility Commission 224 E. Palace Santa Fe, NM 87501

DATED this nd day of October, 1997.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

Final Order Approving Recommended Decision, issued October 24, 1997, was mailed first class, postage prepaid, to each of the following: Charles F. Noble, Esq. Karl O. Wyler Assistant Attorney General Post Office Drawer 1508 Santa Fe, NM 87504-1508 Jeffrey L. Fornaciari, Esq. Post Office Box 2068 Santa Fe, NM 87504-2068 Steven Michel, Esq. 368 Hillside Avenue Santa Fe, NM 87501

and hand-delivered to: Cydney Beadles Salazar, Esq. Staff Counsel NM Public Utility Commission 224 E. Palace Santa Fe, NM 87501

DATED this 24th day of October, 1997. NEW MEXICO PUBLIC UTILITY COMMISSION
Stacey J. Goodwin Commission Counsel FOOTNOTES

all these purposes are: (a) provide for adequate regulatory review of a utility's operations under an FPPCAC; (b) provide for the stability of utility earnings when electric fuel costs and purchased power costs are rising and permit prompt credits to customers when electric fuel costs and purchased power costs are declining; and (c) assure that utilities collect through the FPPCAC the amount actually expended for fuel and purchased power costs.

PUBLIC UTILITIES REPORTS 4TH, SLIP OPINION

52 Under Rule 550.12, Southwestern must show that, (a) the cost of fuel and purchased power are a significant percentage of the total cost of service; (b) the cost of fuel and purchased power contains costs which periodically fluctuate and cannot be precisely determined in a rate case; and (c) the utility's fuel and purchased power policies and practices are designed to assure that electric power is generated and purchased at the lowest reasonable cost.

53 Rule 550.13 requires that all applications for continued use of an FPPCAC be accompanied by a revenue and expense statement that contains an analysis of costs and revenues included in or affected by the operation of the FPPCAC. Additionally, the utility must make the same showings required of an initial tariff filing as stated in Rule 550.12.

South Dakota Public Utilities Commission

WEEKLY FILINGS

For the Period of January 27, 2000 through February 2, 2000

If you need a complete copy of a filing faxed, overnight expressed, or mailed to you, please contact
Delaine Kolbo within five business days of this filing.
Phone: 605-773-3705 Fax: 605-773-3809

CONSUMER COMPLAINTS

CT00-026 In the Matter of the Complaint filed by Timothy William Johnson, Mitchell, South Dakota, against USBI and Preferred Billing Regarding Unauthorized Switching of Services.

On January 24, 2000, the Commission received a complaint from Timothy William Johnson, Mitchell, South Dakota, against Preferred Billing regarding unauthorized switching of services. The complainant alleges that his long distance provider was switched to Preferred Billing without his authorization, and that he has been unable to get his long distance service switched back to his former carrier. The Complainant is asking to have his service switched back to Sprint and to receive a refund of all monies charged over and above Sprint's rates.

Staff Analyst: Heather Forney
Staff Attorney: Karen Cremer
Date Received and Filed: 01/24/00
Intervention Deadline: N/A

CT00-027 In the Matter of the Complaint filed by Dale W. Frederick, Watertown, South Dakota, against OLS, Inc. Regarding Switching Telecommunications Services Through Deceptive Tactics.

The complainant alleges that his service was switched to OLS through deceptive tactics. He is seeking remedies to unauthorized switching and unsolicited telemarketing.

Staff Analyst: Leni Healy
Staff Attorney: Karen Cremer
Date Received: 01/25/00
Date Filed: 01/26/00
Intervention Deadline: NA

CT00-028 In the Matter of the Complaint filed by Rhonda Bendel, Watertown, South Dakota, against OLS, Inc. Regarding Unauthorized Switching of Services.

The complainant claims that she was billed by a company which she did not authorize. The complainant requests fines to be imposed and reimbursement of charges.

Staff Analyst: Leni Healy
Staff Attorney: Karen Cremer
Date Received: 01/25/00
Date Filed: 01/26/00
Intervention Deadline: NA

CT00-029 In the Matter of the Complaint filed by John and Jeanie Endres, Watertown, South Dakota, against ILD Teleservices, Inc. Regarding Unauthorized Switching of Services.

On January 26, 2000, the Commission received a complaint regarding unauthorized switching of phone service. Additional information was provided in an amendment to the complaint received January 31, 2000. The complainant alleges their long distance phone service was switched from MCI WorldCom to America's Tele-Networks without their authorization. The complainants are requesting that all America's Tele-Network charges that have appeared on the telephone bills since October 9, 1999, to the present be removed. Those charges amount to \$286.17. "In addition we request that a fine be placed upon America's Tele-Network for the illegal act of slamming us and causing the problems and expense that we and your commission has to try to straighten out. Only by imposing the maximum fine on these companies is the problem going to be eliminated."

Staff Analyst: Michele Farris
Staff Attorney: Camron Hoseck
Date Received: 01/26/00
Date Filed: 01/31/00
Intervention Deadline: NA

CT00-030 In the Matter of the Complaint filed by Randy Daughenbaugh, Rapid City, South Dakota, against U S WEST Communications, Inc. Regarding Delayed Installation.

On January 27, 2000, the Commission received a complaint from Randy Daughenbaugh, Rapid City, South Dakota, against U S WEST regarding delayed installation. The complainant alleges that he has been trying for seven months to get service provided to his new residence and that U S WEST has missed several promised installation dates. The complainant is asking for a temporary line to be installed.

Staff Analyst: Keith Senger
Staff Attorney: Karen Cremer
Date Received: 01/27/00
Date Filed: 01/31/00
Intervention Date: NA

CT00-031 In the Matter of the Complaint filed by Gustave Orloske, Hill City, South Dakota, against Accutel Communications, Inc. and USBI Regarding Unauthorized Switching of Services.

On February 01, 2000, the Commission received a complaint from Gustave Orloske, Hill City, South Dakota, against Accutel and USBI regarding unauthorized switching of services. The complainant alleges that his long distance provider was switched and he has received unauthorized charges on his phone bill.

Staff Analyst: Keith Senger
Staff Attorney: Karen Cremer
Date Received: 02/01/00
Date Filed: 02/02/00
Intervention Date: N/A

ELECTRIC

EL00-002 In the Matter of the Petition of Otter Tail Power Company for Approval of a Departure from its Fuel Clause Adjustment Tariff.

Otter Tail Power Company petitions the South Dakota Public Utilities Commission for permission to depart from the specific wording of Otter Tail's Fuel Adjustment Clause, Rate Schedule M-605, to allow the pass-through of litigation expenses that have resulted in ratepayer savings.

Staff Analyst: Michele Farris
Staff Attorney: Camron Hoseck
Date Filed: 01/27/00
Intervention Date: 02/18/00

TELECOMMUNICATIONS

TC00-005 In the Matter of the Filing by Kadoka Telephone Company to Establish Switched Access Rates.

The Public Utilities Commission has received a filing of the Kadoka Telephone Company Access Tariff rates to be effective March 1, 2000. In accordance with ARSD 20:10:27:12, the rates are the average of all cost companies in South Dakota, excluding U S WEST.

Staff Analyst: Heather Forney
Staff Attorney: Karen Cremer
Date Filed: 02/01/00
Intervention Date: 02/18/00

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www.otpc.com (web site)

RECEIVED

MAR 30 2000

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

FAX Received MAR 28 2000

OTTER TAIL
Power Company

VIA FAX AND MAIL

March 28, 2000

Mr. William Bullard
Executive Secretary
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Re: In the Matter of Otter Tail Power Company
Docket No. EL00-002

Dear Mr. Bullard:

On January 26, 2000 Otter Tail Power Company filed a Petition seeking to depart from the specific wording of Otter Tail's Fuel Adjustment Clause Tariff to allow the pass-through of litigation expenses that have resulted in ratepayer savings. Since the date of filing, two issues have developed that Otter Tail wants to bring to the Commission's attention before it acts on the Petition. We also provide clarification on one other issue. We request that this letter act to supplement and amend the original Petition. Ten copies of this letter are also enclosed.

Background

The litigation that provides the backdrop for this filing was the result of a dispute between several owners of the Coyote Power Plant - Otter Tail, Northwestern Public Service Company and Minnkota Power Cooperative (as agent for the Northern Municipal Power Agency) on the one side - versus the Knife River Coal Company on the other. Montana-Dakota Utilities Co., though also an owner of the plant, did not join in the claim against Knife River. The arbitration panel ultimately found in favor of the owners and awarded damages in the amount of \$5,901,776, with interest. Otter Tail's share of the damages was \$2,741,773.

In its Petition, Otter Tail sought to net \$1,240,870 in arbitration expenses (mostly for outside attorneys) against its \$2.8 million damage award. The difference between these two figures, or approximately \$1.6 million, would then be passed through Otter Tail's fuel adjustment clause as a credit to ratepayers (roughly seven percent of which is jurisdictional to South Dakota). The complete factual and legal basis of Otter Tail's request is set forth in the Petition.

New Issues

MDU's Contribution

In the Petition, Otter Tail indicated that it had incurred \$1,240,870 as its share of litigation expenses. Northwestern and Minnkota were also responsible for their share of expenses. At the time Otter Tail made the Petition, the undersigned was unaware that MDU – as an owner in the plant who benefited from the litigation – had in fact made a contribution to Otter Tail and the other owners as reimbursement for MDU's share of the litigation costs. The amount of MDU's contribution to Otter Tail was \$250,930. MDU submitted the contribution, however, "under protest." That is, MDU took the position that it was not liable for a percentage of the arbitration costs and reserved its right to further dispute the payment under the dispute resolution provisions of the Coyote Operating Agreement (the ownership and operating agreement between the owners of the plant).

The purpose of this letter is not to argue whether MDU's is liable for its percentage of the arbitration costs.¹ What concerns us at the moment is that we have made full and complete disclosure regarding the facts contained in our Petition. Assuming that Otter Tail will ultimately retain the \$250,930 contribution from MDU, it obviously reduces Otter Tail's out-of-pocket litigation costs. Because Otter Tail is only seeking recovery of its actual expenses – nothing more nothing less – Otter Tail proposes that the \$1,240,870 of expenses be reduced by the \$250,930 received from MDU, bringing the total litigation expenses to \$989,940. A calculation of how the reduction adjusts Otter Tail's Petition is set forth in Exhibit No. 1, attached.

Power Pool Sales

The second issue deals with reducing the award and expenses to take into account the effect of Otter Tail's wholesale economy energy sales from the Coyote Plant.

¹ Otter Tail believes, however, MDU's protest is without merit. MDU and its ratepayers have benefited enormously by the other partners' efforts to reduce fuel costs at the plant and MDU's reimbursement simply represents its fair share to procure that benefit. We also note that while MDU has submitted the contribution under "protest," it has made filings before this Commission and the South Dakota Public Utilities Commission seeking to recover through its fuel adjustment clause the very expenses it alleges it has no legal obligation to pay.

In the Petition, Otter Tail sought to net the \$1.2 million litigation expenses against the \$2.8 million damage award from Knife River. The award was calculated by multiplying the difference between the actual price of coal charged by Knife River for the period between the fourth quarter of 1996 through the first quarter of 1999 (the "Award Period") and the price of coal (on a per ton basis) as reduced by the arbitration panel by the amount of coal attributed to Otter Tail for its sales – both retail and wholesale – from the Coyote Plant.² Attached as Exhibit No. 2 is summary of the price reduction as ordered by the arbitration panel.

In the Petition, Otter Tail did not propose to adjust either the \$2.8 million award or the \$1.2 million of expenses to take into account Otter Tail's wholesale economy-energy sales³ made from the Coyote Plant. As explained, the \$2.8 million represented Otter Tail's damages – the amount it overpaid for coal during the Award Period – for all Otter Tail's energy sales made from Coyote, including both wholesale and retail.

Upon further evaluation, it appears that both Otter Tail's award and its litigation costs should have been adjusted (reduced) by the percentage of overall sales made during the Award Period attributable to wholesale economy energy sales. This is because the coal consumed during the Award Period (or any period) attributable to wholesale economy energy customers are not subject to the fuel adjustment clause. As a result, retail customers should receive credit from that part of the damage award (as a pass-through the energy adjustment clause) attributable to retail sales – not the amount attributable to wholesale economy energy sales. Likewise, retail customers should not be obligated to shoulder the entire burden of litigation expenses but only those attributable to them.

In Otter Tail's case, 89% of all sales made during the Award Period are attributable to retail sales and 11% are attributable to economy energy transactions. Otter Tail proposes adjusting the Petition to take into effect the economy energy wholesale transactions made from the Coyote Plant during the Award Period.

The effect of this adjustment is also set forth in Exhibit No. 1.

Interest on Award

The last issue we bring to the Commission's attention deals with interest on the award. As we set forth in the Petition, Otter Tail has placed the proceeds in Account 242 – a deferred revenue account. The account balance is accruing interest monthly, calculated at the average investment rate Otter Tail earns on its temporary cash investments. Otter Tail

² This is a simplified breakdown of the award calculation. Because the Coal Supply Agreement contains price "step-downs" based on the amount of tons of coal per week consumed (i.e., the price decreases as use increases), the actual award calculation was a bit more complicated.

³ Economy energy sales are wholesale transaction made by utilities, typically between one another, on a non-firm basis and generally only when there is capacity available (not needed for retail customers). Economy energy sales, also known as "pool," "coordination" or "intersystem" sales are regulated by the Federal Energy Regulatory Commission.

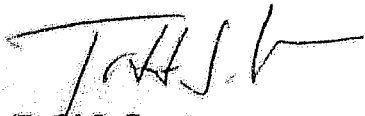
clarifies that ratepayers are entitled to the interest amount earned up to the time of actual pass-through.

Accordingly, Otter Tail hereby respectfully requests permission to amend its January 26 Petition consistent with this letter and the attached Exhibits.

Should you have any questions, please feel free to call me at 218-739-8350.

Thank you for your consideration.

Very truly yours,



Todd J. Guerrero
Associate General Counsel
TJG:dm

Attachments

c: Ms. Bernadeen Brutlag
Ms. Michelle M. Farris, South Dakota Public Utilities Commission

Otter Tail Power Company

Knife River Coal Contract Arbitration

Update of amounts since original filing

A Reduces arbitration costs for reimbursement by MDU

B Apportions arbitration award and costs between retail and power pool sales

	Arbitration Award (1)	Arbitration Costs	Net Award	
1 Total amount of OTP's share per original filing	\$2,884,172	\$1,240,870	\$1,643,302	
2				
3 MDU's reimbursement paid under protest		250,930		A
4				
5 Adjusted amount	\$2,884,172	\$989,940	\$1,894,232	
6				
7 Portion attributable to retail sales (2)	89%	89%	89%	B
8				
9 Amount attributable to retail customers (3)	\$2,576,511	\$884,341	\$1,692,170	

(1) Currently accruing monthly interest at Otter Tail's average investment rate for its temporary cash investments.

(2) For the period September 1996 through March 1999 the following proportion of Coyote output (OTP share only) was used for retail customers and for power pool sales

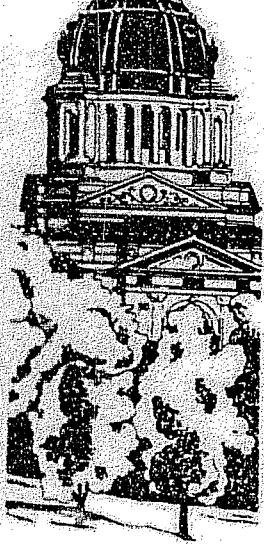
Data for Otter Tail's share of Coyote Plant (megawatt-hours)		Retail Sales	Pool Sales	Total
Sept-Dec 1996		310,747	21,606	332,353
Jan-Dec 1997		704,394	32,990	737,384
Jan-Dec 1998		576,782	117,170	693,952
Jan-Mar 1999		223,623	45,028	268,651
Totals		1,815,546	216,794	2,032,340
Proportions		89%	11%	100%

(3) State proportions (approximate)

Minnesota	54%
North Dakota	39%
South Dakota	7%

ARBITRATION PANEL DECISION
COAL PRICE
(per ton at 45,000 tons per week)

<u>Time Period</u>	<u>Delivered Cost</u>	<u>Panel Determined Cost</u>
4Q96	\$11.53	\$9.83
1997	11.61	9.83
1998	11.48	10.20
1Q99	11.23	10.20



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



April 24, 2000

Mr. Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company
P. O. Box 496
Fergus Falls, MN 56538-0496

Mr. Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, ND 58501

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Mr. Alan D. Dietrich
Vice President - Legal Administration
NorthWestern Public Service
125 S. Dakota Avenue, Suite 1100
Sioux Falls, SD 57104-6403

Re: Dockets EL00-002, EL00-003, EL00-009
Fuel Adjustment Clause, Coyote Coal Arbitration

Gentlemen:

As a follow-up to our phone conversation of last week, transmitted please find Stipulation to Consolidate Dockets.

Please note that a hearing time of Monday, May 15, has been obtained at 10:00 A.M. A notice of hearing should be forthcoming. This will be conducted in a hearing format and Staff intends to call Michele Farris as its witness.

If the Stipulation is drawn to your satisfaction, send me an original of the stipulation page with your signature on it. I will then attach all signature pages to the document to be filed and provide a complete copy to you.

Thank you.

Very truly yours,

Camron Hoseck
Staff Attorney

CH:dk
Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF OTTER)	STIPULATION TO
TAIL POWER COMPANY FOR APPROVAL OF)	CONSOLIDATE DOCKETS
A DEPARTURE FROM ITS FUEL CLAUSE)	
ADJUSTMENT)	EL00-002

IN THE MATTER OF THE FILING BY)	
MONTANA-DAKOTA UTILITIES CO. FOR)	
APPROVAL OF WAIVER OF FUEL CLAUSE)	EL00-003
RATE 58 TO INCLUDE ARBITRATION COSTS)	

IN THE MATTER OF THE PETITION OF)	
NORTHWESTERN PUBLIC SERVICE FOR)	
APPROVAL OF PLAN TO UTILIZE ITS)	EL00-009
ADJUSTMENT CLAUSE TO CREDIT)	
CUSTOMERS FOR ARBITRATION AWARD)	
LESS COSTS)	

The Staff of the South Dakota Public Utilities Commission and the electric utility companies captioned on this document stipulate that these three dockets may be consolidated inasmuch as there are common questions of law and fact.

By stipulating to this consolidation, it is understood and agreed that the consolidation is for the purpose of a hearing and no electric utility company, by agreeing to this consolidation, shall forfeit any rights it may have to present its case, examine and cross-examine witnesses, present arguments and authority unique to its case or otherwise act on its own behalf.

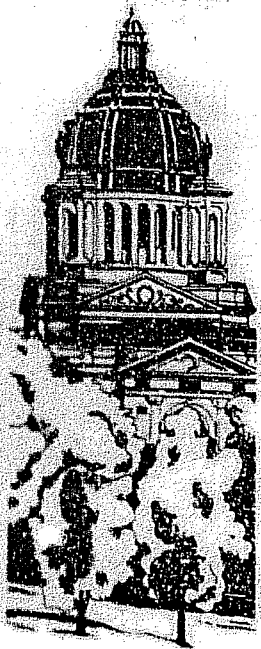
Dated this _____ day of April, 2000.

Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company

Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.

Alan D. Dietrich
Vice President - Legal Administration
NorthWestern Public Service

Camron Hoseck
Staff Attorney
South Dakota Public Utilities Commission



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



April 27, 2000

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
1-800-332-1782

TTY Through
Relay South Dakota
1-800-877-1113

Internet Website
www.state.sd.us/puc/

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Terry Emerson
Michelle M. Farris
Marlette Fischbach
Heather K. Forney
Shirleen Fugitt
Mary Giddings
Lewis Hammond
Lani Healy
Mary Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Jennifer Kirk
Bob Knadle
Delaine Kolbo
Charlene Lund
Gregory A. Riskov
Keith Senger
Kodyne Aita Wiest

Mr. Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company
P. O. Box 496
Fergus Falls, MN 56538-0496

Mr. Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, ND 58501

Mr. Alan D. Dietrich
Vice President - Legal Administration
NorthWestern Public Service
125 S. Dakota Avenue, Suite 1100
Sioux Falls, SD 57104-6403

Re: Dockets EL00-002, EL00-003, EL00-009
Fuel Adjustment Clause, Coyote Coal Arbitration

Gentlemen:

Enclosed for your files you will each find a copy of the Stipulation to Consolidate Dockets with reference to the above captioned matter.

Very truly yours,

Camron Hoseck
Staff Attorney

CH:dk
Enc.

RECEIVED

APR 27 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF OTTER)
TAIL POWER COMPANY FOR APPROVAL OF)
A DEPARTURE FROM ITS FUEL CLAUSE)
ADJUSTMENT)

STIPULATION TO
CONSOLIDATE DOCKETS

EL00-002

IN THE MATTER OF THE FILING BY)
MONTANA-DAKOTA UTILITIES CO. FOR)
APPROVAL OF WAIVER OF FUEL CLAUSE)
RATE 58 TO INCLUDE ARBITRATION COSTS)

EL00-003

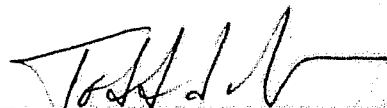
IN THE MATTER OF THE PETITION OF)
NORTHWESTERN PUBLIC SERVICE FOR)
APPROVAL OF PLAN TO UTILIZE ITS)
ADJUSTMENT CLAUSE TO CREDIT)
CUSTOMERS FOR ARBITRATION AWARD)
LESS COSTS)

EL00-009

The Staff of the South Dakota Public Utilities Commission and the electric utility companies captioned on this document stipulate that these three dockets may be consolidated inasmuch as there are common questions of law and fact.

By stipulating to this consolidation, it is understood and agreed that the consolidation is for the purpose of a hearing and no electric utility company, by agreeing to this consolidation, shall forfeit any rights it may have to present its case, examine and cross-examine witnesses, present arguments and authority unique to its case or otherwise act on its own behalf.

Dated this 24th day of April, 2000.



Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company

Douglas W. Schulz
Senior Attorney

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF OTTER)
TAIL POWER COMPANY FOR APPROVAL OF)
A DEPARTURE FROM ITS FUEL CLAUSE)
ADJUSTMENT)

STIPULATION TO
CONSOLIDATE DOCKETS

EL00-002

IN THE MATTER OF THE FILING BY)
MONTANA-DAKOTA UTILITIES CO. FOR)
APPROVAL OF WAIVER OF FUEL CLAUSE)
RATE 58 TO INCLUDE ARBITRATION COSTS)

EL00-003

IN THE MATTER OF THE PETITION OF)
NORTHWESTERN PUBLIC SERVICE FOR)
APPROVAL OF PLAN TO UTILIZE ITS)
ADJUSTMENT CLAUSE TO CREDIT)
CUSTOMERS FOR ARBITRATION AWARD)
LESS COSTS)

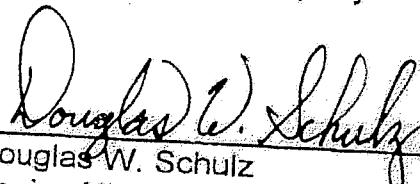
EL00-009

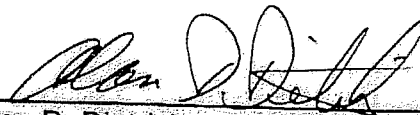
The Staff of the South Dakota Public Utilities Commission and the electric utility companies captioned on this document stipulate that these three dockets may be consolidated inasmuch as there are common questions of law and fact.

By stipulating to this consolidation, it is understood and agreed that the consolidation is for the purpose of a hearing and no electric utility company, by agreeing to this consolidation, shall forfeit any rights it may have to present its case, examine and cross-examine witnesses, present arguments and authority unique to its case or otherwise act on its own behalf.

Dated this 25th day of April, 2000.

Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company


Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.



Alan D. Dietrich
Vice President - Legal Administration
NorthWestern Public Service division of
NorthWestern Corporation



Camron Hoseck
Staff Attorney
South Dakota Public Utilities Commission

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF OTTER)	ORDER FOR AND NOTICE
TAIL POWER COMPANY FOR APPROVAL OF)	OF HEARING
A DEPARTURE FROM ITS FUEL CLAUSE)	
ADJUSTMENT)	EL00-002

IN THE MATTER OF THE FILING BY)	
MONTANA-DAKOTA UTILITIES CO. FOR)	
APPROVAL OF WAIVER OF FUEL CLAUSE)	EL00-003
RATE 58 TO INCLUDE ARBITRATION COSTS)	

IN THE MATTER OF THE PETITION OF)	
NORTHWESTERN PUBLIC SERVICE FOR)	
APPROVAL OF PLAN TO UTILIZE ITS)	EL00-009
ADJUSTMENT CLAUSE TO CREDIT)	
CUSTOMERS FOR ARBITRATION AWARD)	
LESS COSTS)	

On January 27, 2000, the Public Utilities Commission (Commission) received a petition from Otter Tail Power Company (Otter Tail) for permission to depart from the specific wording of its Fuel Adjustment Clause to allow the pass-through of litigation expenses that have resulted in ratepayer savings. An intervention deadline of February 18, 2000, was set by the Commission. No petitions to intervene were filed.

On February 10, 2000, the Commission received a petition from Montana-Dakota Utilities Co. (MDU) for approval of a waiver of Fuel Clause Rate 58. The petition stated that "[t]he waiver is requested to allow the pass-through, in the fuel cost adjustment (FCA), of arbitration costs that have resulted in savings to retail customers." An intervention deadline of March 3, 2000, was set by the Commission. No petitions to intervene were filed.

On March 20, 2000, the Commission received a petition from NorthWestern Public Service (NWPS) for approval of its proposed plan to credit \$682,996.65 to its South Dakota retail electric customers. The credit is due to an arbitration proceeding involving a lignite coal contract. The petition stated that the "plan would utilize its adjustment clause to credit to its retail electric customers (all of whom it serves in South Dakota) the retail portion of the arbitration damage award and interest, less its costs related to its efforts in receiving not only the damage award, but also ongoing coal price reduction and other favorable Coal Agreement provision changes." An intervention deadline of April 7, 2000, was set by the Commission. No petitions to intervene were filed.

On April 27, 2000, the Commission received a Stipulation to Consolidate Dockets. The stipulation stated that Otter Tail, MDU, NWPS, and Commission Staff had agreed to consolidate the dockets due to common questions of law and fact.

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-34A, specifically, 49-34A-2, 49-34A-3, 49-34A-4, 49-34A-6, 49-34A-8, 49-34A-10, 49-34A-11, 49-34A-13, 49-34A-14, 49-34A-25, 49-34A-26, and 49-34A-27.

The Commission approves the consolidation of the dockets. A hearing shall be held on May 23, 2000, beginning at 10:00 o'clock A.M., CDT, in Room 412, State Capitol Building, 500 E. Capitol, Pierre, South Dakota. All persons testifying will be subject to cross-examination by the parties.

The issue at the hearing is whether the Commission shall approve, in whole or in part, the petitions filed by Otter Tail, NWPS, and MDU.

The hearing shall be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on the testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20. After the hearing, the Commission will consider all evidence and testimony that was presented at the hearing. The Commission will then enter Findings of Fact, Conclusions of Law, and a Final Decision regarding this matter. As a result of the hearing, the Commission shall determine whether to approve, in whole or in part, the petitions filed by Otter Tail, NWPS, and MDU. The Commission's Final Decision may be appealed by the parties to the state Circuit Court and the state Supreme Court as provided by law. It is therefore

ORDERED, that consolidation of the above listed dockets for purposes of the hearing is granted, and it is

FURTHER ORDERED, that a consolidated hearing shall be held at the time and place specified above on the issue of whether the Commission shall approve, in whole or in part, the petitions filed by Otter Tail, NWPS, and MDU.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 4th day of May, 2000.

CERTIFICATE OF SERVICE The undersigned hereby certifies that this document has been served today upon all parties of record in this matter, as listed on the docket service list, by personal or by first class mail, in properly addressed envelopes, with charges prepaid thereon. <u>Mildred Kelbo</u> <u>5/4/00</u> (OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

LAW OFFICES
MAY, ADAM, GERDES & THOMPSON LLP
503 SOUTH PIERRE STREET
P.O. BOX 160
PIERRE, SOUTH DAKOTA 57501-0160

May 11, 2000

OF COUNSEL:
WARREN W. MAY

TELEPHONE
605.224-8803
TELECOPIER
605.224-6289
E-MAIL
dag@magt.com

Mr. William Hallard, Jr.
Executive Director
Public Utilities Commission
State Capitol
100 East Capitol Avenue
Pierre, South Dakota 57501-5070

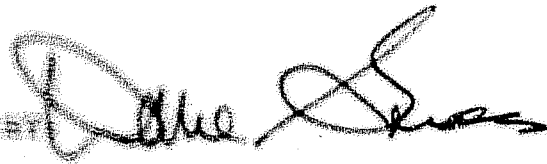
RE: OTTER TAIL FUEL CLAUSE ADJUSTMENT
Docket No: EL00-002
Our file: 0034

Dear Bill:

Enclosed for filing is a certified copy of Judge Zinter's Order admitting Todd Guerrero pro hac vice to appear in this docket. Please file the enclosure.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP



SAG:ma

Enclosure

cc/enc: Camron Hoseack
Todd Guerrero

RECEIVED

MAY 11 2000

SOUTH DAKOTA
UTILITIES COM

RECEIVED

MAY 12 2000

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF OTTER TAIL
POWER COMPANY FOR APPROVAL OF
A DEPARTURE OF ITS FUEL CLAUSE
ADJUSTMENT TARIFF

) DOCKET NO: EL00-002
)
)
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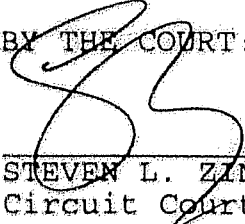
ORDER TO ADMIT NONRESIDENT
ATTORNEY PRO HAC VICE

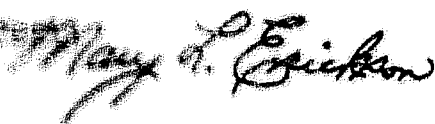
Upon the application of Todd Guerrero to appear as a nonresident attorney in the above-entitled action pursuant to SDCL § 10-18-2, and it appearing that said nonresident attorney is a reputable attorney who will observe the ethical standards required of attorneys in this state, and it further appearing that said nonresident attorney is appearing with a resident attorney who recommends his admission, and it further appearing that the requisite filing fee has accompanied the motion, it is

ORDERED that the motion of Todd Guerrero to appear as a nonresident attorney in the above-entitled matter is hereby granted and he is hereby admitted pro hac vice.

Dated this 11 day of May, 2000.

BY THE COURT:


STEVEN L. ZINTER
Circuit Court Judge

ATTEST: 

Clerk of Courts

(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

MAY 11 2000

 CLERK

State of South Dakota } ss
County of Hughes }

I hereby certify that the foregoing instrument is a true and correct copy of the original on file in my office.

Dated this 11 day of May 2000.
MARY L. ERICKSON, Clerk of Courts

By 
Clerk of Courts / Deputy

OTTER TAIL POWER COMPANY
P.O. BOX 400
Pierrefield, Minnesota 56548-0400
218-739-8350
www.ottertail.com (web site)

RECEIVED

MAY 22 2000

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

OTTER TAIL
Power Company

May 18, 2000

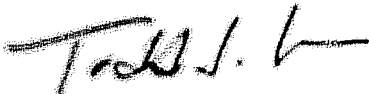
Mr. William Bullard, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: In the Matter of Otter Tail Power Company for Approval
of a Departure of its Fuel Clause Adjustment Tariff
South Dakota PUC Docket No. EL00-002

Dear Mr. Bullard:

I am enclosing 10 copies of what was introduced as a late-filed Exhibit No. 2 in our hearing on Monday. The original has been sent to Ms. Cheri McComsey Wittler, Monday's court reporter. Should you have any questions, please do not hesitate to call me. I can be reached at 218-739-8350.

Very truly yours,



Todd J. Guerrero
Associate General Counsel
TJC:dm

Enclosures

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendraye

Chair
Commissioner
Commissioner
Commissioner
Commissioner

Fred J. Guerrero
Associated General Counsel
Otter Tail Power Company
213 South Cascade Street
Fergus Falls, MN 56538-0496

SERVICE DATE: **MAY 15 2000**

DOCKET NO. E-017/M-00-25

In the Matter of Otter Tail Power Company's Supplemental Petition Providing Additional Information for Approval for a Waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment Rules)

The above entitled matter has been considered by the Commission and the following disposition made:

Allowed Otter Tail to recover the estimated incremental outside legal costs of \$670,872;

Granted Otter Tail's waiver of Minnesota Rules 7825,2400-2600 to allow Otter Tail to refund the settlement award of \$2,576,511 net of the \$670,872 litigation costs through their FAC upon finding that:

disallowing the waiver would impose an excessive burden and create a disincentive for Otter Tail to litigate unreasonable fuel prices in the future;

granting the variance would not adversely affect the public interest since ratepayers still receive a net benefit of a refund through the FAC; and

this waiver does not conflict with standards imposed by law.

Required Otter Tail to work with the Department in determining the method of refunding the net settlement to ratepayers before actually making the refund.

Interest on the refund will be paid at the prime interest rate as agreed to by the Company.

The Commission agrees with and adopts the recommendations of the Department of Commerce which are attached and hereby incorporated in the Order.

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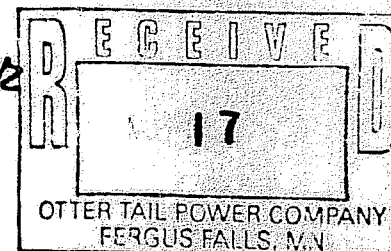
MAY 22 2000

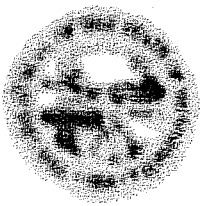
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

SEAL

BY ORDER OF THE COMMISSION

Burl W. Haar
Burl W. Haar
Executive Secretary





MINNESOTA DEPARTMENT OF COMMERCE

RECEIVED

APR 12 2000

April 12, 2000

MIN PUBLIC UTILITIES COMMISSION

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

RE: Supplemental Comments of the Energy Division of the Minnesota Department
of Commerce
Docket No. E017/M-00-25

Dear Dr. Haar:

Attached are the supplemental comments of the Energy Division of the Minnesota
Department of Commerce (Department or DOC) in the following matter:

Otter Tail Power's **supplemental** petition providing additional information for
approval for a waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment
Rules).

The supplemental petition was filed on March 30, 2000 by:

Todd J. Guerrero
Associated General Counsel
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, Minnesota 56538-0496
218-739-6289

The Department continues to recommend approval based on the conditions set forth
in our previous comments (dated February 24, 2000) and is available to answer any
questions the Commission may have. The purpose of these comments is to address the
additional information provided by Otter Tail Power and to adjust the legal expenses
and settlement award amounts accordingly.

Sincerely,

Nancy A. Campbell

NANCY A. CAMPBELL
FINANCIAL ANALYST

NAC/ri
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

SUPPLEMENTAL COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E017/M-00-25

I. BACKGROUND

The litigation that provides a backdrop for this filing was the result of a dispute between several owners of the Coyote Power Plant – Otter Tail, Northwestern Public Service Company, and Minnkota Power Cooperative (as agent for the Northern Municipal Power Agency) versus the Knife River Coal Company. Montana-Dakota Utilities Co. (MDU), though also an owner of the plant, did not join in the claim against Knife River. The arbitration panel ultimately found in favor of the owners and awarded damages in the amount of \$5,901,776, with interest. Otter Tail's share of the damages was \$2,741,773. Otter Tail also received a subsequent \$142,399 post-judgement interest on the award, bring Otter Tail's total award to \$2,884,172.

In its petition dated January 10, 2000, Otter Tail sought to net the \$1,240,870 in litigation expenses (mostly for outside attorneys) against its \$2.8 million damage award. The difference between these two figures, approximately \$1.6 million, would then be passed through Otter Tail's fuel adjustment clause as a credit to ratepayers (roughly fifty-four percent of which is jurisdictional to Minnesota).

The Department recommended, in its original comments, netting \$935,728 of incremental outside legal costs against the \$2,884,172 award refund, so a net refund of \$1,948,444 would be passed to ratepayers through the fuel adjustment clause (see Department's comments of February 24, 2000).

II. NEW ISSUES

In Otter Tail's supplemental petition Otter Tail raises three additional issues that should be considered in making the final determination for the Knife River litigation issue. The issues are: MDU Contribution, Power Pool Sales, and Interest on the Settlement Award.

A. MDU CONTRIBUTION

The first issue relates to the contribution made by MDU to Otter Tail for reimbursement of litigation costs. In its original petition Otter Tail indicated that it has incurred \$1,240,870 as its share of litigation expenses. Northwestern and Minnkota were also responsible for their share of the expenses. At the time Otter Tail made its original petition, the undersigned was unaware that MDU, as an owner in the plant who benefited from the litigation, had in fact made a contribution to Otter Tail and the other owners as reimbursement for MDU's share of the litigation costs. The amount of MDU's contribution to Otter Tail was \$250,930. MDU submitted the contribution, however, "under protest." That is, MDU took the position that it was not liable for a percentage of the arbitration costs and reserved its right to further dispute the payment under the dispute resolution provisions of the Coyote Operating Agreement (the ownership and operating agreement between the owners of the plant).

Otter Tail provides in its supplemental filing that the purpose of this filing is not to argue whether MDU is liable for its percentage of the arbitration costs.¹ Otter Tail's concern is focused on full and complete disclosure regarding the facts contained in the original petition. Assuming that Otter Tail will ultimately retain the \$250,930 contribution from MDU, it obviously reduces Otter Tail's out-of-pocket litigation costs.² As a result, Otter Tail proposes that the \$1,240,870 in litigation expenses be reduced by the \$250,930 received from MDU, bringing the total litigation expenses to \$989,940.

B. POWER POOL SALES

The second issue deals with reducing the settlement award and litigation expenses to take into account the effect of Otter Tail's wholesale economy energy sales from the Coyote Plant.

¹ Otter Tail believes, however, that MDU's protest is without merit. MDU and its ratepayers have benefited enormously by the other partners' efforts to reduce fuel costs at the plant and MDU's reimbursement simply represents its fair share to procure that benefit. Otter Tail also notes that while MDU has submitted the contribution "under protest," it has made filings before the North Dakota Public Service Commission and the South Dakota Public Utilities Commission seeking to recover through its fuel adjustment clause the very expenses it alleges it has no legal obligation to pay.

² By telephone on April 4, 2000, an Otter Tail representative indicated it was highly likely that Otter Tail will retain the \$250,930 reimbursement.

In the original petition, Otter Tail sought to net the \$1.2 million litigation expenses against the \$2.8 million damage award from Knife River. The award was calculated by multiplying the difference between the actual price of coal charged by Knife River for the period between the fourth quarter of 1996 through the first quarter of 1999 (the "award period") and the price of coal (on a per ton basis) as reduced by the arbitration panel by the amount of coal attributed to Otter Tail for its sales, both retail and wholesale, from the Coyote Plant.

In the original petition, Otter Tail did not propose to adjust either the \$2.8 million award or the \$1.2 million of expenses to take into account Otter Tail's wholesale economy-energy sales³ made from the Coyote, including both wholesale and retail sales.

As a result Otter Tail proposes in its supplemental petition that both the settlement award and litigation costs should have been adjusted (reduced) by the percentage of overall sales made during the award period that is attributable to wholesale economy energy customers. Otter Tail believes that retail customers should receive a credit from that part of the damage award (as a pass-through in the energy adjustment clause) attributable to retail sales, not the amount attributable to wholesale economy-energy sales. Likewise, retail customers should not be obligated to shoulder the entire burden of litigation expenses but only those attributable to them.

In Otter Tail's case, approximately 89% of all sales made during the award period are attributable to retail sales and the remaining approximately 11% are attributable to economy-energy transactions. Otter Tail proposes adjusting the original petition to take into effect the economy-energy wholesale transactions made from the Coyote Plant during the award period. The effect of this adjustment is to reduce the award amount to \$2,576,511 and the arbitration costs to \$884,341.⁴

C INTEREST ON THE SETTLEMENT AWARD

The last issue Otter Tail raises is the interest on the settlement award. As set forth in the original petition, Otter Tail has placed the proceeds in Account 242, Miscellaneous Current and Accrued Liabilities, a deferred revenue account. The account balance is accruing interest monthly, calculated at the average investment rate Otter Tail earns on its temporary cash investments. Otter Tail clarifies that ratepayers are entitled to the interest up to the time of the refund is returned through the fuel adjustment clause.

³ Economy energy sales are wholesale transactions made by utilities, typically between one another, on a non-firm basis and generally only when there is capacity available (not needed for retail customers). Economy energy sales, also known as "pool," "coordination" or "intersystem" sales are regulated by the Federal Energy Regulatory Commission.

⁴ See Otter Tail's supplemental filing for the calculation of the adjustment in Exhibit No. 1.

III. DEPARTMENT ANALYSIS

A. MDU CONTRIBUTION

The Department agrees that the \$250,930 contribution by MDU to reimburse Otter Tail for MDU's share of the litigation costs should be used to reduce the \$1,240,870 litigation costs claimed by Otter Tail in its original petition. Therefore, the litigation costs should be reduced to \$989,940.

B. POWER POOL SALES

The Department's focus in its initial comments was on the issue of allowing litigation costs to be netted against the settlement award and recovered through the fuel adjustment clause. The Department was aware of the multi-jurisdictional issue of wholesale and retail (including the states of Minnesota, North Dakota, and South Dakota) for purposes of making the refund. The Department included in its original comments that Minnesota customers were approximately 50 percent of the jurisdiction sales. As a result, the Department was aware Minnesota customers would likely be entitled to approximately half of the settlement award and would be subject to paying about half the litigation costs if recovery of these costs were granted by the Commission.

The Department believed that final jurisdictions percentages would be determined in the refund process after the final determination had been made on allowing Otter Tail to net the litigation costs against the settlement award and recovered through the fuel adjustment clause.

However, the Department sees no harm in removing the approximately 11% of wholesale transactions (power pool sales) at this time. As a result, the settlement award of \$2,884,172 would be reduced to \$2,576,511 and the litigation costs of \$989,940 would be reduced to \$884,341.⁵

C. INTEREST ON THE SETTLEMENT AWARD

The Department agrees that ratepayers are entitled to interest earned up to the time of the actual refund flows through the fuel adjustment clause. As stated in the Department's original comments the Department recommends that the Commission require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

⁵ See Otter Tail's supplemental filing - Exhibit No. 1.

D. CHANGES TO DEPARTMENT'S RECOMMENDED INCREMENTAL OUTSIDE LEGAL COSTS

As stated in the Department's original comments the Department's view is that the public interest is best satisfied by balancing the disincentive for Otter Tail to litigate future unreasonable fuel costs and the fact that legal costs are a cost-of-service item appropriately addressed in a rate case and are not costs that are to be trued-up. As a result the Department recommended allowing Otter Tail to recover the estimated incremental litigation costs above the litigation costs recovered in rates (as calculated in Department's original comments in Attachment No. 3) as a net against the settlement award.

Based on the supplemental filing of Otter Tail and based on the Department's recommendations above the Department continues to recommend that Otter Tail be allowed to recover the incremental litigation costs above the litigation costs recovered in rates. The Department has revised its calculation for the litigation costs to exclude the MDU contribution of \$250,930 and the approximately 11% of wholesale jurisdiction. The Department did this by using the adjusted \$884,341 (which excludes the two items above) and allocating in proportion to the Knife River litigation costs used in Department's original comments in Attachment No. 3. The result was a recommended recovery of \$670,872⁶ in litigation costs net of the settlement award of \$2,576,511.⁷

IV. RECOMMENDATION

The Department recommends based on its original and supplemental comments that the Commission:

- allow Otter Tail to recovery the estimated incremental outside legal costs of \$670,872 as provided in DOC Attachment No. 3;
- grant Otter Tail a waiver of Minnesota Rules 7825.2400-.2600 to allow Otter Tail to refund the settlement award of \$2,576,511 net of the \$670,872 litigation costs through their FAC; and
- require Otter Tail to work with the Department in determining the method of refunding the net settlement to ratepayers before actually making the refund.

/s/

⁶ Minnesota's jurisdiction portion is approximately \$362,271, as shown in Exhibit No. 1.

⁷ Minnesota's jurisdiction portion is approximately \$1,391,316, as shown in Exhibit No. 1.

CONTINUATION # [1]

ADJUSTED LEGAL COSTS & SETTLEMENT AWARD

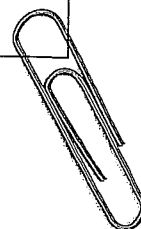
	Adj. Knife River Legal Costs for MDU/wholesale juris.	OT's Other Legal Costs	Total Legal Costs	Cost-of-Service Legal Costs
Adjusted Legal Costs Incurred (Per OT Exh. No.1)	\$ 884,341			
1996 Legal Costs Incurred	\$ 107,624	\$ 236,344	\$ 343,968	\$ 117,000 1/
% of Total Legal Costs	31%	69%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	36,608	80,392		
Allowed Legal Cost Recovery - 1996	\$ 71,016			
1997 Legal Costs Incurred	\$ 231,786	\$ 318,891	\$ 550,677	\$ 117,000 1/
% of Total Legal Costs	42%	58%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	49,247	67,753		
Allowed Legal Cost Recovery - 1997	\$ 182,539			
1998 Legal Costs Incurred	\$ 330,478	\$ 190,172	\$ 520,650	\$ 117,000 1/
% of Total Legal Costs	63%	37%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	74,265	42,735		
Allowed Legal Cost Recovery - 1998	\$ 256,213			
1999 Legal Costs Incurred	\$ 214,453	\$ 255,860	\$ 470,313	\$ 117,000 1/
% of Total Legal Costs	46%	54%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	53,350	63,650		
Allowed Legal Cost Recovery - 1999	\$ 161,103			
Sum of Allowed Legal Cost Recovery for Retail Sales	\$ 670,872			
MN Jurisdiction (Per OT Exh. 1, Fn 3.)	54%			
Approx. MN Jurisd. Amount for Legal Costs	\$ 362,271			
Adj. Settlement Award (Per OT Exh. 1)	\$ 2,576,511			
MN Jurisdiction (Per OT Exh. 1, Fn 3.)	54%			
Approx. MN Jurisd. Amount for Award	\$ 1,391,316			

1/ This is based on Account 923, Outside Services Employed,
balance in the rate case of \$731,248*16% (portion of legal costs).

Continuation

2

of pages





MINNESOTA DEPARTMENT OF COMMERCE

RECEIVED

February 24, 2000

FEB 24 2000

MIN PUBLIC UTILITIES COMMISSION

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

RE: **Comments of the Minnesota Department of Commerce**
Docket No. E017/M-00-25

Dear Dr. Haar:

Attached are the comments of the Energy Division of the Minnesota Department of Commerce (Department or DOC) in the following matter:

Otter Tail Power's petition for approval for a waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment Rules).

The petition was filed on January 10, 2000 by:

Bernadeen Brutlag
Manager, Regulatory Services
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, Minnesota 56538-0496
218-739-8289

The Department recommends **approval based on the conditions set forth in our comments** and is available to answer any questions the Commission may have.

Sincerely,

Nancy A. Campbell

NANCY A. CAMPBELL
FINANCIAL ANALYST

NAC/jl
Attachment

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E017/M-00-25

I. BACKGROUND

On January 10, 2000, Otter Tail Power Company (Otter Tail or the Company) filed a petition requesting that the Minnesota Public Utilities Commission (Commission) approve a waiver of Minnesota Rules 7825.2400-2600 (the Fuel Clause Adjustment Rules) to allow the pass-through of litigation expenses that have resulted in ratepayer savings.

Otter Tail states that this petition arises out a dispute over the pricing provisions of a 35-year coal supply agreement (Agreement) that governs the purchase of lignite coal by the owners of the Coyote Power Plant from the Knife River Coal Company (Knife River). Owners of the plant include Otter Tail, Northwestern Public Service, and the Northern Municipal Power Agency (Owners).¹ The plant, located in Beulah, North Dakota, is a 400-megawatt, mine-mouth power plant, meaning that it takes its coal directly and exclusively from Knife River's adjacent Beulah Mine. The owners began taking regular deliveries under the Agreement in May 1981 when the plant began commercial operation.

Otter Tail states that the issue in the litigation was the price of coal as fixed under the Agreement. The Owners sought relief from the Agreement's pricing adjustment provisions that required the prices to remain "fair and equitable" throughout its term. To guarantee this promise the Agreement, among other things, requires that the price of coal be compared to prices in similar coal "agreements under generally similar mining conditions."

¹ Montana-Dakota Utilities Co. (MDU) is also a partial owner in the plant, and is the parent company of Knife River. MDU did not join the Owners in its claim against Knife River.

Otter Tail indicates in its filing that after extensive negotiations failed, the Owners pursued a claim in North Dakota District Court in November 1995.² The matter was referred to arbitration, which commenced in September 1996. By an Order dated March 26, 1999, the arbitration panel agreed that the price charged for coal by Knife River was not fair and equitable. In accordance with the Agreement's adjustment provisions, the panel reduced the price beginning with the fourth quarter of 1996 (to coincide with the start of arbitration) through the first quarter of 1999 (to coincide with the March decision). The panel also required the parties to propose revisions to the Agreement to reduce the future price of coal and minimize the risk of future pricing disputes.

On August 6, 1999, the panel adopted revised adjustment provisions (reduced the price of future deliveries) and awarded damages to the Owners in the amount of \$5,901,776, with interest from March 26, 1999. The damages represented the difference between the price of coal as reduced by the panel and the actual price of coal charged by Knife River from the fourth quarter of 1996 through the first quarter of 1999.

On September 1, 1999, Knife River remitted to Otter Tail \$2,741,773, which represented Otter Tail's share of damages in accordance with its fuel usage at the Coyote Plant. On December 21, Knife River remitted to Otter Tail \$142,399, for post-judgement interest on the award, bringing Otter Tail's total award to \$2,884,172.

Otter Tail provides in its filing that in addition to the damage award, the reduced prices for future coal deliveries means future fuel savings to Otter Tail ratepayers. Both the \$2.8 million damage award and the future savings will be passed on to ratepayers through the fuel adjustment clause.

Otter Tail indicates in its filing that it has incurred \$1,240,870 as its share of litigation expenses, primarily for outside attorneys and experts. As a result, in this petition Otter Tail seeks to net its \$1.2 million in arbitration expenses against its \$2.8 million damage award and to pass the remaining \$1.6 million through the fuel adjustment clause as a credit to ratepayers.³

² Minnkota Power Cooperative, Inc., et al. V. Knife River Coal Mining Company et al. Civil No. 95-C-2945.

³ Minnesota customers are approximately 50 percent of the jurisdiction with North and South Dakota and Federal Energy Regulatory Commission (wholesale) customers making up the remaining 50 percent.

II. DEPARTMENT ANALYSIS

A. FUEL ADJUSTMENT CLAUSE AND REQUIRED MINNESOTA STATUTES AND RULES

The purpose of the fuel adjustment clause (FAC) is to keep utilities whole with regard to changes in the costs of fuel. It allows utilities to pass through to ratepayers increases or decreases in the cost of fuel (from the base levels set in the utility's previous rate case)⁴ without having to make separate rate filings that reflect each change in fuel cost and without having to obtain prior approval from the regulatory commissions of each change in fuel cost.⁵

- Various Minnesota statutes and rules define the parameters of the FAC. Minn. Stat. § 216B.16, subd. 7 allows the Commission to permit the automatic adjustment of rates for the costs of fuel used in the generation of electricity. Minn. Rules, part 7825.2390 et seq. implement the automatic adjustment of charges, known as the FAC when referring to the provision of electric service. Minn. Rules, part 7825.2920, subpart 2 requires that errors in the FAC will be refunded to the consumer.

Minnesota Rules do not allow utilities to pass through, automatically, litigation expenses,⁶ as such, Otter Tail would need a waiver to the FAC regulations to pass through the litigation costs in the FAC.

Minn. Rule part 7829.3200 sets forth the criteria for evaluating waiver requests:

- (1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule.
- (2) Granting the variance would not adversely affect the public interest.
- (3) Granting the variance would not conflict with the standards imposed by law.

B. ANALYSIS OF THE FUEL ADJUSTMENT CLAUSE WAIVER

The Department considered the following options related to Otter Tail's request for a waiver of Minnesota Rules 7825.2400-2600 (the Fuel Clause Adjustment Rules) to allow the pass-through of litigation expenses related to the coal contract settlement:

- Deny the waiver and disallow recovery of legal costs through the FAC.

⁴ The base cost of fuel is defined in Minn. Rules, part 7825.2400, subparts 4 and 5 as the cost per kilowatt-hour in the base period where the FAC is set to zero. Minn. Rules, part 7825.2400, subpart 8 defines the cost of fuel as the current period withdrawals from Account 151.

⁵ See e.g., Kansas City Power & Light, 51 FERC ¶ 61,285 (1990).

⁶ See DOC Attachment 1, p. 1, for a description of the Uniform System of Accounts and specifically Account 151.

- Allow the waiver and allow the legal costs to be netted against the coal contract settlement and recovered through the FAC;
- Allow recovery of estimated incremental outside legal costs that are above estimated legal outside costs recovered in rates.

The Department will discuss the merits of each option, including some relevant FERC and state cases and other information.

Deny waiver and disallow recovery of legal costs through the FAC.

The Department considered the following arguments in support of denying the waiver. First, as discussed above in the Minnesota statutes and rules, legal costs are not allowed to be passed through the FAC, absent a waiver. This point is not disputed by Otter Tail in its filing. However, Otter Tail's filing is a request for a waiver made in advance of including these costs in the FAC.

Second, the FERC on audit has required FAC refunds when utilities have included litigation and/or outside legal costs and other costs that are not actual fuel costs.⁷ However, the Department also notes that there have been cases before the FERC that have allowed a waiver of FAC requirements, which the Department will address further in the next section of its analysis. Because there is differing case history, FERC does not offer definitive guidance.

Third, legal costs are not trued-up or tracked to guarantee dollar-for-dollar recovery. Instead, legal costs are built into general rates much like depreciation, taxes or other cost-of-service items. These cost-of-service items change outside of a rate case, sometimes as a benefit to the company and sometimes as a benefit to ratepayers. However no attempt to track these changes or collect these differences is made absent a rate case. The Department recognizes that some level of legal costs is built into Otter Tail's current rates.

Balancing these arguments is the concern that fully disallowing all legal costs incurred for this Knife River litigation to obtain the settlement received by Otter Tail could be a disincentive for Otter Tail to litigate unreasonable fuel costs in the future. Since under the present regulatory scheme Otter Tail would be fully compensated for fuel costs through the FAC, there would be no incentive for Otter Tail to litigate unreasonable fuel costs in the future.

As a result of these considerations, the Department concludes that it would not be in the public interest to deny the waiver. However, it does seem reasonable to address, in some manner, the legal costs included in rates.

⁷ See DOC Attachment 1, pp. 2 to 7.

Allow the waiver and allow the legal costs to be netted against the coal contract settlement and recovered through the FAC.

The Department considered the following arguments regarding this option. First, Otter Tail was upfront in its filing to the Commission and the Department by bringing the \$2.8 million refund for ratepayers to our attention. Otter Tail is also requesting approval to net the litigation costs against the refund prior to passing them through the FAC.

Second, FERC Orders on remand have allowed recovery of litigation expenses in the FAC by virtue of a waiver. In its petition Otter Tail relies on a Commission and FERC decision, (Minnesota Power & Light (MP&L) M.P.U.C. Docket No. E015/M-89-42, Minnesota Power & Light, 45 FERC ¶ 61,369 (1988), following remand by the D.C. Circuit, 852 F. 2d 1070). In this case FERC initially had found on audit that MP&L had improperly included certain attorney fees and other related administrative and general expenses (A&G expenses) in Account 151, Fuel Stock, and therefore through the FAC. After shortened procedures for this contested matter FERC issued a May 21, 1987 order⁸ which denied inclusion of attorney fees and A&G expenses in Account 151 and denied recovery through the FAC. This order also denied MP&L's request for a retroactive waiver of its FAC.

MP&L sought a rehearing of this order, which was denied by operation of law.⁹ MP&L appealed the FERC's orders. On August 1, 1988, the Court of Appeals in Minnesota Power & Light v. FERC, *supra.*, remanded the matter to the FERC. In FERC Docket No. FA84-15-003, order on remand, dated December 6, 1988,¹⁰ the FERC indicated that it was concerned about granting a waiver in a situation where the utility failed to seek an interpretation of FERC regulation (waiver of FAC or request from the Chief Accountant), however, FERC nevertheless granted the waiver under the limited facts of the case and based on the court's instructions. The court, in affirming the Commission's decision on the merits, did so stating that its affirmance "will assure that in the future only proper expenses will be included in Account 151."¹¹ FERC stressed that "our action today is based on the unique circumstances presented by the court opinion."

In another FERC order¹² on remand by the Court of Appeals, the FERC indicated that "the court directed the Commission to permit Central Illinois to recoup its litigation expense from the settlement proceeds".¹³ FERC states in this order that "our fuel adjustment clause regulation, Account 151, and Account 518 are narrowly drawn, and that we have long had a policy - which has been upheld in the courts - of strict

⁸ 39 FERC ¶ 61,192 (1987).

⁹ 40 FERC ¶ 61,042 (1987).

¹⁰ See copy of remand order in DOC Attachment 2.

¹¹ 852 F.2d at 1073.

¹² 58 FERC ¶ 61,136 dated February 20, 1992.

¹³ 941 F. 2d at 630.

construction of the fuel adjustment clause regulation and Account 151. We also note litigation expenses, auditing fees and administrative and general expenses, are not listed in the fuel adjustment clause regulation, Account 151 or Account 518."

FERC also clarified that "in order to resolve any ambiguity that may exist as to the future treatment of litigation expenses, auditing fees, and administrative and general expenses, in light of our longstanding policy of strict construction, we clarify that, effective upon publication in the Federal Register, litigation expenses, auditing fees, and administrative and general expenses are not properly included in Accounts 151 and 518 and also not, absent prior waiver by the Commission, properly recoverable through a fuel adjustment clause."

The Department notes in both of these cases that the FERC denied recovery of litigation expenses at the audit level, in the initial FERC order, at the FERC rehearing level. Only when these cases were remanded back to FERC from the Court of Appeals, was FERC persuaded to allow recovery of litigation costs through the FAC. It is also clear in these two cases that the FERC requires utilities to file and make their case to FERC prior to including any costs through the FAC other than the actual cost of fuel.

Third, the Department believes an important consideration in Otter Tail's petition is that there is a clear net benefit for ratepayers. Specifically, that the refund is greater than the litigation costs.

The fourth issue concerns how much legal expenses are recovered, given that rates already include recovery of legal expenses. Otter Tail's petition does not address the fact that some legal expenses are incorporated in rates that were set in Otter Tail's last rate case (Docket No. E017/GR-86-244,380).

Allow recovery of an estimated incremental outside legal costs that are above estimated legal outside costs recovered in rates.

It is the Department's view that the public interest is best satisfied by balancing the possible disincentive for Otter Tail to litigate future unreasonable fuel costs¹⁴ and the fact that legal costs are a cost-of-service item appropriately addressed in a rate case and are not costs that are to be trued-up. The Department recommends allowing Otter Tail to net \$935,728 instead of the approximately \$1.2 million in litigation costs against the settlement amount. The Department's figure is based on the estimated incremental legal costs above those recovered in rates pursuant to Otter Tail's last rate case. The Department also excluded the 1994 and 1995 litigation expenses because they were not material and there were no benefits related to 1994 and 1995.¹⁵ The Department has attached a copy of its calculation as DOC Attachment 3.

¹⁴ In the event the Commission disallows recovery of Knife River litigation costs.

¹⁵ The Knife River settlement was for the period 1996 to 1999.

The Department supports this approach because: 1) Otter Tail filed a request for waiver of the Minnesota Rules 7825.2400-2600 and 2) Otter Tail showed net benefits (i.e. the refund is greater than the litigation costs) for 1996 to 1999. The Department recommends that the decision in this case be based on the unique facts of this case and not be precedent setting.

C. *WAIVER REQUEST*

In considering the three criteria for evaluating waiver requests as provided in Minnesota Rule part 7829.3200, the Department believes Otter Tail has met such criteria.¹⁶

First, the Department believes disallowing the waiver would impose an excessive burden and may create a disincentive for Otter Tail to litigate unreasonable fuel prices in the future. Second, granting the variance would not adversely affect the public interest since ratepayers still receive a net benefit of a refund through the FAC. Moreover, this treatment would encourage Otter Tail to seek further, effective, decreases in fuel costs. Third, this waiver does not conflict with standards imposed by law.

D. *DISPOSITION OF THE REFUND*

Because Minnesota customers make-up approximately half of the FAC sales¹⁷ the Department would expect that approximately half the coal contract settlement and half of the litigation costs approved by the Commission would be netted and refunded to Minnesota ratepayers through the FAC.

Because the implementation of the refund may be complex due to multiple jurisdictions, the Department also requests that the Commission require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

IV. *RECOMMENDATION*

The Department recommends that the Commission:

- allow Otter Tail to recover the estimated incremental outside legal costs of \$935,728 as provided in DOC Attachment No. 3

¹⁶ See pages 8-10 of Otter Tail's petition.

¹⁷ As stated by Otter Tail on page 7 of their petition and as noted by the Department in Otter Tail's monthly FAC filings.

- grant Otter Tail a waiver of Minnesota Rules 7825.2400-.2600 to allow Otter Tail to refund the settlement net of the \$935,728 litigation costs through their FAC; and
- require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

/jl

Attachment 1

Minn. Rules part 7825.0300 states that the Uniform System of Accounts (USofA) adopted by the FPC (Federal Power Commission, now known as the Federal Energy Regulatory Commission, or FERC) shall be implemented as the Minnesota USofA.

The USofA provides that receipts of fuel by electric utilities shall be recorded in Account 151, Fuel Stock, which is an inventory account. The cost of fuel consumed is then recorded in Account 501. The USofA describes Account 151 as follows:

This account shall include the book cost of fuel on hand.

Items

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.
3. Excise taxes, purchasing agents' commissions, insurance and other expenses directly assignable to the cost of fuel.
4. Operating, maintenance and depreciation expenses and ad valorem taxes on utility-owned transportation equipment used to transport fuel from the point of acquisition to the unloading point.
5. Lease or rental costs of transportation equipment used to transport fuel from the point of acquisition to the unloading point.

FUEL COST AND FUEL ADJUSTMENT CLAU

A. FOSSIL FUEL

1. Accounting and fuel adjustment clause (FAC) billing of legal expenses

The Company improperly included payments of \$234,282 to outside attorneys in Account 151, Fuel Stock, and in FAC billings to wholesale customers.

The attorneys represented the Company in litigating the constitutionality of the Montana coal severance tax. During 1978, 1979 and 1980, the Company paid under protest approximately \$3.0, \$4.6 and \$4.9 million, respectively, in Montana coal severance taxes.

In June 1978 the Company joined with eleven other utilities and coal suppliers in filing a suit in the State District Court in Helena, Montana, against the State of Montana challenging its coal severance tax, which equaled 30 percent of the mine price of coal before application of the tax. The suit alleged that the tax violated National energy policies and violated a series of Federal and state compromises under which Federal coal reserves were set aside for the permanent benefit of the people of the entire country, not just the state in which the coal was located. The suit sought to recover any payments of the coal severance tax made under protest, as well as to obtain an injunction against further collection of the tax.

In July 1979, the Montana State District Court granted a motion by the State of Montana to dismiss the suit. The Company and other plaintiff utilities appealed the dismissal to the Montana Supreme Court and in July 1980, this Court upheld the District Court's dismissal. The plaintiffs next appealed to the United States Supreme Court, which granted a writ of certiorari to fully review the merits of the arguments that the severance tax was unconstitutional. In July 1981, the United States Supreme Court rendered an opinion upholding the Montana Courts.

Account 151, Fuel Stock, of the Uniform System of Accounts, states in part: "This account shall include the book cost of fuel on hand." Among the items included in the account instructions are:

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.

Account 151 does not refer to legal expenses.

The Company should have recorded the legal expenditures in Account 923, Outside Services Employed. The instructions to Account 923 state:

It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered as an employee of the utility.

Among the items included in the listing for Account 923 are attorney fees.

Section 35.14 (a)(6) of the Commission's regulations covering fuel adjustment clauses states: "The cost of fossil fuel shall include no items other than those listed in Account 151"

The Commission has acted on a number of cases which addressed the issue of non-fuel items in the FAC. For example, FAC treatment has been denied for limestone, 1/ an agent used in the pollution control process. In its Order, the Commission stated, "Policy considerations support a narrow construction of the expenses listed in Account 151."

FAC treatment has also been denied for operation and maintenance expenses, depreciation and property taxes on oil storage tanks, financing charges, and exploration and development costs. 2/ Deferred fuel expenses have been denied FAC treatment. 3/ Even displaced fuel values are not includable in the FAC, absent specific Commission approval. 4/ The Commission denied FAC treatment for all of these expenditures even though they were related to the cost of fuel.

-
- 1/ Re: Docket EL81-2-000, Declaratory Order issued February 26, 1981, Electric Coops of Kansas (14 FERC 61,176).
 - 2/ Re: Docket E-8570, Initial Decision on Fuel Cost Adjustment Issues, Southern California Edison Co., July 20, 1976 (3 FERC 63,001). Affirmed April 26, 1978 (3 FERC 61,075).
 - 3/ Re: Docket ER76-285, Opinion No. 790, Public Service Company of New Hampshire, March 21, 1977 (57 FPC 1754).
 - 4/ Re: Docket ER82-493, Opinion No. 176, Pennsylvania Power & Light Co., June 22, 1983 (23 FERC 61,395). Also, Docket ER83-301, Southern California Edison Co., April 1, 1983 (23 FERC 61,002).

Recommendation

We recommended that the Company revise procedures to ensure that it does not charge legal expenses to Account 151 or include them in FAC billings to wholesale customers. The Company agreed to refund \$25,626 plus interest overcollected from wholesale customers as a result of including the legal expenses in the wholesale FAC.

19. Accounting and Fuel Adjustment Clause (FAC) Billing for Legal Expenses

The Company improperly included payments of \$1,242,268 for outside attorneys and consultants and other minor related costs in Account 151, Fuel Stock. Also, the Company included the payments in FAC billing to wholesale customers.

The Company hired attorneys and consultants to represent it in legal actions against coal suppliers related to Reid Gardner Units 1 through 4. The following summarizes the legal actions:

1. In 1985, the Company refused delivery of coal from Beaver Creek Coal Company (Beaver Creek) because of alleged poor quality of coal that Beaver Creek provided. Also, Beaver Creek sued the Company contending that the coal was up to contract standards. The litigation was continuing at December 31, 1987.
2. In April 1986, the Company notified U.S. Fuel Company that it would not accept any further deliveries under a coal supply agreement. The Company's specific complaint against U.S. Fuel Company related to the method of determining the cost of coal under the supply contract.

U.S. Fuel filed suit against the Company in the Third Judicial Court in Salt Lake City (Court), Utah, seeking specific performance of the contract. The Company filed a counterclaim seeking damages in overcharges on the payments to U.S. Fuel and to pay to the Court the withholdings pending settlement of the case.

The Company subsequently reached a settlement with the U.S. Fuel Company. It agreed to pay \$23,500,000 to U.S. Fuel Company in exchange for a reduction in both the quantity and price (from approximately \$45 per ton to \$23.50 per ton) of coal.

3. The Company entered into three suits in the Fall of 1987 to renegotiate and reduce the price of coal under the inequities and hardship clauses in the various contracts. Two of the suits relate to contracts with ARCO. The third suit involved Cyprus Western Coal Company. The three suits were pending at December 31, 1987.

The Company recorded \$1,242,268 of payments made to outside attorneys, and consultants and other minor related costs in litigating the above suits in Account 151, Fuel Stock. Also, the Company included the payments as a cost of fuel for determining billings through the FAC to wholesale customers.

The instructions to Account 151, Fuel Stock, of the Uniform System of Accounts state in part: "This account shall include the book cost of fuel on hand."

Among the items included in the account instructions are:

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation not including, however, any charges for unloading from the shipping medium.

The instructions to Account 151 do not refer to legal expenses or other expenses incurred in litigating fuel contractual arrangements.

The Company should have recorded the legal and other expenses incurred in resolving fuel contractual disputes in Account 923, Outside Service Employed. The instructions to Account 923 state in part:

It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstance where the person so engaged is not considered as an employee of the utility.

Among the types of expenses listed in Account 923 are attorney fees.

Section 35.14 (a)(6) of the Commission's Regulations covering fuel adjustment clauses states in part:

The cost of fossil fuel shall include no items other than those listed in Account 151

Since the above costs were not properly includible in Account 151, the Company should not have included these amounts as a component of fuel cost in computing wholesale FAC billings.

On June 27, 1988, the Company filed a petition with the Commission (Docket No. EL88-32-000) requesting waiver of the fuel clause regulations to permit recovery of the aforementioned costs in FAC billings. On December 13, 1988, the Commission denied the Company's request.

Recommendations

We recommended that the Company:

- (1) revise its procedures to ensure that it records payments for legal expenses, contract renegotiation expenses and other non-fuel expenses in Account 923 and does not include them as a component of fuel cost for FAC billings to wholesale customers.
- (2) recompute the wholesale FAC calculations by eliminating the legal and other expenses, including minimum charges for mine operating costs and for coal transportation costs, and refund with interest, any amounts overcollected from wholesale customers.

0386471

Before Commissioners: Martha O. Hesse, Chairman, File
Charles G. Stalon, Charles A. Trabandt,
Elizabeth Anne Moler and Jerry J. Langdon.

Minnesota Power & Light Company)

Docket No. FA84-15-003

ORDER ON REMAND

(Issued December 6, 1988)

This case is before the Commission on remand from the United States Court of Appeals for the Eighth Circuit. 1/ The case concerns Commission orders finding that Minnesota Power & Light Company (MP&L) improperly included certain attorney's fees and other related administrative and general (A&G) expenses in Account 151, Fuel Stock. 2/ The Commission also denied MP&L's alternate request for a waiver of the fuel adjustment clause (FAC) regulations in the event the Commission ruled that the fees and expenses were not properly accounted for in Account 151. The effect of the Commission's orders was to disallow the recovery of these expenses in MP&L's FAC billings.

The court affirmed the Commission's decision that the fees and expenses were not properly included in Account 151. 852 F.2d at 1073. However, the court remanded to the Commission, for further meaningful consideration in light of the court's opinion, the question of whether waiver of the FAC regulations is appropriate in these circumstances. Id. at 1074.

Background

On September 18, 1985, the Commission issued a letter order informing MP&L of the results of a staff audit of MP&L's books and records for the period between January 1, 1979, and December 31, 1983. 3/ In the order, the Commission noted MP&L's disagreement with the portions of the staff audit report concerning the inclusion of outside legal fees and A&G expenses in Account 151.

-
- 1/ Minnesota Power & Light Company v. FERC, 852 F.2d 1070 (8th Cir. 1988).
- 2/ Minnesota Power & Light Company, 39 FERC ¶ 61,192 (1987), rehearing denied, 40 FERC ¶ 61,042 (1987).
- 3/ Minnesota Power & Light Company, 32 FERC ¶ 61,506 (1985).

MP&L consented to the disposition of the contested matters through the shortened procedures set forth in section 41.3 of the Commission's regulations. 4/ By order issued on January 24, 1986, the Commission directed MP&L to show why it should not be required to change its accounting practices and make appropriate refunds of any amounts collected due to improper accounting practices of the items questioned by the audit staff. 5/ The January 24 order also required MP&L to propose an allocation among its customers of any refunds, and set a procedural schedule for the submission of briefs. 6/

On May 21, 1987, the Commission issued an order finding that: (1) the terms of Account 151 should be strictly construed because of the Commission's limited review of FAC adjustments; (2) the attorney's fees and A&G expenses were not "directly assignable to the cost of fuel" within the meaning of Account 151; and (3) therefore, such fees and expenses "are not properly accounted for in Account 151 or properly recovered through MP&L's fuel adjustment clause." 39 FERC at 61,708. The Commission observed that the attorney's fees are properly accounted for in Account 923 and the A&G expenses in Accounts 920 and 921. *Id.* Further, the Commission rejected MP&L's request for waiver of its regulations and stated the need for strict construction of the rules regarding Account 151. *Id.*

MP&L sought rehearing of the May 21 order, which was denied by operation of law. 40 FERC ¶ 61,042 (1987). MP&L appealed the Commission's orders. On August 1, 1988, the court in Minnesota Power & Light Company v. FERC, *supra.*, remanded the matter to the Commission.

The court remanded the case to the Commission concerning its determination not to grant MP&L's request for waiver of the FAC regulations to permit recovery through MP&L's FAC of the attorney's fees and A&G expenses at issue. 7/ While acknowledging that the Commission's desire for strict compliance with its FAC regulations is a legitimate and necessary goal and recognizing that granting waiver of the regulation in this case

4/ 18 C.F.R. § 41.3 (1988).

5/ Minnesota Power & Light Company, 34 FERC ¶ 61,072 (1986).

6/ Briefs were filed by MP&L and the Commission's trial staff. MP&L disputed staff's interpretation of Account 151 and the appropriateness of strict construction in these circumstances. MP&L also requested a waiver should the Commission find that the fees and expenses were not properly included in Account 151.

7/ 852 F.2d at 1073-74.

would have weakened the force of our decision, the court, nevertheless, found that MP&L had presented a logical and reasonable good faith, albeit incorrect, argument for inclusion of the fees and expenses in Account 151. 8/ The court apparently was persuaded by the fact that this case may have presented a question of first impression before the Commission concerning whether legal expenses are directly assignable to the cost of fuel and thus properly accounted for in Account 151. The court also observed that the Commission in recent years has granted waiver of its FAC regulations or recognized that it would be inappropriate to require refunds where costs, which were improperly booked and recovered through a utility's FAC, were legitimate costs which a utility was otherwise entitled to recover through its wholesale rates. 9/ In these circumstances, the court was concerned about the inequity of requiring MP&L's shareholders to bear the burden of expenses to obtain a refund benefiting MP&L's wholesale customers. The court also stated that, in light of its opinion on the merits, the Commission should have very little concern that granting the waiver in this case will weaken the force of the Commission precedent and ruling on the merits. 10/

The court, therefore, remanded the case to the Commission for reconsideration of the requested waiver, giving "meaningful consideration" of present circumstances, including the court's affirmance on the merits. The court also observed that if the Commission grants the waiver it possesses the discretion to determine the prudence, propriety and reasonableness of the attorney's fees and expenses claimed by MP&L. 11/

Discussion

We originally denied MP&L's request for waiver in this case based on a concern that to grant the waiver would undermine the integrity of our fuel clause regulations, and would weaken the force of our precedent that our FAC regulations are to be strictly construed. A utility that has a legitimate question concerning whether an item is properly accounted for in Account

8/ Id. at 1073.

9/ The Commission has infrequently granted waiver of its FAC regulations. In cases where the Commission has granted a waiver of the FAC regulations, it has done so only upon a timely, before-the-fact request for a waiver or upon a request incorporated in a settlement or otherwise not objected to by the affected customers.

10/ 825 F.2d at 1074.

11/ Id.

151, or in any other account, has two procedural avenues available to resolve any uncertainties. It should promptly bring its question to the Commission by either requesting an opinion from the Commission's Chief Accountant 12/ or by filing a petition for declaratory order with the Commission. 13/ In this case, MP&L did neither. Rather, it determined on its own that the attorney's fees and A&G expenses were properly accounted for in Account 151 and thus could be recovered through its FAC.

As a general matter, we believe that it is appropriate to hold the management of utilities accountable for their actions. We presume that all utilities subject to our jurisdiction are familiar with the Commission's procedures, discussed above, that allow questions of doubtful interpretation concerning our accounting regulations to be resolved. In addition, utilities are presumed to know the fuel adjustment clause waiver provisions. See 18 C.F.R. § 35.14(a)(10) (1988). We have serious concerns that allowing management to escape the consequences of not availing themselves of these procedures, through retroactive waivers of our regulations, will weaken our policy of strictly construing our accounting and fuel adjustment clause regulations.

We also note that fuel adjustment clauses are permitted to track changes in allowable base period and current period fuel cost component amounts on an amount per kwh basis. Fuel adjustment clauses may not automatically track the introduction in the current period of new fuel cost components without prior Commission approval. This is the case whether or not the new cost item may be recorded in Account 151.

Although we remain concerned about granting a waiver in a situation where the utility has deliberately failed to seek an interpretation of our regulations, we will nevertheless grant the waiver under the limited facts of this case and based on the court's instructions. The court, in affirming the Commission's decision on the merits, did so stating that its affirmance "will assure that in the future only proper expenses will be included

12/ The Commission's Chief Accountant may issue interpretations of the Uniform Systems of Accounts and pass upon certain proposed accounting matters. 18 C.F.R. § 375.303(a) and (b) (1988).

13/ 18 C.F.R. § 385.207(a)(2) (1988). See also General Instruction No. 5 to Part 101 of the Commission's regulations (Uniform System of Accounts) which provides in accordance with Part 101 [a]: "To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision."

Docket No. FA84-15-003

-5-

in Account 151." 852 F.2d at 1073. At the same time, with that assurance fixed, the court also recognized that in this case "the inequity remains of requiring the shareholders to bear the burden of expenses to obtain a refund benefiting the wholesale customers of MP&L." 852 F.2d at 1074. Balancing this perceived inequity against our serious concerns about maintaining the integrity of our FAC regulations, and given the court's recognition of the need for strict compliance with our regulations and its affirmance of our legal interpretation of the regulations, we conclude that a waiver in this case is appropriate.

In granting this waiver, we stress that our action today is based on the unique circumstances presented by the court opinion. We do not intend that it establish any precedent with respect to other utilities' requests for retroactive waiver of the fuel clause regulations. We affirm our past policy of not granting retroactive waivers of our regulations in cases where the item in question is in a "grey area" of the FAC regulations and the utility fails to take the necessary procedural step to clarify the proper treatment of the item.

On March 21, 1988, MP&L submitted a compliance report detailing its refund payments to its customers, including interest pursuant to 18 C.F.R. § 35.19a (1988). In these circumstances, we will allow MP&L to recover the refunded amounts, with interest, over a 12-month period from the affected wholesale customers. Interest shall be applied to any unbilled balance at rates calculated in conformance with section 35.19a. However, we will allow MP&L's customers the option of repaying the remaining balance due at any time in order to avoid the imposition of additional interest.

The Commission orders:

- (A) MP&L's request for waiver of the FAC regulations is hereby granted.
- (B) MP&L shall recover the refunded amounts with interest pursuant to section 35.19a, over a 12-month period from the affected wholesale customers. MP&L's customers shall have the option of repaying the remaining balance due at any time during the 12-month period.

- (C) Docket No. FA84-15-003 is hereby terminated.
- By the Commission.

(S E A L)

Lois D. Cashell

Lois D. Cashell,
Secretary.

	Knife River Legal Costs	OT's Other Legal Costs	Total Legal Costs	Cost-of-Service Legal Costs	
1996 Legal Costs Incurred	\$ 143,765	\$ 236,344	\$ 380,109	\$ 117,000	1/
% of Total Legal Costs	38%	62%	100%		
Times Cost of Service	\$ 117,000	\$ 117,000			
Incremental Cost Provided in Rates	44,252	72,748			
Allowed Legal Cost Recovery - 1996	\$ 99,513				
1997 Legal Costs Incurred	\$ 309,601	\$ 318,891	\$ 628,492	\$ 117,000	1/
% of Total Legal Costs	49%	51%	100%		
Times Cost of Service	\$ 117,000	\$ 117,000			
Incremental Cost Provided in Rates	57,635	59,365			
Allowed Legal Cost Recovery - 1997	\$ 251,966				
1998 Legal Costs Incurred	\$ 441,368	\$ 190,172	\$ 631,540	\$ 117,000	1/
% of Total Legal Costs	70%	30%	100%		
Times Cost of Service	\$ 117,000	\$ 117,000			
Incremental Cost Provided in Rates	81,768	35,232			
Allowed Legal Cost Recovery - 1998	\$ 359,600				
1999 Legal Costs Incurred	\$ 286,449	\$ 255,860	\$ 542,309	\$ 117,000	1/
% of Total Legal Costs	53%	47%	100%		
Times Cost of Service	\$ 117,000	\$ 117,000			
Incremental Cost Provided in Rates	61,800	55,200			
Allowed Legal Cost Recovery - 1999	\$ 224,649				
Sum of Allowed Legal Cost Recovery	\$ 935,728				

1/ This is based on Account 923, Outside Services Employed.
balance in the rate case of \$731,248*16% (portion of legal costs).

RECEIVED

JUN 08 2000

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

= = = = =

IN THE MATTER OF THE PETITION OF OTTER
TAIL POWER COMPANY FOR APPROVAL OF
A DEPARTURE FROM ITS FUEL CLAUSE ADJUSTMENT

EL00-002

IN THE MATTER OF THE FILING BY
MONTANA-DAKOTA UTILITIES CO. FOR
APPROVAL OF WAIVER OF FUEL CLAUSE
RATE 58 TO INCLUDE ARBITRATION COSTS

EL00-003

IN THE MATTER OF THE PETITION OF
NORTHWESTERN PUBLIC SERVICE FOR
APPROVAL OF PLAN TO UTILIZE ITS
ADJUSTMENT CLAUSE TO CREDIT
CUSTOMERS FOR ARBITRATION AWARD
LESS COSTS

EL00-009

ORIGINAL

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Transcript of Proceedings
May 15, 2000

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BEFORE THE PUBLIC UTILITIES COMMISSION,
JIM BURG, CHAIRMAN
PAM NELSON, VICE CHAIR
LASKA SCHOENFELDER, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
Greg Rislov
William Bullard Jr.

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING

L I M I T E D

A P P E A R A N C E S

CAMRON D. HOSECK,
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,
Staff Counsel, 500 East Capitol Avenue,
Pierre, South Dakota 57501,
appearing on behalf of the Public Utilities
Commission;

TODD J. GUERRERO,
OTTER TAIL POWER COMPANY,
Associate General Counsel, 215 South Cascade,
Fergus Falls, Minnesota 56538-0496,
appearing on behalf of the Otter Tail
Power Company;

DAVID A. GERDES,
MAY, ADAM, GERDES & THOMPSON,
Attorneys at Law, 503 South Pierre Street,
Pierre, South Dakota 57501,
appearing on behalf of Montana-Dakota
Utilities Company;

ALAN D. DIETRICH,
NORTHWESTERN PUBLIC SERVICE,
General Counsel, 125 South Dakota Avenue,
Sioux Falls, South Dakota 57104-6403,
appearing on behalf of Northwestern
Public Service.

= = = = =

TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State
Capitol, Room 412, 500 East Capitol Avenue, Pierre,
South Dakota, on the 15th day of May 2000, commencing
at 10:00 a.m.

I N D E X

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Dennis Bowman	9	19,24	24	--
Bernadeen Brutlag	30	--	48,53	--
Richard Green	58	74	70	--
Jeff Decker	76	82	--	--
Donald R. Ball	94	--	--	--
Michele Farris	105	--	--	--

<u>Rebuttal Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Dennis Bowman	56	--	--	--
Richard Green	88	--	92	--
Jeff Decker	126	--	--	--
Bernadeen Brutlag	130	--	--	--
Donald R. Ball	131	--	--	--
Michele Farris				

<u>Exhibit Nos.</u>	<u>M</u>	<u>Q</u>	<u>R</u>
1 - Otter Tail/Knife River Coal Contract Arbitration	4	33	33
2 - Decision from Minnesota PUC	4	44	44
3 - North Dakota Decision	4	44	44
4 - Original Petition	4	44	44
5 - Filing amending Original Petition	4	44	44
6 - List of Costs by Vendor	56	57	57
7 - Revised Petition	54	81	80
8 - Arbitrator's Decision	82	82	82
9 - Arbitrator's Decision	82	82	82

4

INDEX (Continued)

<u>Exhibit Nos.</u>	<u>M</u>	<u>Q</u>	<u>R</u>
10 - Filing with Commission dated 2-9-00	95	96	96
11 - Amended Attachment A	95	96	96
A - Filing Summary	4	110	110
B - Refund Calculation	4	117	118

1 CHAIRMAN BURG: Good morning. We'll
2 begin the hearing for Docket EL00-002, EL00-003,
3 and EL00-009 In The Matter Of The Petition Of
4 Otter Tail Power Company For Approval Of A
5 Departure From Its Fuel Clause Adjustment, In The
6 Matter Of The Montana-Dakota Utilities Co. For
7 Approval Of Waiver Of Fuel Clause Rates To Include
8 Arbitration Costs, and In The Matter Of The
9 Petition Of Northwestern Public Service For
10 Approval Of Plan To Utilize Its Adjustment Clause
11 To Credit Customers For Arbitration Award Less
12 Costs.

13 The time is approximately 10:00 a.m., the date
14 is May 15, 2,000, and the location of the hearing
15 is Room 412, State Capitol, Pierre, South Dakota.
16 I am Jim Burg, Commission Chairman. Commissioners
17 Laska Schoenfelder and Pam Nelson are also
18 present. I am presiding over the hearing.

19 This hearing was noticed pursuant to
20 Commission's Order for and Notice of Hearing issued
21 May 4, 2000. The issue at this hearing is whether
22 the Commission shall approve in whole or part the
23 Petitions filed by Otter Tail, Northwestern Public
24 Service, and MDU.

25 All parties have the right to be present and

1 to be represented by an attorney. All persons so
2 testifying will be sworn in and subject to
3 cross-examination by the parties. Commission's
4 final decision may be appealed by the parties to
5 the State Circuit Court and the State Supreme
6 Court.

7 Rolayne Wiest will act as Commission counsel.
8 She may recommend rulings on procedural and
9 evidentiary matters. The Commission may overrule
10 its counsel's preliminary ruling throughout the
11 hearing. If not overruled, the preliminary ruling
12 becomes the final ruling.

13 At this time I'll turn it over to Rolayne.

14 MS. AILTS WIEST: First I'll take
15 appearances of parties. Otter Tail.

16 MR. GUERRERO: Good morning,
17 Mr. Chairman, Members of the Commission. My name
18 is Todd Guerrero. That's G-U-E-R-R-E-O. I'm
19 associate general counsel with Otter Tail Power
20 Company.

21 MS. AILTS WIEST: And NWPS.

22 MR. DIETRICH: Good morning. My
23 name is Alan Dietrich of Sioux Falls. I am
24 representing Northwestern Public Service.

25 MS. AILTS WIEST: MDU.

1 MR. GERDES: I'm David Gerdes of
2 May, Adam, Gerdes & Thompson, Pierre, South Dakota,
3 appearing as counsel for Montana-Dakota Utilities
4 Company.

5 MS. AILTS WIEST: Commission staff.

6 MR. HOSECK: Camron Hoseck on behalf
7 of Commission staff.

8 MS. AILTS WIEST: Any motions before
9 we get started? Any parties wish to make any
10 opening statements?

11 MR. GUERRERO: We're here this
12 morning to seek recovery of certain litigation and
13 arbitration costs involved when the partners of the
14 Big Stone Power Plant litigated a coal contract
15 with the Knife River Coal Company.

16 The basis of our request is a Petition that
17 Otter Tail filed with the Commission dated
18 January 26 of 2000. Otter Tail will present two
19 witnesses for the Commission's consideration this
20 morning.

21 The first is Mr. Dennis Bowman. Mr. Bowman is
22 a manager in our power production area, and
23 Mr. Bowman was involved in the underlying dispute.
24 The second witness that Otter Tail will present is
25 Ms. Bernadeen Brutlag. Ms. Brutlag is the manager

1 of our regulatory department at Otter Tail, and
2 Ms. Brutlag was responsible for much of the fuel
3 clause filing and much of the work involved in the
4 data requests and in working with staff prior to
5 this morning's hearing.

6 As one housekeeping item, I would note that I
7 believe there will be a recommendation at the end
8 of this proceeding in which staff will recommend a
9 certain pass-through of costs, and that will be a
10 recommendation for the months of June, July, and
11 August.

12 In light of that, Otter Tail would need a
13 ruling from this Commission either today or
14 tomorrow in order for us to get the accounting in
15 place if that were to take place.

16 Other than that, Ms. Wiest, no further
17 statement.

18 MS. AILTS WIEST: Mr. Dietrich, do
19 you have anything you'd like to state?

20 MR. DIETRICH: I have no opening
21 statement. Thank you.

22 MS. AILTS WIEST: Mr. Gerdes?

23 MR. GERDES: Other than to inform
24 the Commission we have one witness, Don Ball. I
25 have nothing further to say at this time.

1 MS. AILTS WIEST: Okay. Mr. Hoseck,
2 do you have anything?

3 MR. HOSECK: No opening statement.

4 MS. AILTS WIEST: Procedurally then
5 what I was anticipating is that Otter Tail could
6 present its witnesses, NWPS could present any
7 witnesses, MDU would present its witness, and then
8 staff would follow up.

9 Would that be correct, Mr. Hoseck? You don't
10 want staff to come after each?

11 MR. HOSECK: No.

12 MS. AILTS WIEST: We'll get
13 started. Mr. Guerrero, you can call your first
14 witnesses.

15 MR. GUERRERO: Otter Tail would call
16 Mr. Dennis Bowman to the stand, please.

17 DENNIS BOWMAN,
18 called as a witness, being first duly sworn in the above
19 cause, testified under oath as follows:

20 DIRECT EXAMINATION

21 BY MR. GUERRERO:

22 Q Would you state your name and spell it, please.

23 A Dennis Bowman, B-O-W-M-A-N.

24 Q Please tell the Commission where you work.

25 A I work for Otter Tail Power Company in Fergus Falls,

1 Minnesota.

2 Q What is your job description and responsibilities?

3 A I'm the manager of production services, responsible
4 primarily for fuel and freight for our steam plants.
5 I'm a company representative for our joint-owned
6 plants. I'm also responsible for hydro and internal
7 combustion generation.

8 Q Tell me about what it means to be a representative for
9 the jointly owned plants.

10 A The operation of the jointly owned plants is under three
11 committees, a coordinating committee, engineering and
12 operating committee, and an audit committee. The
13 engineering and operating committee supervises the
14 operation of those plants, and I'm a member that
15 committee for Otter Tail Power.

16 Q Was one of those committees involved in the arbitration
17 that we'll talk a little bit about this morning?

18 A Some of the members were. The committee itself -- the
19 coordinating committee authorized the action. The
20 individuals that represent the companies in the
21 arbitration, some of them were on various committees.

22 Q How long have you been with Otter Tail?

23 A I've been there 34 years.

24 Q What other responsibilities have you held?

25 A I've been in division operations. I've been in interna

auditing, accounting, transportation, data processing.

Q Could you give us a little bit of your educational background, please.

A I have a B.A. in accounting, and I'm also a certified management accountant.

Q Mr. Bowman, are you familiar with the facts underlying the dispute between the Big Stone partners and the Knife River Company?

A Yes, I am.

Q Please describe the Coyote Power Plant.

A The Coyote Plant is a sister plant to the one at Big Stone City. It's about the same size. The difference primarily is the Coyote Plant is a mine mouth plant in North Dakota located adjacent to the Knife River mine. It essentially marries the mine and the plant or the life of the plant because of the location.

MR. GUERRERO: Counsel, could we go off the record for just a second, please.

MS. AILTS WIEST: Go ahead.

(Discussion off the record)

MR. GUERRERO: If I could make a statement on the record, earlier I had indicated that the underlying dispute involved the partners of the Big Stone Power Plant. I should have

1 indicated it was the partners of the Coyote Power
2 Plant.

3 Q Describe the contract between the partners and the
4 Knife River Coal Company.

5 A The Coyote Coal Contract is essentially a life of mine.
6 It's a 35-year contract, uses various indexed price
7 components and some actual cost price components,
8 quarterly price adjustments.

9 Q When did the contract begin?

10 A It began in '81 when the plant went on-line. It was
11 signed prior to that, but delivery under the contract
12 started in '81.

13 Q When is it set to expire?

14 A 35 years, which would get us to about 2016, I believe.

15 Q Okay. Who are the partners in the Coyote Power Plant?

16 A Okay. Otter Tail is the largest one with 35 percent.
17 Minnkota Power Cooperative, representing Northern
18 Municipal, owns 30 percent. Montana-Dakota Utilities
19 owns 25, and Northwestern Public Service, 10 percent.

20 Q Do you know why essentially four utilities would own one
21 power plant?

22 A None of these utilities are large enough to take that
23 big of a bite at one time.

24 Q Mr. Bowman, could you please describe, to the extent
25 that you know, the underlying issue in the contract

dispute with the partners and the Knife River Coal Company?

A When the contract was signed an addendum was signed at the same time which essentially required that the pricing mechanism within the contract would result in prices that were comparable to similar mines developed at similar timeframes. It's the divergence from the pricing procedures compared to the comparable prices that became an issue.

Q So there's a provision in the contract, if I can paraphrase, Mr. Bowman, a provision of the contract which allows a pricing of that contract to be compared against similar pricing for similar mines?

A That's correct.

Q And the purpose of that comparison is what?

A It was a check on the actual pricing mechanism to make sure it didn't get out of line with what was happening in the industry.

Q Tell us a little bit about the arbitration process itself. How did that begin?

A The companies had been meeting for several years, a number of meetings attempting to negotiate something. There was very limited progress on that. Initially a suit was filed in North Dakota court. The Court Order was to take it to arbitration first.

1 The arbitration case was then filed with the
2 American Arbitration Association. A three-panel
3 arbitration board was selected. We went through the
4 discovery process, arbitration hearings, and in March of
5 '99 an Arbitration Order was issued.

6 Q Overall, how long was the process?

7 A It was about a two-year process through the arbitration.

8 Q Okay. Overall from the beginning to the end it would
9 have been how long?

10 A From the beginning of?

11 Q The court, the actual court process.

12 A That may be adding another year.

13 Q Okay. Who were the parties -- who did the partners get
14 involved on their behalf to help them in this process?

15 A The legal firm of Donelan, Cleary, Washington, D.C.,
16 coordinated our efforts. In addition to that,
17 Tom Crowley from L.E. Peabody was an expert witness,
18 Bob Sansom from Energy Ventures was an expert witness,
19 and Craig Kuhl with Price Waterhouse was an expert
20 witness for us.

21 Q In your opinion, did this arbitration proceeding proceed
22 much like any typical litigation that would have been in
23 court?

24 A I'm not real familiar with a court proceeding, but I
25 would think it would have been very similar. We went

1 through discovery. It was certainly a very formal
2 process.

3 Q Do you know how to spell Donelan, Cleary?

4 A D-O-N-E-L-A-N, C-L-E-A-R-Y.

5 Q You mentioned, Mr. Bowman, that the arbitration panel
6 did ultimately make a decision in this process. Can you
7 describe that decision?

8 A The initial decision in March of '99 adjusted prices
9 from the first quarter of -- from the fourth quarter of
10 '96 through the decision, established two prices for
11 that time frame. The final price, I think it's in some
12 of the filings, was \$10.20, approximately \$1 less than
13 the price we were charged at that time by Knife River.

14 The Order also requested that the parties
15 modify the pricing procedure within the contract to
16 something that would result in the \$10.20. There is
17 also a profit limitation section in the contract and
18 that was also requested to be modified.

19 We met with Knife River several times, did not
20 come to a mutual agreement on how those things should be
21 modified. It went back to the panel. The panel
22 essentially accepted Knife River's pricing procedure
23 modification and accepted the profit limitation
24 recommendations of the plant owners.

25 Q Thank you. One of the questions that the partners asked

1 on the arbitration panel was that it adjust the prices
2 in the coal contract?

3 A That's correct.

4 Q Did the panel do that?

5 A The panel adjusted prices retroactively and approved a
6 pricing procedure going forward.

7 Q And did they adjust the prices up and down?

8 A Down.

9 Q Tell me a little bit about the retroactive aspect of the
10 pricing provisions, Mr. Bowman.

11 A The Arbitration Order established prices from the fourth
12 quarter of '96 through the decision period. And there
13 was two prices in there. The final one was \$10.20
14 compared to the \$11 plus number that we were currently
15 being charged.

16 We went back and recalculated the billings for
17 that time frame, and it resulted in a rebate or a refund
18 to the three owners of the plant of approximately
19 5.9 million dollars.

20 Q Would that have been a damage award?

21 A Yes.

22 MR. GUERRERO: I have no further
23 questions.

24 MS. AILTS WIEST: Before I ask for
25 any cross-examination, I know in your stipulation

1 you stated that the consolidation was for the
2 purposes of the hearing only.

3 I guess my question to the parties is this
4 witness has just gone through some of the
5 background material and so I'm just anticipating
6 writing orders and the question is can the
7 testimony from other witnesses be used in --

8 For example, can the testimony of Mr. Bowman
9 be used in decisions regarding NWPS and MDU, or are
10 all the witnesses going to separately go through
11 all the procedures so I have a complete record each
12 time?

13 MR. DIETRICH: On behalf of
14 Northwestern, we have no problem using the
15 testimony from Mr. Bowman as evidence in the
16 EL00-009. In fact, it may shorten the testimony
17 that we provide rather than repeat the same
18 procedural background.

19 MS. AILTS WIEST: Would that apply
20 to any of the witnesses or just Mr. Bowman's
21 testimony?

22 MR. DIETRICH: Certainly any of the
23 witnesses presenting evidence here.

24 MS. AILTS WIEST: Mr. Gerdes?

25 MR. GERDES: I would agree to that,

1 your Honor, with this stipulation. I think if
2 something is objectionable, I'll just speak up, but
3 otherwise I'll agree to that.

4 MS. AILTS WIEST: Mr. Guerrero, do
5 you have any problems with that?

6 MR. GUERRERO: That's correct. If
7 something is objectionable, I'll note the objection
8 on the record.

9 MR. HOSECK: I have no objection at
10 all.

11 MS. AILTS WIEST: Then
12 cross-examination. Mr. Dietrich, I guess the
13 problem is is that I'm not sure you're entitled to
14 cross-examination because you did not intervene in
15 this case. So I would assume that the next person
16 I would go to would be Mr. Hoseck.

17 Is that understanding wrong?

18 MR. DIETRICH: As much as I would
19 like the opportunity to cross-examine Mr. Bowman, I
20 think that's fine with us.

21 MS. AILTS WIEST: Does anybody have
22 any problems with that?

23 (No audible response)

24 MS. AILTS WIEST: Mr. Hoseck.

25 MR. HOSECK: Just a couple of

1 questions, Mr. Bowman.

2 CROSS-EXAMINATION

3 BY MR. HOSECK:

4 Q How many partners are there in the Coyote Plant?

5 A Four partners.

6 Q How many participated in the arbitration?

7 A Three.

8 Q Who did not participate in the arbitration?

9 A Montana-Dakota Utilities did not take an active part in
10 the arbitration case.

11 MR. HOSECK: Okay. Thank you.

12 MS. AILTS WIEST: Commissioners?

13 CHAIRMAN BURG: I have none.

14 COMMISSIONER NELSON: I have none.

15 MR. RISLOV: Mr. Bowman, you
16 referred to that contract as a life of mine
17 contract. Did you mean a life of plant contract?

18 THE WITNESS: Yes, I did.

19 MR. RISLOV: Thank you.

20 MS. AILTS WIEST: I had a question
21 about the Petition. You stated that you're also
22 asking our jurisdictions for similar treatment but
23 if the decision is inconsistent, the method to
24 allocate costs would be an E2 energy factor from
25 1998, cost of service, and I'm paraphrasing here.

20
1 Are you proposing that there be any kind of
2 different allocation than what you're proposing
3 here if any of the decisions, for example, in the
4 other jurisdictions would not give you any cost
5 recovery on this?

6 MR. GUERRERO: Counsel, could I
7 interject? You may want to save that question for
8 our next witness. That will be part of her
9 testimony and her expertise.

10 MS. AILTS WIEST: Okay. And then
11 with respect to the pricing procedure going
12 forward, I believe you stated that the arbitrator
13 adjusted prices retroactively and approved a
14 pricing procedure going forward.

15 Does that mean actual prices were approved
16 going forward or just a procedure for pricing?

17 THE WITNESS: Just the procedure --
18 the procedure has various components of actual and
19 indexed costs. Those procedures were adjusted
20 going forward.

21 MS. AILTS WIEST: How is Otter Tail
22 seeking to refund the damages? Would that be a
23 question for your next witness?

24 THE WITNESS: Yes.

25 MS. AILTS WIEST: My other question

1 was with respect to the arbitration decision. Did
2 the arbitrator itself allocate the cost of
3 litigation to the parties involved?

4 THE WITNESS: No, they did not.

5 MS. AILTS WIEST: How was that
6 determined?

7 THE WITNESS: Based on plant
8 ownership percentage.

9 MS. AILTS WIEST: So all the
10 costs -- it was a straight percentage based on the
11 percentages you gave at the beginning of your
12 testimony, for example, Otter Tail assumed
13 35 percent of total costs?

14 THE WITNESS: That's correct.

15 MS. AILTS WIEST: That would be for
16 the arbitration panel costs as well the attorneys
17 fees and expert witnesses?

18 THE WITNESS: That's correct.

19 MS. AILTS WIEST: And were all of
20 those costs common costs, the three that I just
21 mentioned?

22 THE WITNESS: Certainly the bulk of
23 them. There were other attorney fees that
24 Otter Tail had that were considered in-house
25 expenses. And I can't speak to the other

1 companies, whether they had certain in-house costs
2 that they absorbed themselves or not.

3 MS. AILTS WIEST: So your costs
4 included both in-house and outside counsel costs,
5 your attorneys fees?

6 THE WITNESS: Very little in-house.
7 Some of it was outside attorney fees that strictly
8 represented Otter Tail.

9 MS. AILTS WIEST: And is Otter Tail
10 going to give the Commission a breakdown of these
11 fees and costs?

12 MR. GUERRERO: That's correct,
13 Counsel. In fact, those questions you may want to
14 repeat to our next witness.

15 MS. AILTS WIEST: Okay. Do you have
16 any redirect of this witness?

17 MR. GUERRERO: Yes, I do. Thank
18 you.

19 MR. GERDES: Excuse me. Just a
20 minute. Are you ruling that we have no opportunity
21 to cross-examine? And I guess I'd make the point
22 it's not a big deal right at this point, but it
23 would be, I think, inconsistent with the agreement
24 we just had that this witness's testimony would
25 relate to all three proceedings.

1 MS. AILTS WIEST: Right. I
2 understand the point. I'm just trying to figure
3 this out procedurally. And if this doesn't work
4 out that we can't use other witness's testimony,
5 then, I mean, the solution would be, of course, for
6 your witness to go through all the facts on their
7 side.

8 MR. GERDES: My only point is I
9 think that's cured. If we do have some
10 cross-examination -- and there's one question I
11 would like to ask. But it would seem to me we
12 should be entitled to cross-examine the witness.

13 CHAIRMAN BURG: Let me ask it this
14 way. Not being an attorney, it appears to me
15 theirs could be examination, not cross-examination,
16 because they're taking them as a witness.

17 MS. AILTS WIEST: I'm not sure that
18 was his point, that he was taking him as his own
19 witness.

20 MR. GUERRERO: Counsel, I have no
21 objection.

22 MS. AILTS WIEST: I guess it would
23 be up to Otter Tail, if you had any problems with
24 other parties asking questions of your witness even
25 though they're not technically parties in your

1 case.

2 MR. GUERRERO: I have no objections.

3 MS. AILTS WIEST: Do you have any
4 questions, Mr. Gerdes?

5 MR. GERDES: Just one.

6 CROSS-EXAMINATION

7 BY MR. GERDES:

8 Q You indicated that MDU did not participate in the
9 arbitration. Did MDU, however, pay its billed share of
10 the arbitration expenses?

11 A Yes, they did, under protest.

12 MS. AILTS WIEST: Any other
13 questions? Any redirect, Mr. Guerrero?

14 MR. GUERRERO: Thank you, Counsel.

15 REDIRECT EXAMINATION

16 BY MR. GUERRERO:

17 Q Mr. Bowman, I believe Commission Counsel asked you a
18 question about the reduction in prices on a forward
19 going basis. Earlier you indicated that there was a
20 price reduction that the arbitration panel awarded.

21 A That's correct.

22 Q Could you calculate that on a forward going basis, what
23 that means in terms of Otter Tail's cost for fuel at the
24 Coyote Plant?

25 A An estimate on a go-forward basis is that the change in

1 the pricing procedure for Otter Tail maybe equates to
2 \$750,000 a year.

3 Q Why is it an estimate?

4 A We're not calculating what the old procedure would have
5 given us. Also the old procedure was not being followed
6 in that there were some arbitrary price reductions
7 granted by the coal supplier.

8 Q Is it also true that you don't know how much fuel you'll
9 use?

10 A That's correct.

11 MR. GUERRERO: No further

12 questions.

13 MS. AILTS WIEST: Any other

14 questions of this witness?

15 CHAIRMAN BURG: Maybe I have some.

16 You indicated that the arbitrator recommended a
17 change in how it's calculated in the future; is
18 that correct?

19 THE WITNESS: That's correct.

20 CHAIRMAN BURG: Is that to reflect

21 the fact that we got into this problem because it
22 may not have been adequately -- is it more
23 definitive, or just what was their
24 recommendations?

25 THE WITNESS: They established a

1 price of \$10.20 as of March '99. And the
2 instructions were change the pricing procedures so
3 they will yield a price of \$10.20. All of the
4 components of the pricing remain the same, but some
5 of the numbers within those components were
6 changed.

7 CHAIRMAN BURG: Okay.

8 THE WITNESS: There was a price
9 component multiplier, which used to be
10 42.86 percent, I believe, and was changed down into
11 the neighborhood of 30 percent which lowered that
12 price.

13 CHAIRMAN BURG: So, in other words,
14 the original method of determining price is still
15 in place?

16 THE WITNESS: It's still in place.

17 CHAIRMAN BURG: But they just
18 ordered you change some of the factors --

19 THE WITNESS: Some of the factors or
20 procedures within that was changed.

21 MS. AILTS WIEST: So even though the
22 addendum to the contract stated something that it
23 would be comparable, the prices would be
24 comparable, then subsequently you did come up with
25 some sort of formula to determine that.

1 THE WITNESS: During the arbitration
2 procedure what each party considered comparable
3 prices were forwarded, and the panel selected the
4 comparable prices. They did not order comparable
5 prices on a go-forward basis.

6 They ordered the changing of the pricing
7 procedures so at least at the time of the order we
8 were on a comparable basis. Whether the revision
9 of those pricing procedures, go-forward basis, will
10 result in comparable, we'll learn that in the
11 future.

12 MS. AILTS WIEST: When were the
13 pricing procedures originally established?

14 THE WITNESS: Perhaps in 1978, '79.

15 MS. AILTS WIEST: So actually there
16 were pricing procedures in the original contract?

17 THE WITNESS: That's correct.

18 MS. AILTS WIEST: So it was more
19 than the prices would just be comparable? There
20 were actually procedures in place in the contract?

21 THE WITNESS: There are procedures.
22 It's the addendum that was signed when the contract
23 was signed that brought in the comparable issue.

24 MS. AILTS WIEST: But the pricing
25 procedures were still in place, and the addendum

1 was just added to that?

2 THE WITNESS: That's correct.

3 MS. AILTS WIEST: Okay. Any other
4 questions of this witness?

5 COMMISSIONER NELSON: I have one.
6 In other words, are you saying that you had a
7 formula that you followed and basically you ended
8 up tweaking that formula a little bit and you said
9 42 point something percent versus now it's at 30
10 something?

11 THE WITNESS: That's one of the
12 components of it, yes.

13 COMMISSIONER NELSON: Is that just
14 an arbitrary figure, the 42, and 30 is also
15 arbitrary or --

16 THE WITNESS: The 42 is part of the
17 original contract. And we didn't get into how that
18 was established during the arbitration. The new
19 multiplier was devised to yield \$10.20.

20 COMMISSIONER NELSON: How do we know
21 \$10.20 is the right number in the future? I can
22 see where it would be the appropriate number
23 because you already know that it wasn't right
24 working out before and you figured out what would
25 provide for a comparable price. But how do I know

1 in the future that's \$10.20?

2 THE WITNESS: I don't think we do.
3 If it does get out of line and we can't
4 renegotiate, then we'll have to see what kind of
5 action is taken from there.

6 COMMISSIONER NELSON: So you're
7 hoping you'll just be able to negotiate this
8 flexible number?

9 THE WITNESS: That's correct.

10 MR. RISLOV: If I could, did you say
11 the 42 and 30 represented multipliers; is that
12 correct?

13 THE WITNESS: That's correct. They
14 are multipliers applied to cover costs that are not
15 identified, to cover profit.

16 MR. RISLOV: So is there a name for
17 this multiplier?

18 THE WITNESS: It's called the price
19 component multiplier.

20 MR. RISLOV: And the basis for that
21 price component multiplier, I assume, is some type
22 of overhead, or it is designed to achieve some type
23 of overhead coverage; is that correct?

24 THE WITNESS: That's correct.

25 MR. RISLOV: Thank you.

1 MS. AILTS WIEST: Any further
2 questions of this witness? If not, thank you. You
3 may call your next witness.

4 MR. GUERRERO: Thank you.

5 Otter Tail calls Ms. Bernadeen Brutlag.

6 BERNADEEN BRUTLAG,
7 called as a witness, being first duly sworn in the above
8 cause, testified under oath as follows:

9 DIRECT EXAMINATION

10 BY MR. GUERRERO:

11 Q State your name and spell it, please.

12 A Bernadeen Brutlag. The first named is spelled
13 B-E-R-N-A-D-E-E-N. The last name, B-R-U-T-L-A-G.

14 Q Could you tell the Commission where you work and in what
15 capacity?

16 A I work for Otter Tail Power in their general office in
17 Fergus Falls. I am manager of regulatory services.

18 Q What are some of the responsibilities that the manager
19 of regulatory services has?

20 A About two years ago we consolidated all of our
21 regulatory activities into the department of regulatory
22 services. It includes revenue requirements, regulatory
23 compliance, rate design, rate administration, and just
24 about any other regulatory questions that come along in
25 the company.

1 Q Please briefly state your educational and professional
2 background.

3 A I hold a bachelor's degree in accounting from
4 Moorhead State University, and I am a certified public
5 accountant in Minnesota.

6 Q Ms. Brutlag, are you familiar with the facts underlying
7 this dispute?

8 A Yes, I am.

9 Q Okay. Ms. Brutlag, I want to ask you a couple of
10 questions about the fuel adjustment clause generally for
11 the record. Are you familiar with the Otter Tail Power
12 Company Fuel Adjustment Clause?

13 A Yes, I am.

14 Q Could you explain briefly how that works?

15 A Briefly, fuel clause adjustments were put in place so
16 that fuel and purchase power, which is a utilities
17 largest single expense -- so that changes in that
18 expense can be passed through to customers without
19 having to go in to change base rates.

20 Basically, what we do is compare in any given
21 period of time the total of purchase power and fuel
22 that's used for serving our retail customers, and we
23 calculate that and compare it with the amount that's in
24 our base rates in our last rate case.

25 The difference either plus or minus is then

1 passed through as an adjustment to the retail customers'
2 bills.

3 Q Thank you. You heard Mr. Bowman's earlier testimony,
4 did you not?

5 A Yes, I did.

6 Q Did you hear him indicate that the Coyote partners had
7 received a certain award from the arbitrators?

8 A Yes, I did.

9 Q Do you know what Otter Tail Power Company's award was or
10 share of that award?

11 A The share of the award was \$2,884,000.

12 Q Just briefly, what does that amount represent?

13 A It represents Otter Tail's share of the award, and that
14 share is in line with our ownership of the Coyote Plant.

15 Q Okay. Thank you. Ms. Brutlag, earlier I had given to
16 you an exhibit which is Otter Tail Power Company
17 Exhibit 1, which I have also given the original to the
18 court reporter.

19 Ms. Court Reporter has marked that as
20 Otter Tail Exhibit 1. Can you identify that document?

21 A Yes. I have a copy.

22 Q Could you tell us what it is?

23 A It's a summary of the award amount and the amount of
24 litigation costs that we are requesting. And it also
25 involves -- we made two filings. There was an original

1 filing and then we amended that filing because of later
2 adjustments that came to light and this is a summary of
3 those items.

4 Q Okay. Who prepared this document?

5 A I did.

6 Q Was it prepared by you in the regular course of your
7 employment?

8 A Yes, it was.

9 Q And is this a document that is similar in nature to
10 documents that are already part of this record?

11 A Yes, it is.

12 MR. GUERRERO: I will offer this as

13 Otter Tail Exhibit 1.

14 MS. AILTS WIEST: Do you have a copy

15 for the Commissioners?

16 MR. GUERRERO: Yes. I have passed

17 out a copy to all parties.

18 MS. AILTS WIEST: Okay. Is there

19 any objection?

20 MR. HOSECK: No objection.

21 MS. AILTS WIEST: If not, it will be

22 admitted.

23 Q Ms. Brutlag, I was wondering if you could just walk us
24 through this Exhibit 1 very briefly for the benefit of
25 the Commissioners.

1 A Certainly. Line 1 is the amounts that were included
2 in our original filing, and that is the arbitration
3 awarded 2.884 million, arbitration costs, which is
4 \$1.240 million, for a net award that we would anticipate
5 passing back to customers of 1.6 million.

6 At the time that we made the original filing
7 we had received reimbursement from Montana-Dakota
8 Utilities for their share of costs, but it was made
9 under protest. And because we didn't know what the
10 status of those dollars were, they didn't include them
11 in the original filing.

12 As it became clearer that those dollars would
13 probably, in fact, be retained by our company, we made
14 an amended filing and adjusted the arbitration costs
15 that we are requesting downward to give credit for that
16 amount paid by MDU. And that's on line 3 there,
17 \$250,930.

18 The other thing we did in our amended filing
19 was when we owned power plant there are times when we
20 don't need the total output of our share of that plant
21 for our retail owed. And during this period of time
22 which you see laid out in footnote 2 there from
23 December of '96 to March of '99, which is the period of
24 time when the arbitration award was based on, we went
25 back through our records and determined that 11 percent

1 of the output from the plant during that time was really
2 sold into the power pool. They weren't used for retail
3 customers.

4 So we then determined that line 7 is the
5 89 percent that had to do with serving our retail load.
6 So in all cases we adjusted both the arbitration cost
7 and the arbitration award to reflect that. And so on
8 line 9 what you see there is the arbitration award of
9 \$2.576 million. The arbitration costs would be \$884,341
10 for a net award of \$1,692,170.

11 And of that then I did have a footnote 3 just
12 to show an estimated portion of that award that would go
13 to each state. And you can see there that South Dakota
14 is about 7 percent.

15 Q Explain that footnote 3 just a little bit more, if you
16 could, in terms of allocations and how Otter Tail
17 allocates for the purposes of three jurisdictions.

18 A Okay. We develop allocation factors every year based on
19 demand, energy, and customer count. What this is based
20 on is actually 1998 allocation factors for one of the
21 energy factors -- there are actually two energy
22 factors -- but one of the energy factors which we would
23 use to allocate fuel in our cost of service since this
24 is related to fuel. These amounts were for 1998. They
25 change slightly each year.

1 Q Does Otter Tail have allocator factors on file with this
2 Commission?

3 A We have an allocation manual on file with all three
4 State Commissions that were approved in our last rate
5 case. And that is a manual that describes how we are to
6 develop the factors to get to this end point.

7 Each state -- all states have allowed us the
8 same methodology. As I say, the result varies each
9 year, but the methodology has been in place for a number
10 of years.

11 Q Ms. Brutlag, I want to take you back up to line 1. The
12 net award -- or, excuse me, back down to line 9, the net
13 award. Can you explain what the net award signifies.

14 A The net award is the allocation award and subtracting
15 out the arbitration costs which we're requesting
16 permission from this Commission to recover through the
17 fuel clause.

18 So there would be a net amount that would be
19 passed back to customers basically as a credit to fuel
20 and purchase power of the 1.6 million.

21 Q Is Otter Tail asking permission to pass the 1.6 to the
22 fuel clause?

23 A Actually what we're asking permission to do is pass the
24 884,341 through the fuel clause. The award itself is
25 directly related, as you heard earlier, to the cost of

1 coal during this period of time. And, in our view, it
2 is a cost of fuel and would be required to be passed
3 through the fuel clause aside from any order of the
4 Commission.

5 Q So the net award actually acts as a credit to rate
6 payers; correct?

7 A It will be a credit to rate payers, yes.

8 Q Ms. Brutlag, earlier you had heard testimony from
9 Mr. Bowman regarding the \$750,000 reduction.

10 A Yes.

11 Q Explain how that amount will affect rate payers.

12 A That amount is already affecting rate payers in that --
13 to the extent that our month-by-month cost of coal for
14 the Coyote Plant is lower than it was before this
15 effort. It results in a larger credit to customers
16 every month.

17 Our fuel clause has been negative ever since
18 our last rate case in the mid '80s. It is a credit to
19 the customers every month on their bill, and this just
20 means it will be a larger credit. That is already
21 taking effect today.

22 MR. GUERRERO: I don't have any
23 further questions. Thank you.

24 MS. AILTS WUEST: Mr. Dietrich?

25 MR. DIETRICH: No questions.

1 MS. AILTS WIEST: Mr. Gerdes?

2 MR. GERDES: No questions.

3 MS. AILTS WIEST: Mr. Hoseck?

4 MR. HOSECK: No questions.

5 MS. AILTS WIEST: Commission?

6 CHAIRMAN BURG: I'm interested in
7 the one you have.

8 MS. AILTS WIEST: How are you
9 intending to flow this back through the fuel
10 clause? Over what time period?

11 THE WITNESS: There are a couple of
12 ways we could do it. When we did the original
13 filing we suggested using the allocation factor.
14 And I think at that time we were anticipating doing
15 it in a lump sum in one movement.

16 Realistically, what will probably happen is
17 whatever the net amount of the award that we are
18 allowed to take, we will use that in probably June,
19 if we have a determination soon enough. If not, it
20 would be July. We would reduce the amount of fuel
21 for that month.

22 Our total fuel costs were reduced by the
23 amount of the award. Since South Dakota has a
24 three-month average, the benefit would actually
25 flow back to customers for three months.

1 What we end up doing as a practical matter is
2 we put the total dollar amount of whatever
3 South Dakota would allow as a credit to the fuel
4 costs and as a double-check once it's all flowed
5 through we take a look at the dollar amount that
6 actually goes to South Dakota customers and it
7 should be this 7 percent factor.

8 And I have done some calculations to show that
9 it does work.

10 MS. AILTS WIEST: And then on the
11 Petition in one of your footnotes in Page 8 you
12 stated that you intended to wait until receiving
13 orders from each of the jurisdictions before making
14 any disposition of the award. Has that position
15 changed?

16 THE WITNESS: We would still like to
17 do that but Minnesota has already ruled.
18 North Dakota has had their informal hearing and
19 will not actually have it on their final agenda
20 until May 26. But we have a pretty good indication
21 of what it would be.

22 The reason we said that primarily was because
23 if we use that allocation factor, we want to have
24 all states being -- you know, so we'd be whole and
25 all the customers would be whole on the allocation

1 factor.

2 It appears that each state is doing things a
3 little bit differently so I've also worked out a
4 spreadsheet that will allow us to do it state by
5 state, and they're not as dependent on the other
6 states any longer.

7 A long answer to your question, but I believe
8 we can do it and begin passing it back before all
9 the states have ruled.

10 MS. AILTS WIEST: You stated not
11 as dependent on the other states as before. My
12 question is why would the allocation for
13 South Dakota be any different depending on what
14 other jurisdictions do?

15 THE WITNESS: I guess the other
16 thing, it really isn't dependent on what the other
17 states do. When we went into this we were already
18 quite clear how we were really going to implement
19 it when we got down to the dollars.

20 If all states had treated this identical, if
21 we had gotten the same dollar amount in each state,
22 it would have been much easier if we could have
23 waited until they're all finished and treated it as
24 one number.

25 It appears they're not treating it quite the

1 same. So we will be able to do it independently.
2 It really doesn't affect -- the other states really
3 don't have an effect on this.

4 MS. AILTS WIEST: How did Minnesota
5 rule? Can you explain that ruling?

6 THE WITNESS: Minnesota ruled that
7 the majority of the costs were recoverable. What
8 they attempted to do was determine how much dollar
9 amount of attorneys fees we had in base rates back
10 when we had our last rate case.

11 And they made an adjustment that basically
12 would recognize us as an extraordinary expense, but
13 that some dollar amount would be in base rates.

14 MS. AILTS WIEST: So they did
15 disallow some costs; is that correct?

16 THE WITNESS: That's correct.

17 MS. AILTS WIEST: Would those costs
18 be associated purely with in-house counsel?

19 THE WITNESS: They did not specify
20 which costs they were disallowing. They did it
21 more as a percentage, as a ratio.

22 MS. AILTS WIEST: What was that
23 based on?

24 THE WITNESS: Discussions with staf
25 and trying to come up with a way to simulate the

1 amount of attorneys fees that we had in our last
2 rate case in Minnesota.

3 In discussions with them we were discussing
4 the fact that each year we have probably as much
5 attorneys fees as we had in base rates aside from
6 this but they were still feeling there was an
7 amount that was in base rates and they created a
8 rather complex spreadsheet that ratioed it down.

9 On a total amount basis they disallowed about
10 24 percent, I believe, of the total award.

11 MS. AILTS WIEST: And you referenced
12 North Dakota making a final decision May 26, but
13 you seemed to imply you had an idea already of what
14 that decision was going to be. Could you explain
15 that?

16 THE WITNESS: Correct. In
17 North Dakota they have a couple of steps involved
18 And the first one is an informal hearing where the
19 Commission and staff has an opportunity to ask all
20 the questions and get all of their questions
21 answered. We've had that.

22 Normally after that proceeding we have a
23 pretty good idea of how the Commission will vote
24 when it comes on their regular agenda on May 25 or
25 24, I don't remember the date now, we are fairly

1 comfortable with how the Commission is viewing
2 this. But realistically we don't know their final
3 vote until after that hearing.

4 MS. AILTS WIEST: How do you think
5 they're going to rule?

6 THE WITNESS: Two of the
7 Commissioners stated quite clearly they supported
8 this, and the third one is still thinking about it.

9 MS. AILTS WIEST: Can we get a copy
10 of the Minnesota decision? Can you late file that
11 or file that?

12 MR. GUERRERO: Counsel, we are still
13 actually waiting for a written order, but I will
14 file that as soon as that decision is reached.

15 MS. AILTS WIEST: Why don't we
16 reserve Exhibit No. 2 for that. I don't know when
17 the Commission is going to make a decision, but
18 could we have a copy of the North Dakota decision
19 as soon as that is filed?

20 MR. GUERRERO: Exhibit No. 3.

21 MS. AILTS WIEST: Okay. Another
22 thing I was going to mention is I know you
23 referenced the application in the record, and I
24 just wanted to state that right now none of the
25 applications or the amendments, amended

1 applications are actually in the record.

2 And in order to get the application in you can
3 certainly mark it as an exhibit and put them in.
4 Would you care to put those applications into the
5 record?

6 MR. GUERRERO: Yes, I would. Thank
7 you.

8 MS. AILTS WIEST: So let's mark your
9 original Petition as Exhibit 4. And then if we
10 could mark your filing received by us on March 28,
11 2000, which I believe amended to some extent your
12 original Petition, that will be 5. Is there any
13 objection to the Commission receiving Exhibits 2,
14 3, 4, 5?

15 If not, they have been offered and will be
16 admitted.

17 MR. GUERRERO: Thank you.

18 COMMISSIONER SCHOENFELDER: Are you
19 finished? I have a question.

20 MS. AILTS WIEST: I just have --

21 COMMISSIONER SCHOENFELDER: Go ahead
22 and finish.

23 MS. AILTS WIEST: Do you have a
24 breakdown then of the actual costs or the attorneys
25 fees broken down between in-house counsel and

1 outside counsel? Could we get that into the
2 record?

3 THE WITNESS: I think I have --
4 yes. I have a list of costs by vendor which we'd
5 have to make copies of, but we can submit that.

6 MS. AILTS WIEST: Okay. On that
7 would it be clear as to which were in-house and --

8 THE WITNESS: There is a relatively
9 small dollar amount of \$33,196 that is Otter Tail
10 Power labor. I don't know whether that's attorneys
11 fees or some other labor of people that were
12 involved in that case. By far the majority of the
13 vendors on here are outside vendors, either
14 attorneys or other consultants Mr. Bowman could
15 discuss. I'm not familiar enough with who these
16 various entities are.

17 MS. AILTS WIEST: Okay. We'll get
18 copies made of that. Can we mark that as
19 Exhibit 6? Besides the costs listed on that, what
20 additional costs are you seeking to recover?

21 THE WITNESS: This is the total of
22 the cost.

23 MS. AILTS WIEST: This is all the
24 cost?

25 THE WITNESS: This shows the

1 breakdown of the original -- this will total the
2 original filing costs that I mentioned without the
3 credit from MDU. And then it also shows the costs
4 incurred by year. It just happens to be on this
5 sheet of paper.

6 MS. AILTS WIEST: Thank you. I know
7 NWPS stated in theirs they were seeking recovery of
8 travel expenses for various officers and
9 directors. Were those included in the costs?

10 THE WITNESS: We have a relatively
11 small amount for \$14,974 for vehicles and/or the
12 plane.

13 MS. AILTS WIEST: Would that be
14 travel expenses related directly to directors and
15 officers attending hearings or meetings?

16 THE WITNESS: I guess I don't know.
17 Mr. Bowman could actually answer that question.

18 MS. AILTS WIEST: If Mr. Bowman
19 could be recalled and go through those numbers and
20 explain them in a little more detail.

21 COMMISSIONER SCHOENFELDER: You
22 asked my question. I wanted the breakdown, but I
23 also want to know on the record the breakdown on
24 there is Otter Tail Power's expenses only? It
25 doesn't include the total expense? It's your

1 share?

2 THE WITNESS: That's correct.

3 COMMISSIONER SCHOENFELDER: Thank
4 you.

5 MS. AILTS WIEST: It was not awarded
6 by the arbitrator, any of these expenses? The
7 companies just assigned them based upon the
8 percentage of sharing --

9 THE WITNESS: For the costs that
10 were shared, which is the majority of these, yes,
11 they are in line with your share of ownership of
12 the plant.

13 MS. AILTS WIEST: Are those
14 separated out, the costs that were shared and the
15 individual costs on there?

16 THE WITNESS: Not on this exhibit,
17 no.

18 MS. AILTS WIEST: Could Mr. Bowman
19 explain which are shared costs and which are not
20 shared costs?

21 THE WITNESS: I'm not sure. I don't
22 have those numbers in front of me. I don't know
23 exactly the split. Perhaps he does.

24 MS. AILTS WIEST: Do you have any
25 redirect, Mr. Guerrero?

you.

REDIRECT EXAMINATION

BY MR. GUERRERO:

Q Commission Counsel asked you about the Minnesota rulings, Ms. Brutlag. Could you explain a little bit about how that decision was reached in your negotiations with both Commission staff and with the Minnesota Department of Commerce?

A There were a number of discussions with Department of Commerce staff trying to establish an estimate of how many dollars of attorneys fees are base rates from our last rate case. And since there is no account that is specifically attorneys fees, it's difficult to determine what that was at the time that we had our last rate case.

So we went through a series of calculations, a series of estimates, to try to come up with a dollar amount. And then what the Department of Commerce analyst did roughly was to take a proportion and carry that proportion forward to today's -- what it did was allow the Commission today's to decide how much was in base rates and how much would be considered extraordinary.

Q Did the Minnesota matter go to a formal contested

1 hearing with witnesses and testimony?

2 A No, it did not. We had reached a settlement agreement
3 with them prior to coming before the Commission, and the
4 Commission ruled very quickly on it. In fact, I don't
5 remember if there were even any questions.

6 Q Commission Counsel also asked you about a \$33,000 labor
7 expense, I believe?

8 A Yes.

9 Q Is it your understanding that is also subject to some
10 negotiation or discussion with the Commission staff here
11 present?

12 A Yes. We've had some discussions with Commission staff
13 here on some of these specific costs that were internal
14 sorts of costs, particularly labor. And there was some
15 discussion about reaching an agreement for us not to
16 include certain of those costs.

17 MR. GUERRERO: I don't think I have
18 any further questions, Counsel. I would like the
19 opportunity to the extent it is necessary to keep
20 the record open to supplement this record with all
21 of the invoices that Otter Tail has incurred in
22 this matter, if it's necessary to do that in order
23 for Otter Tail to show extensively the costs that
24 it incurred in this matter.

25 MS. AILTS WIEST: Okay.

COMMISSIONER SCHOENFELDER: We have a couple down here.

MS. AILTS WIEST: Go ahead.

COMMISSIONER SCHOENFELDER: First of all, you should have an arbitration document that would have allocated those costs. Do you have that document, and could that be submitted to the Commission as an exhibit?

THE WITNESS: I don't have it. I'm not familiar with it.

COMMISSIONER SCHOENFELDER: It would have been a document that the arbitrator would have allocated the costs amongst all of you.

THE WITNESS: There's an arbitration award document, which I don't know if I've even seen the total. I've seen a summary of it.

MS. AILTS WIEST: I thought the arbitrator didn't allocate the cost.

THE WITNESS: I don't think the arbitrator really ruled on the costs themselves because it goes back to how the plant is owned.

MS. AILTS WIEST: Maybe Mr. Bowman could answer the question.

THE WITNESS: I think he would be closer to be able to answer that than I can.

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MR. RISLOV: Do you have a document among the parties showing the assignment of shared costs? I would think there would be a memo sent to each company or an agreement reached for each company on a source document.

THE WITNESS: I don't have it. But, again, I wasn't there at the beginning of the lawsuit. Mr. Bowman was. Perhaps he can answer that.

MR. RISLOV: That may make all of these questions a little easier to deal with if there is a document assigning those shared and common costs.

THE WITNESS: Okay.

MR. RISLOV: I have a couple of other questions. To the extent the companies included these labor costs, has there been any showing that these costs are not the routine labor costs that would appear in cost service in a rate case setting?

Are these considered to be extraordinary costs? Is there a showing these are extraordinary costs?

THE WITNESS: Are you specifically talking about the labor costs?

1 MR. RISLOV: Correct. I think you
2 said 33,000.

3 THE WITNESS: The 33,000, correct.
4 Probably not. It wasn't a question that had come
5 up during discussions. And, to be honest, I'm not
6 sure whose labor this is. Like I said, Mr. Bowman
7 was involved in the case itself. He may be able to
8 tell you whose labor this is and whether, in fact,
9 it would be extraordinary. To the extent it is
10 routine labor, it's correct it would be in a cost
11 of service in our base rates probably.

12 MR. RISLOV: I'd like to go back for
13 the next question on the original Petition
14 Otter Tail Company filed in this docket, and I
15 believe Rolayne referenced the footnote on Page 8.

16 THE WITNESS: Okay.

17 MR. RISLOV: There's a statement in
18 there that states in this event Otter Tail suggests
19 using the E2 energy factor. I don't know which
20 event that's mentioning. Do you intend to use the
21 E2 energy factor? Is that the factor you used for
22 Exhibit 1 as to allocate cost?

23 THE WITNESS: That is the factor
24 that was used for footnote 3 in Exhibit 1 that
25 shows the percentages by state. And the E2 factor

1 is used within the cost of service to allocate fuel
2 and purchase power. And that's why that factor
3 seemed to be an appropriate factor to use.

4 MR. RISLOV: So if I apply the
5 percentages found in footnote 3 to the amounts
6 listed on line 9, I can generate the amount
7 Otter Tail is signing to each individual state they
8 serve.

9 THE WITNESS: That's correct.

10 MR. RISLOV: Thank you.

11 MS. AILTS WIEST: Any further
12 questions of this witness?

13 MR. GUERRERO: One or two follow-up
14 questions regarding your Exhibit 1.

15 REDIRECT EXAMINATION

16 BY MR. GUERRERO:

17 Q Ms. Brutlag, is it your understanding that that is
18 subject to some change depending on staff's testimony
19 and recommendation in this proceeding?

20 A Yes. The numbers may change slightly.

21 Q And the purposes of submitting and going through that
22 Exhibit 1 was to provide background information on
23 Otter Tail's cost it's incurred?

24 A Yes. That's right.

25 Q As well as how it proposed to allocate those costs?

1 A Correct.

2 Q The final decision, I believe, has been negotiated to
3 some extent with staff?

4 A That's my understanding.

5 MR. GUERRERO: Thank you.

6 MS. AILTS WIEST: Any other
7 questions of this witness?

8 MR. GUERRERO: Just in terms of my
9 motion to keep the record open.

10 MS. AILTS WIEST: Yes. We'll grant
11 that motion to keep the record open. Thank you,
12 Ms. Brutlag.

13 (Witness excused)

14 MS. AILTS WIEST: Could we recall
15 Mr. Bowman?

16 MR. GUERRERO: Could I take one
17 second?

18 MS. AILTS WIEST: Yes. Go ahead.

19 (Discussion off the record)

20 (Exhibit 7 is marked for identification)

21 MR. GUERRERO: I do have a
22 stipulation, Counsel, that I can either offer now
23 or after Mr. Bowman's recross.

24 MS. AILTS WIEST: You can offer it
25 now.

1 MR. GUERRERO: Thank you.

2 Otter Tail would like to propose a stipulation that
3 it has reached with Mr. Hoseck and Ms. Farris
4 regarding certain costs that have been the subject
5 of some discussion this morning. The total amount
6 of the stipulation is \$139,635.

7 Those dollars represent essentially two
8 things. The first and the bulk of it, essentially
9 roughly \$103,000, represents costs that Otter Tail
10 incurred that the other partners in the
11 Coyote Plant did not incur. Those included
12 litigation costs, attorneys fees, primarily
13 attorneys fees for outside law firm, the Donelan,
14 Cleary Law Firm and one or two other law firms.
15 Essentially 33,000 of that also represents the
16 internal labor costs that Otter Tail originally
17 proposed as part of its January 26 petition.

18 So essentially what the stipulation is is that
19 Otter Tail is stipulating that \$139,000 essentially
20 comes off the top of its costs that it incurred to
21 obtain a benefit to rate payers of some
22 \$13 million.

23 That essentially reduces our costs that we're
24 seeking to pass through the Fuel Clause
25 Adjustment. And I believe staff will go through

1 that stipulation in a little bit more detail as
2 part of their recommendation.

3 MS. AILTS WIEST: Those would be
4 subtracted from the 1.2 million arbitration costs?

5 MR. GUERRERO: That's correct.

6 MR. HOSECK: And for the record, I
7 would stipulate to that reduction, and it will be
8 further explained through witness Farris's
9 testimony.

10 MS. AILTS WIEST: Okay. Thank you.
11 Mr. Bowman, I think you have before you Exhibit 6;
12 is that correct?

13 THE WITNESS: I don't know what the
14 number is. It's Otter Tail Power Company Knife
15 River Coal Contract. It has a total cost --
16 (Exhibit 6 is marked for identification)

17 MR. GUERRERO: Counsel, I have just
18 handed to Mr. Bowman, Otter Tail Power Company
19 Exhibit No. 6. This is an exhibit that has not yet
20 been copied so the only copy right now is with
21 Mr. Bowman.

22 DIRECT EXAMINATION

23 BY MR. GUERRERO:

24 Q Mr. Bowman, briefly describe that document.

25 A It's a breakdown of the costs in the work order that we

1 used to accumulate costs associated with the
2 negotiations and arbitration of the coal contract.

3 Q Who prepared that document?

4 A It was proposed by someone within Otter Tail.

5 Q Not by you?

6 A No.

7 MS. AILTS WIEST: Is there any
8 objection to Exhibit 6?

9 MR. HOSECK: None.

10 MS. AILTS WIEST: If not, it's been
11 admitted. Mr. Bowman, I believe there was
12 mentioned labor costs of \$33,000. Based on that
13 stipulation that would no longer be a cost that
14 you're seeking to recover? You don't know the
15 answer to that?

16 THE WITNESS: I don't.

17 MR. GUERRERO: Again, Counsel, I
18 believe that that was really a question that --
19 maybe Ms. Brutlag would be better to address that
20 question, but it was a stipulation that I'm not
21 sure testimony's necessary on that, stipulation
22 through counsel.

23 MS. AILTS WIEST: Well, does anybody
24 else have any questions?

25 CHAIRMAN BURG: Can that one

1 probably be answered by staff when they explain t
2 stipulation?

3 MR. HOSECK: Staff will offer
4 testimony in the exhibit that reconciles all of
5 these, I believe.

6 CHAIRMAN BURG: Okay.

7 MS. AILTS WIEST: Does anyone have
8 any questions of Mr. Bowman then? If not, thank
9 you.

10 (Witness excused)

11 MS. AILTS WIEST: Do you have any
12 further witnesses, Mr. Guerrero?

13 MR. GUERRERO: None, thank you.

14 MS. AILTS WIEST: Mr. Dietrich, you
15 may call your witness.

16 MR. DIETRICH: Richard Green.

17 RICHARD GREEN,
18 called as a witness, being first duly sworn in the above
19 cause, testified under oath as follows:

20 DIRECT EXAMINATION

21 BY MR. DIETRICH:

22 Q Would you please state your name and position with
23 Northwestern.

24 A My name is Richard Green. I work for Northwestern
25 Public Service in the capacity of process leader of

1 system operations.

2 Q Okay. What are then your areas of responsibilities?

3 A Among other things, the responsibility I have is
4 representing Northwestern in our efforts at the
5 joint-owned power plants including the Coyote facility
6 I'm a member of the Coyote engineering and operating
7 committee. I have been for many years. So that's
8 included in my area of responsibility.

9 Q Okay. Have you also been a member of the team that was
10 set up at Northwestern to negotiate with Knife River
11 Coal Mining Company?

12 A Yes, I am, have been.

13 Q And actually you were a representative both with regard
14 to Big Stone and Coyote?

15 A That's correct.

16 Q So you're familiar with the negotiations, the
17 North Dakota court suit, and the arbitration process
18 that was followed?

19 A Yes, I am.

20 Q Okay. And you were present and heard Mr. Bowman testify
21 as to quite a bit of the background of those
22 proceedings, were you not?

23 A Yes.

24 Q And do you agree with his explanation of how those
25 proceedings were conducted?

1 A Yes, I do.

2 Q Okay. There was some discussion about a contract
3 addendum. Was this contract addendum the primary
4 difference between the coal agreements at Big Stone and
5 Coyote?

6 A Yes. That's correct. At the time the Coyote contract
7 was being negotiated in the late '70s there was some
8 concern that the pricing mechanism by itself would not
9 provide adequate protection to the Coyote owners to
10 maintain a competitive power plant in the future.

11 Therefore, the addendum was constructed and
12 made part of the contract to provide for low cost coal
13 competitive positioning of the plant in the future.

14 Q Okay. About how much coal is produced at Coyote on an
15 annual basis for Northwestern?

16 A Northwestern Public Service consumes approximately
17 between 200 and 250,000 tons per year of coal at the
18 Coyote facility. That number is somewhat variable due
19 to the fact the power plant on some years has major
20 overhaul periods where it's not available so it isn't a
21 constant number every year.

22 Q Okay. As a result of the arbitration proceeding which
23 resulted in the decision in March of '99 as Mr. Bowman's
24 testified, did Northwestern take steps to implement that
25 decision and the immediate price reductions therefor?

1 A Yes, we did.

2 Q Okay. And that was through filings with our adjustment
3 clause?

4 A That's correct. The fuel cost as it changes, any
5 changes in the cost, of course, flow right directly
6 through the clause.

7 Q Okay. Northwestern files its adjustment clause
8 quarterly?

9 A I believe that's correct. I'm not that familiar with
10 that part of it.

11 Q Okay. And so the price of \$10.20 that was established
12 effective with the spring of 1999, was the price at that
13 period of time that would have been passed through our
14 adjustment clause?

15 A That's correct.

16 Q For Coyote?

17 A That's correct.

18 Q And they are quarterly adjustments, as I understand,
19 that Knife River makes to the price of coal under the
20 agreement?

21 A Yes. We receive each quarter an adjustment pricing
22 mechanism tabulation that all the owners receive which
23 indicates the price going forward for the next quarter.

24 Q Okay. All of Northwestern's electric customers are in
25 South Dakota, are they not?

1 A That's correct.

2 Q So the only allocation that needed to be made for
3 Northwestern would be the difference between retail
4 tariff customers and wholesale tariff customers?

5 A That's correct. I think something in excess of
6 99 percent of our load to Coyote was to retail
7 customers. Small balance was to what I'll refer to as
8 WS1, wholesale customers.

9 Q And, therefore, all of the expenses -- or the refund
10 damage amount and interest less cost would flow through
11 to South Dakota customers?

12 A That is correct.

13 Q Okay.

14 MR. DIETRICH: I think that's all I
15 have for this witness.

16 MS. AILTS WUEST: Mr. Guerrero,
17 Mr. Gerdes, do you have any questions?

18 MR. GUERRERO: No questions.

19 MR. GERDES: No questions.

20 MS. AILTS WUEST: Mr. Hoseck?

21 MR. HOSECK: No questions.

22 CHAIRMAN BURG: I have a couple.

23 What has been the effect of that addendum that was
24 put on the contract at the time of the
25 implementation of the contract?

1 THE WITNESS: The effect at the time
2 of the implementation I don't think was felt.

3 CHAIRMAN BURG: Since then.

4 THE WITNESS: Well, it led to the
5 arbitration. It eventually led to this damage
6 award. That's the major effect. As I think we
7 have heard elsewhere, it may not be the same as
8 what we've seen recently.

9 CHAIRMAN BURG: Did I understand the
10 reason for that was to more closely reflect the
11 total cost of coal as compared to other plants?

12 THE WITNESS: That's correct. The
13 addendum contains language that indicates that the
14 price of coal from this mine for the Coyote
15 facility was to be lower than or at least
16 comparable to other similar mines -- mining
17 contracts that were formulated about the same
18 period of time under similar conditions, primarily
19 in the North Dakota area.

20 CHAIRMAN BURG: Were there any
21 reductions since 1981 until now? Were there any
22 reductions other than the one ordered in this
23 arbitration?

24 THE WITNESS: Yes. Knife River Coal
25 Mining Company did a voluntary reduction, I

1 believe, the beginning of 1988 of about a dollar
2 per ton. We had attempted to negotiate even in
3 those early days prices that were more comparable
4 to other mines in the area and they voluntarily
5 reduced the price by \$1 per ton.

6 CHAIRMAN BURG: But it was
7 determined by the operators that was not enough?

8 THE WITNESS: That's correct.

9 CHAIRMAN BURG: Then you pulled in
10 the language of the addendum to request even more
11 lowering?

12 THE WITNESS: That's correct.

13 CHAIRMAN BURG: And that led to
14 first filing of the suit and then arbitration?

15 THE WITNESS: That's right.

16 CHAIRMAN BURG: Okay. And the other
17 question that I have is in your testimony you
18 indicate that you're going to use -- Northwestern
19 intends to use the adjustment clause, and that
20 clause is a 12-month crediting mechanism; is that
21 correct?

22 THE WITNESS: I believe that may be
23 changing. I'm not sure.

24 CHAIRMAN BURG: I heard a different
25 discussion for Otter Tail and a talk about some

1 stipulation. I was wondering if this was going to
2 hold true.

3 MR. DIETRICH: We will probably go
4 through the adjustment clause mechanism with the
5 next witness, Mr. Decker.

6 CHAIRMAN BURG: You're going to have
7 another witness. Okay.

8 COMMISSIONER SCHOENFELDER: But
9 you're the right witness to answer questions about
10 Exhibit C; is that right? That's your expenses?

11 THE WITNESS: That's correct.

12 COMMISSIONER SCHOENFELDER: I was
13 confused because I had three copies, one of which
14 didn't look at previously. Do you have a
15 stipulation that's going to deal with these
16 exhibits, or do I ask questions about it?

17 MR. DIETRICH: We have continued to
18 work with staff with regard to the costs that are
19 in Exhibit C and the revised -- we have made a
20 revised filing which we have labeled here as
21 Exhibit 7 which is a Revised Petition which
22 contains all the information in the prior filings
23 along with revised exhibits and Exhibit C and D.

24 Exhibit C is actually the breakdown of the
25 costs for the various parties for whom costs were

1 incurred. And then Exhibit D runs the sum of those
2 costs through a calculation that adds the interest,
3 subtracts the cost from the net recovery. So
4 Mr. Decker will go through those numbers, but this
5 Exhibit C does outline the various parties for
6 which costs were incurred.
7

8 COMMISSIONER SCHOENFELDER: Well,
9 but the difference is some of them went up, some of
10 them went down from the original filing, and I want
11 to know if I'm going to get an explanation of
12 those.
13

14 MR. DIETRICH: Yes.

15 COMMISSIONER SCHOENFELDER: Then I
16 want to know -- because I thought the Petition was
17 Mr. Green's, but if that's what he's testifying
18 to --
19

20 MR. DIETRICH: Well, we have two
21 witnesses for Northwestern. Mr. Green was the
22 party who was familiar with the facts of the
23 negotiations, arbitration process. The cost data
24 was actually put together in conjunction with
25 counsel.

26 COMMISSIONER SCHOENFELDER: Okay.
27 So the questions I have about the footnote on
28 Exhibit C, I can save those for Mr. Decker too?
29

1 MR. DIETRICH: Yes. I think
2 Mr. Green may be able to answer a question with
3 regard to the footnote.

4 COMMISSIONER SCHOENFELDER: Well, it
5 just says first they paid -- I don't understand. I
6 simply don't understand the footnote, actually
7 contributed 13.3 percent representing its share of
8 the 75 percent interest Coyote but obviously have
9 10 percent ownership.

10 Is that because of MDU being in and then out?

11 THE WITNESS: That's correct.
12 That's out and then in. That's correct.

13 COMMISSIONER SCHOENFELDER: That's
14 what I wanted to know. Thank you.

15 MS. AILTS WIEST: Your Exhibit C
16 does not contain any in-house attorneys expenses at
17 all; correct?

18 THE WITNESS: No. That's correct.

19 MS. AILTS WIEST: Any other
20 questions of this witness?

21 CHAIRMAN BURG: Probably an
22 explanation I might want then. You don't include
23 any in-house attorneys fees, but do you have some
24 travel expenses?

25 THE WITNESS: That's correct.

CHAIRMAN BURG: Those would be direct costs? Could that include some of attorney travel?

THE WITNESS: Yes, it would. But it was directly related to this arbitration case.

CHAIRMAN BURG: In other words, you had to fly to someplace.

THE WITNESS: That's correct.

MS. AILTS WIEST: Northwestern is not actually asking for any waivers of any tariffs; is that correct?

THE WITNESS: That's correct.

MS. AILTS WIEST: You believe that it's allowable under the tariff as long as the Commission has given its approval for that?

THE WITNESS: I believe that would be correct, yes.

MR. DIETRICH: I guess maybe it's a legal theory, but it's actually our position that our tariff doesn't speak to a situation of a damage award such as this as opposed to an ongoing change in fuel which we automatically were flowing through.

So what we're asking for is the use of our adjustment clause to credit the damage award,

1 interest less costs through the adjustment clause.
2 Our adjustment clause is set up under its terms as
3 a 12-month process where funds that are added to
4 that are distributed over a 12-month period.

5 As we've discussed with staff in the last few
6 days, we certainly could look -- or consistent with
7 the Commission Order, could use a different time
8 period if the Commission wanted to enter an order
9 that has the same time period of a crediting that
10 the other companies are suggesting. But our
11 adjustment clause by its terms provides for a
12 12-month pass-back.

13 MS. AILTS WIEST: So if the
14 Commission did decide on a different term than
15 12 months, at that point would there need to be
16 some sort of waiver of that tariff language then?

17 MR. DIETRICH: I think the
18 Commission could make a specific Order for the
19 crediting that could take into account any waiving
20 or modification of provisions on an extraordinary
21 basis for this particular proceeding.

22 MS. AILTS WIEST: So it would
23 possibly need some -- my point is you would still
24 be using that tariff, but it wouldn't be the
25 12 months. There would be some exception made to

that tariff. Would that be correct?

MR. DIETRICH: Yes. It would be slightly different than the terms of our tariff. Mechanically we can do it whatever way the Commission feels is appropriate.

MS. AILTS WIEST: Okay. Any other questions of this witness?

MR. DIETRICH: I just had a couple on redirect, if I could briefly.

REDIRECT EXAMINATION

BY MR. DIETRICH:

Q This proceeding that Northwestern and the other parties were involved in was a fairly long drawn-out proceeding?

A Yes. That's correct. In the early '90s we had the negotiating committee that I was a member of involved with this and then those negotiations were unsuccessful and we began the arbitration process which ultimately was filed in 1996 and then, of course, the final award was in 1999.

Q Okay. And a question was asked about the addendum. As a result of the final arbitration award, you did not have the ability to include comparability as an ongoing adjustment mechanism?

A That is correct. The Addendum remains, however, in force, and it can be used again in a similar fashion, I

1 would think.

2 Q Okay. In fact, the parties had requested that the price
3 adjustment mechanism get changed so that comparability
4 would be implemented; is that correct?

5 A That is correct. Unfortunately, that was not contained
6 in the final Order from the arbitration panel.

7 Q Okay. But we do have the Addendum in case we feel price
8 comparability is not there. And again at some point in
9 the future with the pricing provisions as modified the
10 parties could again institute a proceeding to challenge
11 the prices --

12 A That is correct. We will be studying the ongoing cost
13 comparability with other mines in North Dakota to judge
14 whether or not something else should be done in the
15 future.

16 Q Okay. As an overall result, is your company pleased
17 with the results the arbitration was able to bring?

18 A Yes, they were.

19 MR. DIETRICH: Thank you.

20 MS. AILTS WIEST: Speaking about the
21 arbitration, I assume there was a written decision,
22 is that correct, by the arbitrators?

23 THE WITNESS: Yes, there was.

24 MS. AILTS WIEST: Did they make any
25 findings with respect to whether the original, I

think, pricing -- how you decided to come up with the original pricing, whether that was a good idea or not, or was it too vague? Do you remember?

THE WITNESS: They did not change any of the methodology except for some of the individual numerical factors.

MS. AILTS WIEST: So they did accept the actual methodology?

THE WITNESS: That's correct.

MS. AILTS WIEST: Thank you. Any other questions of this witness?

CHAIRMAN BURG: Let me clarify that a little more. If I understand, they determined the factors that were being used were wrong or were those factors applied to do a catchup?

THE WITNESS: I guess I'm not sure what you're referring to in terms of factors.

CHAIRMAN BURG: If I understood the purpose of the Addendum, the purpose of the Addendum was to get a coal price for Coyote Plant to what was similar to a coal price across others. And if that would have functioned properly, there wouldn't have been anything happen.

THE WITNESS: That's correct.

CHAIRMAN BURG: The fact they did

not apply the Addendum the way you felt it should have been applied is what led to this procedure.

THE WITNESS: That's correct.

CHAIRMAN BURG: So what I've been a little confused about, because I've heard of this changing of factor a couple of times, was that because they determined the factors applied in the original Addendum were wrong, or were those factors used to make the necessary adjustment for now?

THE WITNESS: The factors that were changed at the time of the award were done to result in the price of the methodology for what they agreed to be a comparable price, the \$10.20 at that time, and it was just a back calculation, if you will, to get that result.

CHAIRMAN BURG: Would it be accurate to say if they would have applied the Addendum properly, there wouldn't need to be any factor changes?

THE WITNESS: That's correct.

CHAIRMAN BURG: So if this works going forward, the Addendum, it's not to have another reason to sue or to change? The Addendum is to actually set the price right and hopefully you'll never need to do this again? Would that be

accurate?

THE WITNESS: Hopefully, yes.

CHAIRMAN BURG: I was trying to get the relevance of the Addendum to what's happened here. And it looks to me like they didn't apply it the way the purpose was to be intended, and that's what the arbitrators found.

THE WITNESS: That's correct.

CHAIRMAN BURG: Thank you.

MS. AILTS WIEST: Any other questions of this witness?

(No audible response)

MS. AILTS WIEST: If not, you may call your next witness.

MR. GUERRERO: May I ask a question?

MS. AILTS WIEST: I assume you don't have any objection, Mr. Dietrich.

MR. DIETRICH: No.

CROSS-EXAMINATION

BY MR. GUERRERO:

Q Mr. Green, just to clarify, the purpose of the arbitration was to get a fair price for coal at the Coyote Plant; correct?

A That's correct.

1 Q It was the partners' contention prior to the arbitration
2 that the price that Knife River was charging the
3 partners was not fair and reasonable; correct?

4 A That's correct.

5 Q And the arbitration panel adjusted the price and made a
6 ruling that the charge prior to the arbitration by
7 Knife River was not fair and reasonable?

8 A That's correct.

9 Q And the decision by the arbitration panel was meant to
10 ensure a fair and reasonable price for coal?

11 A That's correct. A comparable price at that time.

12 MR. GUERRERO: Thank you.

13 MS. AILTS WIEST: Any other
14 questions?

15 (No audible response)

16 MS. AILTS WIEST: If not, thank
17 you.

18 (Witness excused)

19 MS. AILTS WIEST: Mr. Dietrich.

20 MR. DIETRICH: Jeff Decker.

21 JEFF DECKER,
22 called as a witness, being first duly sworn in the above
23 cause, testified under oath as follows:

24 MR. DIETRICH: May I approach the
25 witness?

MS. AILTS WUEST: Go ahead.

DIRECT EXAMINATION

BY MR. DIETRICH:

Q Would you state your name and position with the company.

A My name is Jeff Decker. I work for Northwestern Public Service, manager of pricing services NEC.

Q Okay. And are you familiar with the cost and related calculations that have been made as part of the filing of the Revised Petition marked as Exhibit 7?

A Yes, I am.

Q Okay. If I could walk you through that exhibit, it has several exhibits within it. Among those, Exhibit C, which highlights the costs incurred. Are these costs all the costs -- are all categories except for the last line item, Northwestern Travel Expenses, these are all out-of-pocket costs for Northwestern's share of the witnesses and attorneys that were hired; correct?

A That is correct.

Q Okay. And the Northwestern Travel Expenses, what is constituted in that item?

A Just the costs related for travel only in relation to this arbitration case. There are no labor costs whatsoever in that \$13,218.22.

Q Okay. These costs represent essentially 10 percent of

1 the costs incurred by the owners related to this case?

2 A Yes. That is right.

3 Q Okay. So the footnote that spoke to the 13.3 actually
4 dealt with billings during the period of time of the
5 case which has now be en reconciled to 10 percent?

6 A Yes. The final result was 10 percent.

7 Q Okay. Turning to Exhibit D which carries forward the
8 costs and also includes other information, what does
9 this particular exhibit portray?

10 A This portrays the final damage award plus interest and
11 in addition to that subtracting out the out-of-pocket
12 costs for Northwestern Public Service resulting in the
13 net refund to the customers both wholesale and retail.

14 Q Okay. Now the interest, there's a line on there that
15 says Plus Northwestern Interest Through April 30, 2000.
16 This was meant to add the cost or the calculation of the
17 interest for the time that Northwestern held the money
18 from the damage award in interest?

19 A That is correct.

20 Q All right. Until April 30, and then that interest would
21 continue to grow until its distributed?

22 A Until the money is passed back to the customer.

23 Q Okay. Do these cost numbers, as you've researched this,
24 accurately reflect the costs actually incurred by
25 Northwestern?

1 A Yes. In my review of the individual invoices these are
2 the costs that I would agree with.

3 Q Okay. And you have shared a copy of all of those
4 invoices with staff?

5 A That is correct.

6 Q The proposal in Exhibit 7 asks for crediting over a
7 12-month period. Is that consistent with Northwestern's
8 adjustment clause?

9 A Yes. Normally we would credit over a 12-month period as
10 we calculate our normal fuel costs. We file on a
11 quarterly basis, February 1, May 1, August 1, and
12 November 1. So that is our normal procedure.

13 As far as if staff and Commission would order
14 us to pass that back in a different time frame, we can
15 sure do that. We've taken a look at that, and whatever
16 their desire would be, we could pass that back in that
17 manner.

18 Q Okay. And I guess I'd like to back up to a couple of
19 other things. The damage award amount itself that
20 Northwestern received, is that based just upon a
21 percentage of ownership, or is it based on another
22 calculation?

23 A The damage award we received is based on, I believe, the
24 amount of usage we had at that time, the usage of the
25 plant.

1 Q So it's based on the actual generation that Northwestern
2 did during the period of time that the damages were
3 calculated?

4 A Right.

5 Q Okay. And the allocation of the wholesale and retail
6 portions for Northwestern, how was that calculated?

7 A That was derived by the volumes used on wholesale versus
8 retail.

9 Q Okay. And that's shown on Exhibit B of our Petition; is
10 that correct?

11 A That is correct. And as you can see, retail ends up
12 with over 99 percent of this award.

13 Q Okay. And with regard to the wholesale portion, what is
14 Northwestern proposing to do there?

15 A I'm not sure. I would assume we would pass that back as
16 well as the retail.

17 Q But that would be under a tariff subject to the Federal
18 Energy Regulatory Commission?

19 A Okay. Correct.

20 Q Okay. There's no allocation of any internal labor force
21 for any of the cost calculations for Northwestern?

22 A That's right. There is none.

23 Q Okay. So essentially Northwestern is passing back the
24 damage award in interest less its out-of-pocket costs
25 complete?

1 A Yes. Only the direct costs related to this case.

2 Q Okay. I would like to offer Exhibit 7, which is the
3 May 9 Revised Petition. I don't think it's necessary to
4 offer the prior filings because they were all
5 incorporated into this with the revised numbers, and I
6 think it would avoid some confusion in having numbers --
7 essentially, Mr. Decker, this filing shows the largest
8 pass-through, total pass-through, of the three filings
9 Northwestern made; correct?

10 A To the customers' benefit.

11 MR. DIETRICH: Thank you. No
12 further questions.

13 MS. AILTS WIEST: Is there any
14 objection to Exhibit 7?

15 MR. HOSECK: No objection.

16 MS. AILTS WIEST: If not, it's
17 admitted. Mr. Gerdes, Mr. Guerrero, do you have
18 any questions of this witness?

19 MR. GERDES: None.

20 MR. GUERRERO: Before I do, I would
21 note for the record Otter Tail and I would imagine
22 the other partners here as well would offer the
23 actual arbitrator's decision.

24 There were actually two decisions in this
25 matter. For the record for the purposes of

1 convenience and clarification, we can make those
2 available. I have copies here today. I just don't
3 have enough of them at the moment.

4 MS. AILTS WIEST: There would be two
5 of those?

6 MR. GUERRERO: Two decisions.

7 MS. AILTS WIEST: Can we mark those
8 Exhibit 8 and 9?

9 MR. DIETRICH: I have no objection
10 to that information being presented to the
11 Commission pursuant to a Commission Order.
12 However, one of the reasons we've been fairly vague
13 in some of the information is there's a
14 Confidentiality Agreement which prohibits the
15 sharing of some of the detailed information from
16 that proceeding other than as required by law.

17 But if the Commission would order those
18 documents would be provided, then I think that
19 would be appropriate. I have the terms of the
20 Confidentiality Agreement that I can share with
21 Counsel today.

22 MR. GUERRERO: I'll adjust my offer
23 accordingly. That's correct. Mr. Dietrich is
24 correct.

25 MR. GERDES: I would think we would

1 want to offer it as a confidential document, both
2 documents as confidential documents, to be held
3 under the Commission's rules as such.

4 (Exhibits 8 and 9 are marked for identification)

5 MS. AILTS WIEST: Okay. Is there
6 any objection to receiving Exhibits 8 and 9 which
7 would be two arbitration decisions or agreements,
8 and we would receive them as confidential?

9 MR. HOSECK: No objection.

10 MS. AILTS WIEST: If not, Exhibits 8
11 and 9 are received.

12 MR. GUERRERO: I have a few
13 clarification questions. Hopefully, maybe the
14 confusion was created by Otter Tail in this case.

15 CROSS-EXAMINATION

16 BY MR. GUERRERO:

17 Q I want to ask you briefly about the award. I believe
18 your Counsel asked you about the basis of that award
19 from the arbitration, 5.8 million in total. Part of
20 that, which was allocated to Northwestern, as it was the
21 other partners; correct?

22 A That's correct.

23 Q The basis of that allocation was not made on the basis
24 of ownership of the Coyote Plant; correct?

25 A That's right.

1 Q It was made on the amount of fuel that's allocated to
2 each of the partners in the plant; correct?

3 A Yes.

4 Q It's a fairly complicated allocation. Would that be a
5 true statement?

6 A I'm not familiar with the details of that calculation.

7 Q Okay. The amount of coal burned by each of the partners
8 or that's allocated to each of the partners' native load
9 customers or retail customers may or may not be
10 different from it's actual ownership percentage;
11 correct?

12 A That is correct.

13 MR. GUERRERO: No further
14 questions. Thank you.

15 MS. AILTS WUEST: Mr. Hoseck?

16 MR. HOSECK: No questions.

17 CHAIRMAN BURG: I have a couple of
18 quick ones.

19 Do you know if all the companies allocated
20 expenses or calculated expenses the same as you
21 did?

22 THE WITNESS: I guess I'm not sure.

23 CHAIRMAN BURG: I'm not sure if
24 you'd have to know that, but if you did, I was just
25 asking you. Okay. And I think I had the other

1 question was on whether everybody was allocated on
2 the basis of their share of fuel. That was just
3 answered.

4 COMMISSIONER SCHOENFELDER: I hate
5 to keep beating this dead horse to death but you
6 have three Exhibit Cs before me and there were some
7 significant changes in some of those numbers.

8 Can you explain why some of them went up and
9 some went down in your final Exhibit C?

10 THE WITNESS: I reviewed the numbers
11 that you see in the final exhibit, and in the
12 process of my review I had seen that some expenses
13 that were categorized in one column needed to be in
14 another. There was some inadvertent
15 categorization.

16 So, for instance, some numbers that were
17 listed as one expert witness, one's consultant's
18 fees should have been in a different category. So
19 that's why those columns went up and down. I
20 believe that the final fees, the total, is not
21 significantly different between the exhibits. It's
22 just the classification between witness columns.

23 COMMISSIONER SCHOENFELDER: Okay. I
24 can accept that. But then I think for my comfort
25 level, if there is such a thing, as from

1 Price Waterhouse, the total bill -- so if anyone
2 has a document that says this is a total bill from
3 Price Waterhouse and Northwestern's is \$18,000 and
4 Otter Tail's is a different number and MDU's is a
5 different number, do you have that document
6 available?

7 It's very important to me that I know what the
8 total number of one of these bills would be.

9 THE WITNESS: What I have is
10 individual invoices, and so I could go through --

11 COMMISSIONER SCHOENFELDER: Was that
12 individual invoice made out to Northwestern Public
13 Service as their proportion, or was it the total of
14 all four?

15 THE WITNESS: It was the total of
16 all four, and then I took 10 percent of that total
17 to come up with the numbers that are before you.

18 COMMISSIONER SCHOENFELDER: Is it
19 possible to see those, to produce those?

20 THE WITNESS: Yes. I believe we
21 can.

22 MR. DIETRICH: We have produced
23 those with staff.

24 COMMISSIONER SCHOENFELDER: Okay.
25 But I don't.

1 MR. DIETRICH: We can certainly
2 provide that information. A complicating factor is
3 that the expert witnesses' fees are all rolled into
4 the Donelan, Cleary Law Firm bills because they
5 retained those firms on behalf of us. And so in
6 their billings it includes all four of those expert
7 witness --

8 COMMISSIONER SCHOENFELDER: Counsel,
9 you understand I need to be comfortable we're not
10 paying double at some point in time or the consumer
11 is not.

12 MR. DIETRICH: I understand. That's
13 why we wanted to give the detail both in the
14 breakdown on this exhibit and in work papers, and
15 we can certainly share those work papers.

16 COMMISSIONER SCHOENFELDER: I just
17 need a comfort level that that's what's happening.
18 Thank you.

19 MS. AILTS WIEST: You stated and it
20 was in your Petition that damages are based on
21 usage, not ownership, and allocation fees are based
22 on ownership; correct?

23 THE WITNESS: That's correct.

24 MS. AILTS WIEST: Is there any
25 reason why you wouldn't use the same percentage?

1 both?

2 THE WITNESS: I guess I understand
3 fully why we would use usage to allocate the
4 award. As far as using usage to allocate the
5 percentage of expense, that may be a reasonable
6 approach.

7 MS. AILTS WIEST: What was your
8 percentage of usage?

9 THE WITNESS: That, I am not sure
10 of. Possibly Witness Green would have that number.

11 MS. AILTS WIEST: And do you know
12 the allocation of fees based on ownership, was that
13 because of an agreement among a Complainant? Is
14 that your understanding, or don't you know?

15 THE WITNESS: I don't know that.

16 MS. AILTS WIEST: You're not aware
17 that the arbitrator set any of those damage
18 wards -- I mean, allocation of cost?

19 THE WITNESS: No. I'm not familiar
20 with that.

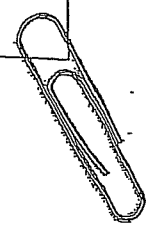
21 MS. AILTS WIEST: Mr. Dietrich, is
22 there somebody that could answer that question for
23 me?

24 MR. DIETRICH: Yeah. I think
25 Mr. Green can.

Continuation

2-A

of pages



1 MS. AILTS WIEST: Do we have anymore
2 questions of this witness?

3 (No audible response)

4 MS. AILTS WIEST: If not, thank
5 you.

6 (Witness excused)

7 MS. AILTS WIEST: Perhaps we could
8 call Mr. Green back.

9 MR. DIETRICH: That would be fine.
10 If I could ask him a couple of introductory
11 questions, it might help explain this.

12 MS. AILTS WIEST: Go ahead.

13 DIRECT EXAMINATION

14 BY MR. DIETRICH:

15 Q Mr. Green, when the negotiations process began parties
16 at that time determined how they would share the costs
17 going forward; is that correct?

18 A Well, actually the mechanism of our ownership agreement
19 among the parties, the only mechanism in that agreement
20 is to share the out-of-pocket costs, if you will, on an
21 ownership basis.

22 There's a separate section in the ownership
23 agreement that talks about allocating fuel cost on a
24 usage basis. So that's where the two distinctions, cos
25 on ownership basis and that is operating costs other

1 than fuel ownership basis, fuel cost on usage basis.

2 Because it can make a big difference in the cost to the
3 owners if we did it some other way.

4 Q Okay. Based upon Northwestern's 10 percent ownership
5 share, how is that share -- how is that compared to our
6 percentage of the damages that we received?

7 A The usage of the plant during that period of time I
8 don't have the exact number, but I would estimate it's
9 somewhere above 10 percent, perhaps about 11 percent or
10 so of the total usage during that period of time. So
11 your share of the damages to our retail customers should
12 represent something larger than ownership share.

13 Q Okay.

14 MR. DIETRICH: Does that --

15 MS. AILTS WIEST: Just a couple. Do
16 you know then -- I guess your point is is that the
17 10 percent and 11 percent were fairly comparable
18 percentages, usage and the amount?

19 THE WITNESS: Yeah.

20 MS. AILTS WIEST: Do you know if
21 that's true for MDU and Otter Tail?

22 THE WITNESS: I'm not familiar with
23 their exact numbers, no.

24 MS. AILTS WIEST: You're not. And
25 you referenced -- was there ever any separate

agreement when the parties -- I assume they decided perhaps as a group to go forward with this litigation as to how expenses would be shared, or was it entirely based on your prior ownership agreement?

THE WITNESS: Ownership agreement defines the cost sharing allocation.

MS. AILTS WIEST: That clause you spoke of, out-of-pocket cost, did that specifically reference litigation expenses?

THE WITNESS: I guess I'm not sure if it specifically states that. Essentially it's all operating costs other than fuel.

MS. AILTS WIEST: All operating costs other than fuel?

THE WITNESS: Well, labor costs, for example, at the power plant, miscellaneous materials necessary to run the power plant. Those kinds of costs are shared on an ownership basis.

MS. AILTS WIEST: So you considered that litigation expenses were part of operating costs other than fuel?

THE WITNESS: That's correct.

MS. AILTS WIEST: Thank you. Any other questions of this witness?

CHAIRMAN BURG: Just one that may not be directly pertinent to the case. How does the fuel cost compare to the amount of power taken from the plant?

THE WITNESS: I guess I'm not sure --

CHAIRMAN BURG: Well, I first thought to me it would be allocated -- I can see where the damages would be allocated, I would say, compared to the power taken from the plant.

THE WITNESS: Yes. It's a little complicated, but, yes, basically the amount of power taken is directly correlated to the amount of fuel burned.

CHAIRMAN BURG: I was just curious if that was a direct correlation or not.

THE WITNESS: It is very close to direct. There is efficiency gains as the unit is loaded more heavily. A party who loads it heavier may get a little more efficiency out of the amount of fuel.

CHAIRMAN BURG: That's all. Thank you.

MS. AILTS WIEST: Any further questions of this witness?

REDIRECT EXAMINATION

BY MR. DIETRICH:

Q Maybe we're beating this to death. As we went forward and hired the Donelan firm to move forward with the arbitration case essentially Otter Tail, Minnkota, and Northwestern agreed to fund their fees 100 percent without MDU reserving later to recover those expenses from MDU at the conclusion?

A Yes. That's correct.

Q Okay. So at that time we shared it at this slightly higher percentage?

A Our share was 13.3, of course, to cover our share of their share.

Q Okay. Until a damage award was received you had no idea of how the fuel use would be?

A No.

Q So it was just a mechanism to share the cost on a going-forward basis, and these invoices were paid during the pendency of the proceedings and other steps from 1995 to '99?

A That's correct.

MR. DIETRICH: Thank you.

MS. AILTS WUEST: Any other questions of this witness?

(No audible response)

MS. AILTS WIEST: Thank you.

(Witness excused)

MS. AILTS WIEST: Do you have any further witnesses, Mr. Dietrich?

MR. DIETRICH: No, I do not.

MS. AILTS WIEST: Mr. Guerrero, is it possible to call one of your witnesses to state what the percentage of usage was that you received?

MR. GUERRERO: Sure.

MS. AILTS WIEST: Which witness would that be?

MR. GUERRERO: That would most likely be Mr. Bowman, if he knows the answer to that question, Counsel.

Mr. Bowman, could you please take the stand.

(Mr. Bowman takes the stand)

MR. GUERRERO: You've already been sworn.

MS. AILTS WIEST: Do you know that, Mr. Bowman?

THE WITNESS: I don't know what the exact percentage is. It is relatively close to the ownership percentage.

MS. AILTS WIEST: Relatively close?

THE WITNESS: Yes. Within a few percent at the most.

MS. AILTS WIEST: Okay. Thank you. I guess at this point it's 10 to 12:00. Did the Commissioners want to take a break at this point?

CHAIRMAN BURG: I think we just as well. It will take you awhile with your portion, will I not?

MS. AILTS WIEST: And we have MDU left. Do you want to come back at 1:00 or what time?

CHAIRMAN BURG: That sounds all right with me.

MS. AILTS WIEST: We'll be back at 1:00.

(A lunch break is taken from 11:50 p.m. to 1:00 p.m.)

MS. AILTS WIEST: I believe, Mr. Gerdes, you may call your first witness.

MR. GERDES: MDU calls Don Ball.

DONALD R. BALL,
called as a witness, being first duly sworn in the above cause, testified under oath as follows:

DIRECT EXAMINATION

BY MR. GERDES:

Would you state your name, please.

2 A My name is Donald R. Ball.

3 Q Where do you reside?

4 A I live in Bismarck, North Dakota.

5 Q What is your occupation?

6 A I'm employed by Montana-Dakota Utilities Company as the
7 director of regulatory affairs.

8 Q What's your educational background?

9 A I hold a B.S. Degree in business administration with an
10 accounting emphasis from Black Hills State University,
11 Spearfish, South Dakota.

12 (Exhibit 10 is marked for identification)

13 Q Mr. Ball, I'll show you what has been marked as
14 Exhibit 10 and ask you what that is.

15 A Exhibit 10 is our filing with this Commission dated
16 February 9, 2000.

17 (Exhibit 11 is marked for identification)

18 Q And then I'll show you Exhibit 11, and I'll ask you to
19 identify that.

20 A Exhibit 11 is an Amended Attachment A, which was
21 attached to our filing February 9. It reflected a
22 correction in the amount of arbitration costs that were
23 billed.

24 It was discovered that one of the invoices
25 rendered was in error, and this simply reflects the
corrected invoice received. And in addition on the

1 Amended Attachment A we have included the approximate
2 allocation to our South Dakota retail customers.

3 MR. GERDES: Your Honor, copies of
4 these two exhibits have been distributed to the
5 Commissioners and to Counsel. We'll offer
6 Exhibits 10 and 11.

7 MS. AILTS WIEST: Any objection?

8 MR. HOSECK: No objection.

9 MS. AILTS WIEST: If not, they're
10 received.

11 Q Mr. Ball, would you please state MDU's position on its
12 request for relief in this docket.

13 A In this case Montana-Dakota has sought approval of a
14 waiver of our fuel clause under our Rate No. 58. We
15 seek the waiver to allow the pass-through through our
16 fuel clause mechanism of the arbitration costs that have
17 resulted in the savings to our retail customers.

18 Now although Montana-Dakota was not a party to
19 this arbitration, our retail customers will receive the
20 same benefit as if Montana-Dakota had been a party to
21 this arbitration. Knife River, after the arbitration
22 decision, remitted the proper dollar amounts to
23 Montana-Dakota for pass-through to Montana-Dakota's
24 retail customers.

25 We paid approximately \$416,000 in arbitration

costs related to retail operations. These costs were billed by the Coyote operator for Montana-Dakota's 25 percent ownership of the Coyote station. We believe it is proper to net the incurred costs of this arbitration against the savings in fuel costs.

We think that, you know, absent this costly arbitration proceeding that the net savings would not have materialized and that there is certainly a direct cause and effect here. We believe that granting the waiver that we've sought will be in the public's interest.

First of all, the customers will benefit from the pass-through of a rather substantial credit, and they also benefit by the ongoing coal price reduction. Montana-Dakota's and its shareholders' interests will be upheld through the ability to recover the costs incurred in obtaining those benefits for the retail customers.

The total net benefit applicable to our retail electric customers is \$2,742,000. That figure is shown on the Amended Attachment A, which I believe is Exhibit 11. For Montana-Dakota there is also an amount related to the Heskett Station. The Heskett Station coal prices -- while under their own coal purchase contract the prices that Heskett were tied to, the prices at Coyote and, therefore, the arbitration result

1 was sought from and obtained from Knife River.

2 So in our case there is an additional benefit
3 other than the arbitration award related to Coyote. The
4 arbitration award related to Heskett as well. And
5 Montana-Dakota does own 100 percent of the
6 Heskett Station.

7 We would propose to include the \$2,742,000 net
8 benefit in the first fuel adjustment filing following
9 the issuance of an Order granting our waiver. The
10 approximate amount of the net benefit applicable to our
11 South Dakota electric retail customers is \$185,000. I
12 believe Exhibit 4 shows about \$184,000. Or Exhibit 11.
13 I'm sorry.

14 We have agreed through discussions with your
15 staff to pay interest on net benefit amount at the rate
16 of interest for three-month treasury bill as published
17 monthly by the Federal Reserve Board until such time as
18 a credit is reflected in bills to our customers. We
19 received payment from Knife River on February 28, 2000.

20 And, of course, in addition to the immediate
21 benefit that we would propose to include in our next
22 fuel adjustment filing, there is the ongoing price
23 reduction which for our portion Coyote should amount to
24 about \$519,000 per year. That concludes my direct
25 remarks.

MR. GERDES: No further questions.

MS. AILTS WIEST: Mr. Guerrero, any

questions?

MR. GUERRERO: None.

MS. AILTS WIEST: Mr. Dietrich?

MR. DIETRICH: No.

MS. AILTS WIEST: Mr. Hoseck?

MR. HOSECK: No.

MS. AILTS WIEST: Commissioners?

COMMISSIONER NELSON: I have one.

Why did you pay in protest?

THE WITNESS: Why did we pay in protest? We were billed for the arbitration costs, and because we had been dismissed from the arbitration by the arbitration panel, we paid the arbitration costs under protest.

If you look at the Coyote operating agreement if one of the owners does not pay, then that owner could be subject to not being able to schedule its capacity in energy from the unit. So in accordance with the agreement, we paid under protest. That's kind of a long answer to a short question.

COMMISSIONER NELSON: Well, everyone else was thinking they were paying too much for their product. Why weren't you concerned about

1 that?

2 THE WITNESS: We were concerned
3 about that. You know, we --

4 COMMISSIONER NELSON: But they were
5 willing to go to court, and you weren't.

6 THE WITNESS: If you look at the way
7 that this happened, we were named as an initial
8 party in the arbitration. However, the other
9 owners of Coyote demanded arbitration against
10 Knife River and MDU, and the demand indicated that
11 because MDU Resources owns Knife River that MDU had
12 a conflict of interest in furthering the buyers'
13 interest in the arbitration.

14 Subsequently MDU sought to be removed from the
15 arbitration process. The arbitrator agreed with
16 that because the Coal Purchase Agreement called for
17 arbitration between the buyers of the coal and the
18 seller of the coal. It did not contemplate
19 arbitration among the owners of Coyote.

20 COMMISSIONER NELSON: Thank you.

21 CHAIRMAN BURG: Just one. I believe
22 you mentioned that you have agreed to pay interest
23 up until the time the funds are disbursed.

24 THE WITNESS: That is correct. Our
25 initial filing did not address that.

1 CHAIRMAN BURG: That was going to be
2 my question. It was not in your initial filing.
3 That is an agreement that's been reached with
4 staff?

5 THE WITNESS: That's right.

6 MS. AILTS WIEST: Any other
7 questions?

8 I just had a couple. Damages were based on
9 usage. What was your usage, or what was the
10 percentages?

11 THE WITNESS: Well, approximately
12 25 percent.

13 MS. AILTS WIEST: Approximately 25.

14 THE WITNESS: As we've talked about
15 here with other witnesses, fuel itself is allocated
16 based upon the actual use by the various owners.

17 In looking at our particular situation, my
18 analysis indicated that based on the fuel usage
19 type, we were very close to our 25 percent
20 ownership interest. I don't think it was more than
21 1 percent off either way.

22 MS. AILTS WIEST: And then I believe
23 you were here when Otter Tail was testifying and
24 you stated that the South Dakota portion on your
25 Exhibit 11 Interconnected System Percentage of

1 Kilowatt Hour Sales, does that differ from how
2 Otter Tail came up with their portion of
3 South Dakota, or do you know?

4 THE WITNESS: I guess I don't know.
5 I heard reference to an energy factor.

6 MS. AILTS WIEST: Right. In 1998.
7 Could you explain what yours is in any more
8 detail?

9 THE WITNESS: Ours is based on
10 kilowatt hour sales to retail customers.

11 MS. AILTS WIEST: Any other
12 questions?

13 CHAIRMAN BURG: I have one
14 additional. Do the four owners of the company --
15 there is four; right?

16 THE WITNESS: There is four of the
17 station, yes.

18 CHAIRMAN BURG: Do they take
19 100 percent of the power?

20 THE WITNESS: I think generally the
21 do.

22 CHAIRMAN BURG: Do you ever have
23 excess power? Do they sell off outside of the fo
24 owners?

25 THE WITNESS: Well, in our case

1 you've seen about 22 percent of our use has been
2 for what we call pool sales. These are simply
3 opportunity sales in the pool.

4 I guess to the extent Coyote is up and
5 running, I think most of the owners will try to
6 schedule all of the power available to them.

7 CHAIRMAN BURG: Because what I was
8 getting at is if there's ever surplus generation
9 that's sold off, how is that allocation of the fuel
10 supply and also the sales -- and does that even
11 become a factor --

12 I mean, I can see two ways of doing it. One
13 is if you have excess capacity and can sell into
14 the grid, that you can do that and share the income
15 from it. Or the other one is individual companies
16 take their share, and then they would sell whatever
17 surplus there would be.

18 And I was wondering how that's handled,
19 whether that even becomes a factor in something
20 like this.

21 THE WITNESS: I'm pretty sure it's
22 the latter situation where each owner probably
23 schedules its own availability. In our case we own
24 25 percent so we will take our 25 percent
25 interest. We may be in a situation where we might

1 be able to make an opportunity sale in the pool.
2 Otter Tail may be in a different situation where
3 they need that for their retail load.

4 CHAIRMAN BURG: But we did hear an
5 indication at some times at certain times a company
6 may take more than their ownership share in power.

7 THE WITNESS: And I think that can
8 happen from time to time. But in looking, I did a
9 year and a half or almost two-year period, it
10 averaged out at least in our case very close to our
11 ownership percentage.

12 CHAIRMAN BURG: Okay.

13 MS. AILTS WUEST: And then just
14 getting back to your kilowatt hour per sales
15 percentage, was that based upon a particular time
16 period, that percentage?

17 THE WITNESS: Actually I think we
18 looked at -- let me double-check the year here. I
19 believe the -- well, the 6.7 percent, which is the
20 ratio, our South Dakota retail customers to our
21 system, was equally applicable in both '98 and
22 '99. It just doesn't change that much.

23 MS. AILTS WUEST: Okay. Thank you.
24 Any redirect, Mr. Gerdes?

25 MR. GERDES: I have none.

1 MS. AILTS WIEST: Any further
2 questions of this witness?

3 (No audible response)

4 MS. AILTS WIEST: If not, thank
5 you.

6 (Witness excused)

7 MS. AILTS WIEST: Do you have any
8 other witnesses?

9 MR. GERDES: We have no further
10 witnesses.

11 MS. AILTS WIEST: Mr. Hoseck?

12 MR. HOSECK: I would call
13 Michele Farris to the stand, please.

14 MICHELE FARRIS,
15 called as a witness, being first duly sworn in the above
16 cause, testified under oath as follows:

17 DIRECT EXAMINATION

18 BY MR. HOSECK:

19 Q Would you state your name for the record, please.

20 A Michele Farris.

21 Q And what is your job?

22 A I'm a utility analyst with the Public Utilities
23 Commission.

24 Q How long have you been there?

25 A Approximately a year and a half.

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1 Q What is your educational background?

2 A I have a Bachelor of Science Degree in mechanical

3 engineering from South Dakota State University and a

4 Master's of Science Degree in civil engineering from the

5 University of Colorado.

6 Q Do you hold any professional designations?

7 A I'm a registered professional engineer in the

8 State of South Dakota.

9 Q And would you just briefly tell the Commissioners what

10 your work experience has been since you graduated from

11 college.

12 A I worked approximately four years for an aerospace firm

13 in Denver, Martin Marietta & Associates, and then I

14 worked for two years as an engineering consultant in

15 environmental engineering for Applied Environmental in

16 Denver and I took a job with the Department of

17 Environment and Natural Resources in South Dakota and

18 worked for them approximately six years.

19 Q And are you familiar with the cases that we've been

20 discussing here today in the hearing room?

21 A Yes, I am.

22 Q And were you assigned these dockets, and I'll shorten up

23 the numbers but it's EL-002, 03, and 09?

24 A Yes, I was.

25 Q Okay. Just generally would you describe what these

1 dockets attempt to accomplish.

2 A EL00-002 is a Petition from Otter Tail Power to be
3 allowed to net out their litigation expenses from the
4 refund and pass it through the Fuel Adjustment Clause.
5 EL00-003 was a Petition from Montana-Dakota Utilities to
6 also net out the litigation expenses and pass the refund
7 through the Fuel Adjustment Clause. And EL00-009 was
8 the Petition from Northwestern Public Service.

9 Q And did that have a similar objective?

10 A Yes, it did.

11 Q Would you just briefly describe the work that you did in
12 processing these dockets?

13 A Originally, 002 and 003, the Otter Tail and MDU dockets,
14 came in first. I reviewed those dockets and put a data
15 request together and sent it out asking questions and I
16 notified Northwestern Public Service of what I was
17 looking for in the docket prior to their filing and then
18 they filed their docket.

19 Q In addition to the formal data requests that you made,
20 did you have verbal conversations with representatives
21 of all three of these utilities in the process of
22 working on these dockets?

23 A Yes, I did.

24 Q And did you research the heating and cooling degree
25 days?

1 A Yes. I went out to the National Oceanic and Atmospheric
2 Administration website and got some information for the
3 State of South Dakota on what the cooling degree day
4 high months were and what the heating degree day months
5 were.

6 Q And did the companies provide examples of how the
7 distributions were proposed to be made?

8 A Yes, they did.

9 Q And did you do any calculations or any further
10 investigation into those figures?

11 A I just verified the costs that were presented and
12 calculated the -- ran the numbers myself.

13 Q Generally now with regard to Otter Tail Power's Petition
14 in this matter would you describe what information they
15 furnished to you.

16 A Could you state that again.

17 Q In other words, what information did Otter Tail Power
18 provide to you just in a general sense?

19 A They provided an example calculation of how they would
20 use the Fuel Adjustment Clause. They provided the
21 future benefit to the consumers based on the arbitration
22 agreement and they also provided the summary of their
23 expenses.

24 Q And was similar information provided by MDU and
25 Northwestern?

1 A Yes, it was.

2 Q Okay. I'm going to show you what has been marked as
3 Exhibit A. Would you identify that document for the
4 record, please.

5 A It's an Exhibit that I prepared that summarizes the
6 information contained in the three filings.

7 Q And this would be information that was furnished to you
8 through the processes of discovery and with the filings
9 from the three utilities that we're visiting about here
10 today; is that correct?

11 A That's correct.

12 Q I'm going to ask you to go through Exhibit A and explain
13 to the Commissioners what this document shows.

14 A Okay. The first line, the damage award, shows the
15 amount that each of the three companies received.
16 You'll see there's an asterisk that indicates it does
17 not include any of the interest. I left the interest
18 that is accruing now off to keep the exhibit the same.
19 Because the interest would be accruing as we wait. And
20 also you'll see that on Montana-Dakota Utilities its
21 asterisked to show it's the Coyote Plant as well as the
22 Heskett Station.

23 Then below that I show that on September 1 of
24 1999 is when Otter Tail Power and Northwestern Public
25 Service Company received their award, and on February 28

1 of 2000 is when Montana-Dakota Utilities received their
2 award. There was also interest that was received by
3 Otter Tail Power Company and Northwestern Public
4 Service, and that was received on 12-21 of '99.

5 Further down there's the litigation expenses
6 incurred by each of the three companies and on
7 Montana-Dakota Utilities there's an asterisk and that's
8 to indicate that that also -- this was what was in their
9 filing, and it included the amount that was paid to
10 Northern Municipal Power Agency.

11 Underneath Litigation Expense is the amount
12 that MDU reimbursed to Otter Tail Power Company and
13 Northwestern Public Service Company. Then the portion
14 that's retail sales, the portion that's wholesale sales,
15 and then the percentage of the customer base that's in
16 South Dakota for each of the three companies.

17 MR. HOSECK: At this time I would
18 move Exhibit A into evidence.

19 MS. AILTS WIEST: Any objection?
20 (No audible response)

21 MS. AILTS WIEST: If not, it's been
22 received.

23 Q In looking at Exhibit A, would you explain MDU's damage
24 award in how that is different from the other
25 utilities.

1 A MDU's damage award includes \$2,373,711 for the
2 Coyote Plant and an additional \$1,695,876 for the
3 Heskett Station. And, as Mr. Ball testified, they own
4 100 percent of the Heskett Station, and that facility
5 operates under the same coal contract.

6 Q Okay. And also in the MDU column there would you
7 reconcile the amounts under the category reimbursed from
8 MDU in the amount of litigation expense.

9 A MDU paid to Otter Tail \$250,930. They paid to
10 Northwestern Public Service Company \$70,775. And they
11 paid to Northern Municipal Power Agency \$214,470.

12 Q In your dealing with these cases, what was your
13 understanding of Otter Tail Power's role in the
14 litigation generally?

15 A My understanding is that Otter Tail was the lead
16 company. There's one thing I would like to point out.
17 The difference on the numbers that you heard Mr. Ball
18 testify to are different than what I have here because
19 I -- I put them back up to the total award, not the
20 retail portion.

21 I wanted to show the three companies equally.
22 And his numbers were based on the 77.6 percent being
23 retail.

24 Q Is there anything further that you would like to explain
25 about this exhibit?

1 A I don't believe so.

2 Q Okay. I've shown you what has been marked as
3 Exhibit B. Would you identify that for the Commission,
4 please.

5 A This is an exhibit I put together to summarize the three
6 companies and how the refund calculation would be
7 calculated for each of them.

8 Q Would you go through Exhibit B, each of the categories
9 of numbers here, and explain to the Commissioners where
10 they came from.

11 A Okay. Line 1 is the total damages that were awarded to
12 each of the companies. And, there again, that doesn't
13 include any of the interest that's accruing. Line 2 are
14 the company request litigation expenses for each of the
15 three companies. Line 3 is just the difference between
16 the total damage award and subtracting off the
17 litigation expenses to come to a net damage award.

18 Line 4 is the percentage of retail sales that
19 are included in the Fuel Adjustment Clause. Line 5
20 would be the total refund to the retail customers.
21 Line 6 is the percentage of the customer base in
22 South Dakota, and line 7 is just a calculation to show
23 the total amount that would be refunded to South Dakota
24 customers.

25 Q Now earlier in the proceedings there was a stipulation

entered into between the staff and Otter Tail Power on the record with regard to the removal some \$139,635.

Would you explain to the Commissioners the origin of that figure? In other words, where did the \$139,635 come from?

A When I was reviewing the three different files I noticed that the numbers did not tie out and there was \$103,075 that Otter Tail was asking for in their litigation expenses that was not shared by the other owners of the company.

And Otter Tail has agreed to remove those costs. There was approximately \$33,000 in Otter Tail Power labor that is not included and approximately \$3,300 of miscellaneous expenses for a total of 139.

Q Now is that \$139,635 factored into Exhibit B?

A Yes, it is. This exhibit was done under the knowledge that Otter Tail was going to agree to remove those. So if you look at Exhibit A under Otter Tail Power Company, litigation expenses, the \$1,101,235, that would be the difference between what they had filed and the 139,000.

Q Now are any of the litigation costs, as you have adjusted them in Exhibit B and in these dockets, were any of those recovered by these three utilities in any rate cases?

A No. The last time any of these companies were in for a

rate case was in the latter part of 1980, and these would not have appeared in the test case, test year.

Q Based on your analysis of this, would you deem these costs to be extraordinary events?

A Yes.

Q And why?

A Because they did not occur during the test year for the rate cases.

Q And is it true that they would not be an ongoing expense?

A That's correct.

Q Were the litigation costs in these dockets as you have adjusted them in direct relation to the delivered cost of fuel used in the generation of electricity by these three utilities?

A In my opinion it is.

Q And how much was the cost of coal reduced by this arbitration?

A I have to get my sheet out. I can't remember. In the fourth quarter of 1996 the delivered cost was \$11.53, and the panel determined the cost to be \$9.83. For 1997 it went from \$11.61 to \$9.83. In 1998, \$11.48 to \$10.20, and the first quarter of 1999, \$11.23 to \$10.20.

Q Based on the analysis that you did, do you have an opinion as to whether or not each of these utilities

should recover the amounts as shown in Exhibit B for litigation costs through the Fuel Adjustment Clause?

A Yes.

Q What is that opinion?

A It's my opinion that this refund would not have occurred had there not been the arbitration and the consumers would not have seen the benefit without proceeding with that.

Q Now you testified earlier that you had done some research with regard to heating and cooling days. Why did you do that research?

A I wanted to determine which months had the higher heating and cooling usage.

Q And how did you do your research?

A I went out to the National Oceanic and Atmospheric Administration website and pulled off a summary for the State of South Dakota for each of those categories.

Q And what years did you look at this data for?

A For the cooling degree days I looked at 1994 through 1999.

Q And what did this research demonstrate with regard to cooling days?

A In general it showed that June, July, and August are the months with the highest cooling degree days.

Q Did you also look at the heating degree days?

1 A Yes, I did.

2 Q What years did you look at for that data?

3 A For heating degree days they go by seasons. I went
4 from -- looked at '93-94 to '98-99.

5 Q And, again, what did that data show you in terms of the
6 degree heating days?

7 A It showed that the months with the highest heating
8 degree days were December, January, and February.

9 Q Now is this information useful in the analysis that you
10 did with regard to when a Fuel Adjustment Clause --
11 adjustment might be put into effect?

12 A Yes.

13 Q Okay. And based on your research, did you form an
14 opinion as to when that refund should be distributed to
15 South Dakota customers?

16 A Yes.

17 Q And what is that opinion?

18 A It's my opinion that June, July, and August are going to
19 have the highest usage resulting in higher bills, and if
20 the refund were to be given during that period of time,
21 it would lower the bills.

22 Q And is that your opinion as to what would be the most
23 desirable thing in these cases?

24 A Yes.

25 Q Now is there a difference between the utilities, the

three different utilities, as to their ability to implement this adjustment?

A Yes.

Q And what is that difference?

A Otter Tail Power and Montana-Dakota Utilities do a monthly calculation, and Northwestern Public Service does theirs quarterly.

Q And as a part of the handling of these dockets did you visit with representatives of these three utilities with regard to this issue?

A Yes, I did.

Q And did you modify your opinion in any manner based on those conversations that you had with those people?

A I'm not sure I understand your question.

Q In other words, have you modified your opinion as to when would be the most desirable time to implement these fuel adjustment changes as a result of conversations with any of these individuals?

A Only to the extent that if a decision isn't made in time for the June month, that we could go into September based on the cool degree day information that I received.

MR. HOSECK: Okay. I would offer

Exhibit B.

MS. AILTS WIEST: Any objection?

1 MR. GUERRERO: No objection.

2 MR. GERDES: No objection.

3 MR. DIETRICH: No objection.

4 MS. AILTS WIEST: If not, it's
5 admitted.

6 MR. HOSECK: I have no further
7 questions of this witness at this time.

8 MR. GUERRERO: I have no questions.
9 Thank you.

10 MS. AILTS WIEST: Mr. Dietrich?

11 MR. DIETRICH: No questions.

12 MS. AILTS WIEST: Mr. Gerdes?

13 MR. GERDES: No questions.

14 MS. AILTS WIEST: Commissioners?

15 COMMISSIONER NELSON: Michele, do
16 you know when we'd have to make the decision in
17 order for them to do this in June, July, and
18 August?

19 THE WITNESS: Well, as Mr. Guerrero
20 stated earlier, Otter Tail would need a decision in
21 the next day or two, and as far as the other two
22 companies, I wasn't given a date.

23 CHAIRMAN BURG: I have a couple of
24 questions. On Exhibit A there's no interest shown
25 for Montana-Dakota Utilities. Why would that be?

1 THE WITNESS: Because they received
2 their damage award after -- they received it in
3 February.

4 CHAIRMAN BURG: But shouldn't there
5 have been interest -- did it include all -- all
6 interest included in that month then? Because
7 shouldn't there have been interest calculated on
8 their since -- when did it start, '96, the same as
9 the others?

10 THE WITNESS: The way I understand
11 the interest was calculated is the Order was
12 entered into in March of '99 and I don't remember
13 who testified but they had to go back again on
14 another issue and it wasn't settled until August.

15 So Otter Tail and Northwestern should have
16 received their award at the end of March when the
17 decision was made, but they didn't get it until
18 September. So they received interest for that
19 period of time between March and August.

20 CHAIRMAN BURG: What about Montana?
21 They didn't have the same situation?

22 THE WITNESS: No. Because they
23 weren't a party to the arbitration to start with.

24 CHAIRMAN BURG: Okay. Are you
25 making a recommendation on the time period for the

1 refund to be made?

2 THE WITNESS: Yes. I would
3 recommend that it be done during the high cooling
4 degree day season when most people will be using
5 their space heat -- space cooling. I'm sorry.

6 CHAIRMAN BURG: Yeah. When I first
7 saw the recommendation that Northwestern was over
8 12 months I had the same feeling, it ought to be
9 done in a short period of time because I think you
10 don't have interest accumulation over the long
11 period of time and that.

12 However, through more consideration, are there
13 any people who would not receive a refund because
14 they would not be using power during that time that
15 actually have paid it over the years? Is there a
16 danger of a miscalculation of who receives
17 refunds?

18 THE WITNESS: I'm not sure I can
19 answer that for what their customer base is. But I
20 did have examples of refunding it over a 12-month
21 period versus a three-month period, and there
22 wasn't a lot of difference in how much was given
23 back --

24 CHAIRMAN BURG: No. I understand
25 how you could give it all back properly, but I'm

1 wondering whether all customers will receive some
2 benefit or if there are some who are winter
3 peeking, for example, who don't use much in the
4 summer who will not get refunds if it wasn't done
5 in the summer. Or am I calculating that out
6 wrong?

7 THE WITNESS: I don't know if I can
8 answer that question. The industrial customers
9 should have a flat amount of usage with maybe a
10 slight increase during the summer months for the
11 space cooling. And other than that, I'm not sure
12 what the other customer usage is.

13 CHAIRMAN BURG: Okay. That's all I
14 have.

15 MS. AILTS WIEST: Any other
16 questions for the Commissioners?

17 MR. RISLOV: I have a question.
18 Could you contrast your refund method with the ones
19 the companies have laid out? Because, frankly, I'm
20 not so sure I understand any company has taken a
21 position on refund.

22 THE WITNESS: As part of a data
23 request, I received copies of how the money would
24 be refunded and I had requested a 12-month
25 calculation and then a three-month average and they

showed very little difference in the calculations.

MR. RISLOV: But you're recommending a refund over three months during the summer period. NWPS had mentioned 12 months. It's not clear to me that they're holding tight with the 12 months or they're agreeing with what staff is recommending. I guess I'm not clear. What's your understanding?

THE WITNESS: My understanding is if the Commission decided for them to do it over a three-month period, they would be agreeable to do that. There's no extra cost involved for them to do that.

Their Fuel Adjustment Clause is done over a 12-month period and to keep it consistent they proposed doing it that way but they're not in disagreement about doing it over a three-month period.

MR. RISLOV: Thank you.

MS. AILTS WIEST: Did you have any -- did you agree that the percentage or allocation of cost should be based on ownership rather than how the determination of damages were based, which is on usage?

THE WITNESS: I agreed that it

1 should be done on ownership.

2 MS. AILTS WIEST: And then I was
3 wondering with respect to MDU's 6.7 percent
4 allocation to South Dakota and I believe Otter Tail
5 came up with a 7 percent allocation, could you
6 compare the methods they used to come up with
7 those?

8 THE WITNESS: No. I can't.

9 MS. AILTS WIEST: But you didn't
10 have any problem with how they calculated those
11 two?

12 THE WITNESS: No, I didn't.

13 MS. AILTS WIEST: That's all I had.
14 Did you have any redirect?

15 MR. HOSECK: No redirect. No
16 further witnesses.

17 MS. AILTS WIEST: Thank you. Any
18 rebuttal witnesses?

19 MR. GUERRERO: No. Thank you.

20 CHAIRMAN BURG: I have one
21 question. Do we have any late filed, or has
22 everything been filed now?

23 MS. AILTS WIEST: We had requested
24 some additional documents.

25 CHAIRMAN BURG: That is going to be

1 submitted later?

2 MS. AILTS WIEST: Right.

3 CHAIRMAN BURG: I still have some
4 concern over allocating it on a three-month basis
5 if there are certain customers who may not get any
6 refund that actually end up paying. I'm interested
7 in some kind of a customer profile.

8 MS. AILTS WIEST: Customer profile?

9 CHAIRMAN BURG: Well, as to see what
10 customers paid over the years and which ones may
11 not receive anything if it's only paid on a
12 three-month basis rather than a 12-month.

13 MS. AILTS WIEST: From all three
14 companies?

15 CHAIRMAN BURG: Probably. I don't
16 want anything elaborate, but I'm just wondering if
17 there's a mismatch here.

18 MR. RISLOV: Commissioner Burg, if I
19 could.

20 CHAIRMAN BURG: If anybody's got
21 clarity.

22 MR. RISLOV: With regard to the
23 residential class, and I'm anticipating maybe
24 incorrectly what you're asking, but there are some
25 customers who don't have air conditioners who don't

1 cool their living space in the summer, and that may
2 be one group that you're talking about that may get
3 a smaller portion of the refund perhaps than
4 compared to what they paid in over approximately a
5 three-year period.

6 CHAIRMAN BURG: Another place where
7 I would see some mismatch would be irrigation, if
8 there's any irrigation, people that have
9 irrigation. They're only going to have it those
10 three months. So they're going to get a benefit
11 because it happens to be three months that they use
12 whereas the rest of year they wouldn't be using it
13 at all.

14 That's why even though I was initially
15 concerned about spreading it over too long a period
16 of time rather than get the money back to the
17 people, if we do it on a 12-month basis as
18 Northwestern does it, it's going to be applied
19 equally because you figure each year, you know, it
20 should be approximately the same.

21 I am concerned about people that pay because
22 they pay 12 months over the period of this
23 settlement, but they're only going to receive over
24 a three-month period.

25 MR. DIETRICH: If it would help shed

1 any light, Mr. Decker, he does the monthly analysis
2 of billings. He may be able to shed some light on
3 the issue as far as our company is concerned.

4 MR. GUERRERO: Same with Ms. Brutlag
5 of Otter Tail Power Company.

6 CHAIRMAN BURG: I would just as soon
7 get as much information now as we can, whichever
8 one wants to start.

9 DIRECT EXAMINATION

10 BY MR. DIETRICH:

11 Q Jeff, can you shed any light on any inequities or
12 differences that you can see among the Northwestern
13 electric customer profile over a three-month summer
14 period as opposed to a 12-month period?

15 A Yes. Mr. Rislov and Chairman Burg have touched on two
16 of the major groups of customers. With the irrigation
17 obviously they don't use much in the other nine months
18 of the year so they would get a benefit they probably
19 don't fully deserve.

20 We do have some customers that are on electric
21 heat that will probably not -- use very little of this
22 benefit compared to if we'd use the 12-month basis. We
23 have some commercial customers who are also electric
24 heat that use much more usage in the wintertime than the
25 summer.

1 Now, granted, a number of the industrial
2 customers will -- they have average use over the
3 12 months, they're fine. But there are some select
4 groups, as you've discussed, that will not receive the
5 benefit they should and others that will get a benefit
6 that they didn't pay for to begin with because they did
7 not -- they're going to be receiving a benefit that they
8 didn't pay for due to the periods involved.

9 COMMISSIONER NELSON: I guess I
10 assumed, though, since the irrigators would have
11 been irrigating in the years they were overpaying
12 and the people who didn't have air conditioning
13 wouldn't have been paying so it would seem to me it
14 would kind of all even out. Why wouldn't it?

15 THE WITNESS: Because the irrigation
16 customer over the three-month period will be
17 receiving a full benefit in actuality they only
18 paid three-twelfths of.

19 COMMISSIONER NELSON: Wouldn't they
20 have paid three-twelfths of the years it was a
21 problem overcharging the coal?

22 THE WITNESS: They paid
23 three-twelfths but will be receiving three -- they
24 paid for it. They're receiving a refund 100
25 percent of the time we're giving it back if we use

1 June, July, and August.

2 COMMISSIONER SCHOENFELDER: I can
3 see how that can work with irrigators and I know
4 this is really very difficult, at least it would be
5 for me, but if you're just a regular residential
6 user and you don't use air conditioning, which I
7 think there probably aren't a large number of those
8 people, but if there were people who didn't use the
9 air conditioning for one reason or another, how
10 much difference would it be in refunded over -- I
11 mean, dollar amount?

12 If I'm a consumer residential and I want a
13 dollar amount credit, do you have any idea how to
14 calculate the difference between 12 months and
15 three months?

16 THE WITNESS: As far as what the
17 monthly amount will be?

18 COMMISSIONER SCHOENFELDER: No.
19 Just the total dollars that -- the total inequity
20 that people perceive is there. Because, I mean,
21 this is different than natural gas because natural
22 gas there's practically no usage at some times of
23 the year, and it spikes up.

24 Most people paying the electric bill have some
25 level of usage over the three months or the whole

1 year, whichever way you're looking at it.

2 THE WITNESS: So the average
3 residential customer, whether it's over a year or
4 three months, is not going to make any difference.
5 Those who don't have electric heat or air
6 conditioning, they're going to have an equal
7 amount.

8 Just on average I take the total refund amount
9 less the litigation costs and divide it by our
10 customer base. We're looking at roughly \$18 a
11 customer. Now it's going to be --

12 COMMISSIONER SCHOENFELDER: \$18
13 period, not per month?

14 THE WITNESS: Period. But that's
15 not based on usage. That's going to skew. The
16 residential customer number is going to be probably
17 much less than that. So that gives you a rough
18 idea.

19 COMMISSIONER SCHOENFELDER: Thank
20 you.

21 (Witness excused)

22 CHAIRMAN BURG: Comment from the
23 other two companies?

24 MR. GUERRERO: Otter Tail would call
25 Ms. Brutlag.

DIRECT EXAMINATION

BY MR. GUERRERO:

Q Ms. Brutlag, you've heard discussion regarding whether or not it would be more equitable or more practical to flow the refund over a three-month versus a 12-month period.

Do you have any comment on that from Otter Tail's perspective?

A A couple of things, I'm not as close to the rate analysis as Mr. Decker is in his company, but one thing I should point out is we have certain rates that don't have the Fuel Adjustment Clause applied to them. One is dual fuel. If we waited until winter, those dual fuel customers who haven't paid the higher cost in the first place wouldn't receive any benefit of this award.

And a lot of our heating load is the controllable heating load. So that's, you know, one reason where in their case it's not going to make any difference whether we give it back in the summer or winter.

The other thing is I haven't done a per customer amount, but I think a typical residential customer is something in the 5 to \$6 range that they will receive back over the three-month period. If you take that and spread it over 12 months administratively,

1 it gets to be a lot of work to spread it over that long
2 period of time.

3 Q Does Otter Tail have a preference, three months versus
4 12 months?

5 A We'd very much prefer three months because we can roll
6 it through the way we normally do our fuel clause, and
7 it should work pretty much automatically.

8 CHAIRMAN BURG: You do your --

9 MR. GUERRERO: I'm done. Thank you.

10 CHAIRMAN BURG: Do you do your fuel
11 clause on a monthly or quarterly basis?

12 THE WITNESS: We do it monthly, but
13 it's a three-month average so once it gets into a
14 particular month it takes three months for that
15 dollar amount to completely go back to the
16 customers.

17 CHAIRMAN BURG: Okay.

18 MS. AILTS WIEST: Any other
19 questions of this witness? Thank you.

20 (Witness excused)

21 DIRECT EXAMINATION

22 BY MR. GERDES:

23 Q Mr. Ball has a couple of comments.

24 A I guess from MDU's perspective, we would prefer the
25 three-month period rather than the 12-month period,

1 simply because the dollars are not that substantial. It
2 would be a lot easier administratively for us to do
3 that. And I guess, in our opinion, the dollar amount is
4 small enough for a typical residential that it does not
5 warrant running it over a 12-month period.

6 For example, in the information that we gave
7 to your staff we were looking for a typical residential
8 customer, and this would have been had we done it in
9 January, February, and March. We were looking at \$4.69
10 as the credit for a typical residential bill in the
11 month of January, 4.71 in February, 4.45 in March. The
12 grand total would be \$13.85. It's all over in three
13 months.

14 If you went on an annual basis, we were
15 looking at, you know, rather than returning \$13.85 in
16 our example, returning \$13.56 over a 12-month period.
17 In other words, you know, just about a dollar 13 cents a
18 bill for a typical residential customer. In our view
19 we'd rather do it over three months, and then it's
20 behind us.

21 CHAIRMAN BURG: I can understand
22 from, you know, the ease for the company. Do you
23 see any group of customers who will not receive
24 their share, their return on this, by just doing it
25 in a three-month period?

1 THE WITNESS: I don't see any
2 customer group that we're going to exclude
3 completely. Because this is not like natural gas.
4 In the natural gas side of the business we actually
5 have customers that cut out during the summer
6 months. They use nothing.

7 Most people never shut their electricity off.
8 They're still running their refrigerators. They're
9 watching TV. They're doing all kinds of things.

10 CHAIRMAN BURG: But if you had
11 somebody on electric heat who didn't have
12 electricity.

13 THE WITNESS: Then their summer bill
14 would be less than winter bill. But hopefully
15 they're running fans.

16 MS. AILTS WIEST: Any other
17 questions of this witness? If not, thank you.

18 (Witness excused)

19 MS. AILTS WIEST: Mr. Hoseck?

20 MR. HOSECK: I'd have a concluding
21 motion if it's appropriate at this time. On behalf
22 of staff, I would move the Commission to allow the
23 litigation costs consistent with the staff's
24 opinion and to do it through the Fuel Adjustment
25 Clause and to do it in the time frame which is

1 reasonable in staff's opinion which is the
2 three-month period.

3 Further, I'm not really hung up on this, but I
4 don't believe that there's a need for a waiver. I
5 know the two of the three companies asked for a
6 waiver of their tariff. NWPS did not.

7 It would be my position that under
8 49-34(a)-25, I believe it is, that this could flow
9 through as a cost directly attributable to fuel
10 cost used in the generation of electricity. And I
11 would refer the Commission to Otter Tail's Petition
12 at Page 5 which talks about the use of
13 Account 151. And in that, as I read the tariffs,
14 that is a mechanism all three tariffs seem to
15 universally have.

16 There is a provision in there for other
17 expenses directly assignable for the cost of fuel.
18 And I would submit that is a proper mechanism for
19 the use of that. Like I say, I'm not necessarily
20 hung up on this as a matter of legal protocol.
21 However, I think it is possible to do it without
22 necessarily having any waivers. Thank you.

23 MS. AILTS WIEST: You mean waivers
24 of the tariffs?

25 MR. HOSECK: Yes.

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MS. AILTS WIEST: Any concluding statements, Mr. Guerrero?

MR. GUERRERO: Thank you, Counsel. Members of the Commission, I want to thank you on behalf of Otter Tail Power Company and also extend my thanks to staff. Throughout this time they have been nothing but diligent in their investigation of Otter Tail's Petition.

Briefly, just to clarify Otter Tail's position on the legal question of a waiver, we're not necessarily hung up on whether or not we need a waiver or not. We took the position that reading the rules strictly it appeared that litigation or arbitration costs could not be directly assignable to the cost of fuel. That was based on case law that we had read, most notably dealing with FERC cases.

We thought those cases provided guidance to the State Commissions as well since this Commission as well as the Minnesota and North Dakota Commission have adopted the Uniform System of Accounts. But to the extent that Mr. Hoseck believes that and your Counsel believes a waiver is not necessary, we would defer to that legal interpretation.

1 Our goal obviously is to get recovery of the
2 litigation costs that we incurred that have since
3 benefitted rate payers. Thank you.

4 MS. AILTS WUEST: Mr. Dietrich, do
5 you have anything?

6 MR. DIETRICH: Not to prolong this
7 further, but, I think we're pleased to be able to
8 bring a result to the Commission that shows that
9 the companies have been able to work to a
10 successful result for rate payers, both in an
11 ongoing reduction in the costs of coal, other
12 contract changes that you'll find described in the
13 panel's decisions, and a damage award.

14 And I think we're just pleased that through
15 these steps we're able to receive a positive result
16 and whatever the mechanism is used to pass that
17 credit on to the customers, we're apt to do so.

18 MS. AILTS WUEST: Just to clarify,
19 would you still prefer the 12 months, or is that
20 correct or not?

21 MR. DIETRICH: We're indifferent as
22 to the approach used. We do have -- our tariff in
23 place speaks to 12 months, but we can certainly
24 mechanically do it on a three-month basis with our
25 next quarterly filing locally.

1 MS. AILTS WIEST: Could you do it
2 for the months requested by staff, though, the
3 June, July, and August months with a quarterly
4 filing?

5 MR. DIETRICH: We'd have to do a
6 special filing other than our normal quarterly
7 filing to catch June because our quarter, I
8 believe, was May, June, July.

9 MR. DECKER: May and August would be
10 our filings.

11 MS. AILTS WIEST: You could do it,
12 but you'd have to do a special filing?

13 MR. DIETRICH: We'd do a special
14 calculation and filing, but we could certainly do
15 so.

16 MS. AILTS WIEST: Okay. Thank you.
17 Mr. Gerdes.

18 MR. GERDES: Not wanting to go over
19 ground already plowed, we would just say that MDU
20 would appreciate the Commission's consideration of
21 its Petition and believe that staff has fairly
22 reviewed it and ask that the Commission grant the
23 Petition as suggested by staff.

24 MS. AILTS WIEST: Are you still
25 seeking a waiver of Fuel Clause Rate 58?

1 MR. GERDES: Like other counsel, I'
2 not hung up on whether it's in the form of a waiver
3 or not. I believe that the Commission is entitled
4 to interpret the fuel clause, the statute, and a
5 Commission Order directing that would, I think,
6 serve the same purpose.

7 MS. AILTS WIEST: Thank you.

8 CHAIRMAN BURG: Can I have
9 clarification? Is there a necessity that all three
10 companies use the same three months?

11 MS. AILTS WIEST: I don't think so
12 but --

13 CHAIRMAN BURG: Because I do see
14 there's different quarters and --

15 MS. AILTS WIEST: Yeah. I doubt
16 that there would be any -- unless somebody has any
17 different information.

18 CHAIRMAN BURG: And, again, to
19 refresh me, how much late filed do we have if
20 looking at trying to get this turned around at the
21 request of at least one company?

22 MS. AILTS WIEST: Well, I had asked
23 for the Minnesota decision and North Dakota's in
24 the future but that doesn't matter if we get that
25 one in or not. I'm not sure if there's anything

beyond there. Was there?

CHAIRMAN BURG: Do you have Minnesota with you?

MR. GUERRERO: Chairman Burg, we appeared in front of the Minnesota Commission on May 4 of this month. They are required to issue a written opinion within 20 days of their approval of the bench.

They made a motion, and it was approved unanimously. I expect a written decision in the next few days, and I will forward that to counsel and to the court reporter when I receive it.

But to the extent that we have a June pass-through, our billing goes out as of the 17th of this month so we would need a decision for a June pass-through either today or tomorrow.

Otherwise, as Ms. Farris had indicated, we would be looking at July, August, September.

CHAIRMAN BURG: So you could have staggered three-month? I thought you wanted to do it in one quarter?

MR. GUERRERO: On a three-month basis.

CHAIRMAN BURG: Just any three months? It can be whatever three-month basis?

1 COMMISSIONER NELSON: They were
2 going to do it June, July, and August.

3 CHAIRMAN BURG: I thought if they
4 didn't do it June, July, August, they had to do it
5 August, September, and October. I thought they
6 were going on a quarterly basis. That's not true?

7 MR. GUERRERO: That's correct.

8 CHAIRMAN BURG: Would that be true
9 of the other two companies as well?

10 MR. GREEN: Correct.

11 CHAIRMAN BURG: Northwestern, could
12 you do it -- you didn't do it May, June, July. Ca
13 you do it July, August, September as well?

14 MR. DECKER: Yeah. Our normal
15 filing is May and August, but we'd make a special
16 filing to do it July and August -- whether we do i
17 June or July, we'll have to do a special filing so
18 it doesn't matter either way.

19 MS. AILTS WIEST: Are you taking it
20 under advisement?

21 CHAIRMAN BURG: Well, if we got to
22 wait for -- don't we have to wait for the late
23 filed?

24 MS. AILTS WIEST: The Minnesota
25 decision was prior to the time that that -- we were

1 informed that those expenses had been taken out by
2 staff.

3
4 CHAIRMAN BURG: I'm asking should we
5 go ahead and withdraw the request for a late
6 filed? I think we need to do that if we're going
7 to make that a quicker decision, aren't we?

8 MS. AILTS WIEST: Right.

9 CHAIRMAN BURG: I have no objection
10 to not getting those.

11 COMMISSIONER SCHOENFELDER: They can
12 still file it after the decision is made for our
13 information.

14 CHAIRMAN BURG: But not base our
15 decision on it.

16 COMMISSIONER SCHOENFELDER: Well, I
17 wasn't going to base my decision on Minnesota
18 anyway.

19 CHAIRMAN BURG: I wasn't sure why we
20 were going to get it.

21 COMMISSIONER NELSON: Rolayne wants
22 to see it.

23 CHAIRMAN BURG: I think we're close
24 enough yet that we've got a hearing on Wednesday;
25 right?

MS. AILTS WIEST: He said today or

1 tomorrow.

2 MR. BULLARD: I think this room is
3 open back here (Indicating).

4 MS. AILTS WIEST: Even though the
5 Commission would make a decision today, there would
6 not be a written decision because I have to wait
7 for the transcript in order to make findings of
8 fact so my point is you'd have to implement this
9 based on a nonwritten decision if you would be
10 willing to do that.

11 MR. GERDES: Based on faith.

12 MS. AILTS WIEST: Yes. Did you want
13 to recess, Commissioners?

14 MR. GUERRERO: Counsel, we'd
15 certainly -- to the extent there was a vote and we
16 knew what the decision was, we could certainly base
17 our decision on the basis of a record vote without
18 a written opinion.

19 (A short recess is taken)

20 MS. AILTS WIEST: I think we want to
21 recall a witness. Ms. Farris.

22 COMMISSIONER SCHOENFELDER: I have
23 questions. When you went through the calculation
24 of the refund and you prepared the numbers of each
25 company Northwestern has travel expenses for around

1 \$13,218.22.

2 Did you justify those travel expenses anyway?

3 THE WITNESS: I looked at the
4 invoices and it was coded to this case, time-coded.

5 COMMISSIONER SCHOENFELDER: Okay.
6 Were any of the expenses that you asked to be
7 disallowed from Otter Tail travel expenses?

8 THE WITNESS: No. Labor and
9 miscellaneous.

10 COMMISSIONER SCHOENFELDER: And
11 you're very comfortable -- because I don't see
12 travel expenses for any of the other two companies
13 and I do Northwestern.

14 THE WITNESS: Otter Tail also has
15 travel expenses.

16 COMMISSIONER SCHOENFELDER: I didn't
17 see it itemized. I don't remember the exhibit
18 number it was marked. It was the single sheet --
19 the vehicle/plane, 14,000?

20 THE WITNESS: Yes.

21 COMMISSIONER SCHOENFELDER: Because
22 I had missed that part of it. And I see
23 Northwestern's were itemized out separately.

24 THE WITNESS: MDU did not have any,
25 but the other two did.

1 COMMISSIONER SCHOENFELDER: I think
2 that clarifies it for me.

3 CHAIRMAN BURG: They were not
4 disallowed there? They're allowed in both
5 companies?

6 THE WITNESS: Correct.

7 MS. AILTS WIEST: Thank you.

8 COMMISSIONER SCHOENFELDER: That
9 clarifies it for me.

10 CHAIRMAN BURG: With that I believe
11 we're ready for a bench decision. Then we got that
12 clarified.

13 I move that we allow as recommended by staff
14 for a refund of June, July, and August. Do we need
15 anything else? Oh, yes. And we would grant the
16 waivers as requested by the company.

17 COMMISSIONER SCHOENFELDER: I would
18 amend your decision just a little bit,
19 Commissioner, and say that I would like the
20 calculations that staff has provided before us. I
21 believe that's in Exhibit A and B and those to be
22 the reflection and the June, July, and August with
23 the waivers for the tariffs.

24 I would also like the motion to say that over
25 and above just granting a waiver, this is the fuel

1 clause and this is not a precedential decision and
2 I'm going to second Commissioner Burg's motion but
3 I want it to be very, very clear that this is a
4 one-time only thing from my perspective.

5 COMMISSIONER NELSON: I'd concur.

6 MS. AILTS WIEST: Mr. Hoseck?

7 MR. HOSECK: Point of
8 clarification. Does that include the interest?

9 CHAIRMAN BURG: Yes.

10 COMMISSIONER SCHOENFELDER: Because
11 the interest wasn't calculated on here, but there's
12 an indication that you were taking interest into
13 account.

14 MS. FARRIS: Right. It's just not
15 on the exhibit.

16 COMMISSIONER SCHOENFELDER: Thank
17 you.

18 MS. AILTS WIEST: Is there anything
19 else? Thank you.

20 (The hearing concluded at 2:50 p.m.)
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25

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF HUGHES)

4
5 I, CHERI MCCOMSEY WITTLER, Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 15th day of
11 May 2000, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 7th day
14 of June 2000.

15
16
17 Cheri M. Wittler
18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21
22
23
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Otter Tail Power Company
Knife River Coal Contract Arbitration

A Reduces arbitration costs for reimbursement by MDU

B Apportions arbitration award and costs between retail and power pool sales

	Arbitration Award (1)	Arbitration Costs	Net Award
1 Total amount of OTP's share per original filing	\$2,884,172	\$1,240,873	\$1,643,300
2 MDU's reimbursement paid under protest		250,930	
3 Adjusted amount	\$2,884,172	\$989,943	\$1,894,229
4 Portion attributable to retail sales (2)	89%	89%	89%
5 Amount attributable to retail customers (3)	\$2,576,511	\$881,241	\$1,695,270

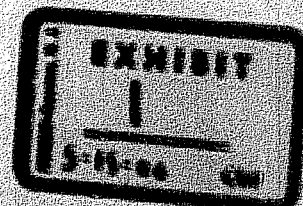
(1) Currently accruing monthly interest at Otter Tail's average investment rate for its temporary cash investments.

(2) For the period September 1996 through March 1999 the following proportion of Coyote output (OTP share only) was used for retail customers and for power pool sales

Data for Otter Tail's share of Coyote Plant (megawatt-hours)		Retail Sales	Pool Sales	Total
Sept-Dec 1996		310,747	21,606	332,353
Jan-Dec 1997		704,364	32,990	737,354
Jan-Dec 1998		576,782	117,170	693,952
Jan-Mar 1999		223,623	45,028	268,651
Totals		1,815,516	216,794	2,032,310
Proportions		89%	11%	100%

(3) State proportions (approximate)

Minnesota	54%
North Dakota	39%
South Dakota	7%



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendraye

Chair
Commissioner
Commissioner
Commissioner
Commissioner

Todd J. Guerrero
Associated General Counsel
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56538-0496

SERVICE DATE: MAY 15 2000

DOCKET NO. E-017/M-00-25

In the Matter of Otter Tail Power Company's Supplemental Petition Providing Additional Information for Approval for a Waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment Rules)

The above entitled matter has been considered by the Commission and the following disposition made:

Allowed Otter Tail to recover the estimated incremental outside legal costs of \$670,872;

Granted Otter Tail's waiver of Minnesota Rules 7825.2400-2600 to allow Otter Tail to refund the settlement award of \$2,576,511 net of the \$670,872 litigation costs through their FAC upon finding that:

disallowing the waiver would impose an excessive burden and create a disincentive for Otter Tail to litigate unreasonable fuel prices in the future;

granting the variance would not adversely affect the public interest since ratepayers still receive a net benefit of a refund through the FAC; and

this waiver does not conflict with standards imposed by law.

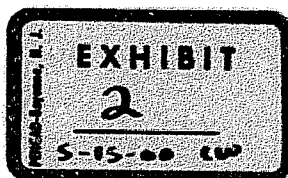
Required Otter Tail to work with the Department in determining the method of refunding the net settlement to ratepayers before actually making the refund.

Interest on the refund will be paid at the prime interest rate as agreed to by the Company.

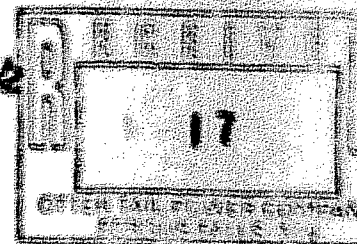
The Commission agrees with and adopts the recommendations of the Department of Commerce which are attached and hereby incorporated in the Order.

BY ORDER OF THE COMMISSION

Paul W. Haar
Paul W. Haar
Executive Secretary



(S E A L)



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MINNESOTA DEPARTMENT OF COMMERCE

RECEIVED

APR 12 2000

April 12, 2000

MN PUBLIC UTILITIES COMMISSION

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

RE: **Supplemental Comments of the Energy Division of the Minnesota Department of Commerce**
Docket No. E017/M-00-25

Dear Dr. Haar:

Attached are the supplemental comments of the Energy Division of the Minnesota Department of Commerce (Department or DOC) in the following matter:

Otter Tail Power's **supplemental petition providing additional information for approval for a waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment Rules).**

The supplemental petition was filed on March 30, 2000 by:

Todd J. Guerrero
Associated General Counsel
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, Minnesota 56538-0496
218-739-8289

The Department continues to recommend **approval based on the conditions set forth in our previous comments (dated February 24, 2000)** and is available to answer any questions the Commission may have. The purpose of these comments is to address the additional information provided by Otter Tail Power and to adjust the legal expenses and settlement award amounts accordingly.

Sincerely,

Nancy A. Campbell

NANCY A. CAMPBELL
FINANCIAL ANALYST

NAC/jl
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

SUPPLEMENTAL COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E017/M-00-25

I. BACKGROUND

The litigation that provides a backdrop for this filing was the result of a dispute between several owners of the Coyote Power Plant - Otter Tail, Northwestern Public Service Company, and Minnkota Power Cooperative (as agent for the Northern Municipal Power Agency) versus the Knife River Coal Company. Montana-Dakota Utilities Co. (MDU), though also an owner of the plant, did not join in the claim against Knife River. The arbitration panel ultimately found in favor of the owners and awarded damages in the amount of \$5,901,776, with interest. Otter Tail's share of the damages was \$2,741,773. Otter Tail also received a subsequent \$142,399 post-judgement interest on the award, bring Otter Tail's total award to \$2,884,172.

In its petition dated January 10, 2000, Otter Tail sought to net the \$1,240,870 in litigation expenses (mostly for outside attorneys) against its \$2.8 million damage award. The difference between these two figures, approximately \$1.6 million, would then be passed through Otter Tail's fuel adjustment clause as a credit to ratepayers (roughly fifty-four percent of which is jurisdictional to Minnesota).

The Department recommended, in its original comments, netting \$935,728 of incremental outside legal costs against the \$2,884,172 award refund, so a net refund of \$1,948,444 would be passed to ratepayers through the fuel adjustment clause (see Department's comments of February 24, 2000).

II. NEW ISSUES

In Otter Tail's supplemental petition Otter Tail raises three additional issues that should be considered in making the final determination for the Knife River litigation issue. The issues are: MDU Contribution, Power Pool Sales, and Interest on the Settlement Award.

A. MDU CONTRIBUTION

The first issue relates to the contribution made by MDU to Otter Tail for reimbursement of litigation costs. In its original petition Otter Tail indicated that it has incurred \$1,240,870 as its share of litigation expenses. Northwestern and Minnkota were also responsible for their share of the expenses. At the time Otter Tail made its original petition, the undersigned was unaware that MDU, as an owner in the plant who benefited from the litigation, had in fact made a contribution to Otter Tail and the other owners as reimbursement for MDU's share of the litigation costs. The amount of MDU's contribution to Otter Tail was \$250,930. MDU submitted the contribution, however, "under protest." That is, MDU took the position that it was not liable for a percentage of the arbitration costs and reserved its right to further dispute the payment under the dispute resolution provisions of the Coyote Operating Agreement (the ownership and operating agreement between the owners of the plant).

Otter Tail provides in its supplemental filing that the purpose of this filing is not to argue whether MDU is liable for its percentage of the arbitration costs.¹ Otter Tail's concern is focused on full and complete disclosure regarding the facts contained in the original petition. Assuming that Otter Tail will ultimately retain the \$250,930 contribution from MDU, it obviously reduces Otter Tail's out-of-pocket litigation costs.² As a result, Otter Tail proposes that the \$1,240,870 in litigation expenses be reduced by the \$250,930 received from MDU, bringing the total litigation expenses to \$989,940.

B. POWER POOL SALES

The second issue deals with reducing the settlement award and litigation expenses to take into account the effect of Otter Tail's wholesale economy energy sales from the Coyote Plant.

¹ Otter Tail believes, however, that MDU's protest is without merit. MDU and its rate-payers have benefited enormously by the other partners' efforts to reduce fuel costs at the plant and MDU's reimbursement simply represents its fair share to procure that benefit. Otter Tail also notes that while MDU has submitted the contribution "under protest," it has made filings before the North Dakota Public Service Commission and the South Dakota Public Utilities Commission seeking to recover through its fuel adjustment clause the very expenses it alleges it has no legal obligation to pay.

² By telephone on April 4, 2000, an Otter Tail representative indicated it was highly likely that Otter Tail will retain the \$250,930 reimbursement.

In the original petition, Otter Tail sought to net the \$1.2 million litigation expenses against the \$2.8 million damage award from Knife River. The award was calculated by multiplying the difference between the actual price of coal charged by Knife River for the period between the fourth quarter of 1996 through the first quarter of 1999 (the "award period") and the price of coal (on a per ton basis) as reduced by the arbitration panel by the amount of coal attributed to Otter Tail for its sales, both retail and wholesale, from the Coyote Plant.

In the original petition, Otter Tail did not propose to adjust either the \$2.8 million award or the \$1.2 million of expenses to take into account Otter Tail's wholesale economy-energy sales³ made from the Coyote, including both wholesale and retail sales.

As a result Otter Tail proposes in its supplemental petition that both the settlement award and litigation costs should have been adjusted (reduced) by the percentage of overall sales made during the award period that is attributable to wholesale economy energy customers. Otter Tail believes that retail customers should receive a credit from that part of the damage award (as a pass-through in the energy adjustment clause) attributable to retail sales, not the amount attributable to wholesale economy-energy sales. Likewise, retail customers should not be obligated to shoulder the entire burden of litigation expenses but only those attributable to them.

In Otter Tail's case, approximately 89% of all sales made during the award period are attributable to retail sales and the remaining approximately 11% are attributable to economy-energy transactions. Otter Tail proposes adjusting the original petition to take into effect the economy-energy wholesale transactions made from the Coyote Plant during the award period. The effect of this adjustment is to reduce the award amount to \$2,576,511 and the arbitration costs to \$884,341.⁴

C. *INTEREST ON THE SETTLEMENT AWARD*

The last issue Otter Tail raises is the interest on the settlement award. As set forth in the original petition, Otter Tail has placed the proceeds in Account 242, Miscellaneous Current and Accrued Liabilities, a deferred revenue account. The account balance is accruing interest monthly, calculated at the average investment rate Otter Tail earns on its temporary cash investments. Otter Tail clarifies that ratepayers are entitled to the interest up to the time of the refund is returned through the fuel adjustment clause.

³ Economy energy sales are wholesale transactions made by utilities, typically between one another, on a non-firm basis and generally only when there is capacity available (not needed for retail customers). Economy energy sales, also known as "pool," "coordination" or "intersystem" sales are regulated by the Federal Energy Regulatory Commission.

⁴ See Otter Tail's supplemental filing for the calculation of the adjustment in Exhibit No. 1.

III. DEPARTMENT ANALYSIS

A. MDU CONTRIBUTION

The Department agrees that the \$250,930 contribution by MDU to reimburse Otter Tail for MDU's share of the litigation costs should be used to reduce the \$1,240,870 litigation costs claimed by Otter Tail in its original petition. Therefore, the litigation costs should be reduced to \$989,940.

B. POWER POOL SALES

The Department's focus in its initial comments was on the issue of allowing litigation costs to be netted against the settlement award and recovered through the fuel adjustment clause. The Department was aware of the multi-jurisdictional issue of wholesale and retail (including the states of Minnesota, North Dakota, and South Dakota) for purposes of making the refund. The Department included in its original comments that Minnesota customers were approximately 50 percent of the jurisdiction sales. As a result, the Department was aware Minnesota customers would likely be entitled to approximately half of the settlement award and would be subject to paying about half the litigation costs if recovery of these costs were granted by the Commission.

The Department believed that final jurisdictions percentages would be determined in the refund process after the final determination had been made on allowing Otter Tail to net the litigation costs against the settlement award and recovered through the fuel adjustment clause.

However, the Department sees no harm in removing the approximately 11% of wholesale transactions (power pool sales) at this time. As a result, the settlement award of \$2,884,172 would be reduced to \$2,576,511 and the litigation costs of \$989,940 would be reduced to \$884,341.⁵

C. INTEREST ON THE SETTLEMENT AWARD

The Department agrees that ratepayers are entitled to interest earned up to the time of the actual refund flows through the fuel adjustment clause. As stated in the Department's original comments the Department recommends that the Commission require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

⁵ See Otter Tail's supplemental filing - Exhibit No. 1.

D. *CHANGES TO DEPARTMENT'S RECOMMENDED INCREMENTAL OUTSIDE LEGAL COSTS*

As stated in the Department's original comments the Department's view is that the public interest is best satisfied by balancing the disincentive for Otter Tail to litigate future unreasonable fuel costs and the fact that legal costs are a cost-of-service item appropriately addressed in a rate case and are not costs that are to be tried-up. As a result the Department recommended allowing Otter Tail to recover the estimated incremental litigation costs above the litigation costs recovered in rates (as calculated in Department's original comments in Attachment No. 3) as a net against the settlement award.

Based on the supplemental filing of Otter Tail and based on the Department's recommendations above the Department continues to recommend that Otter Tail be allowed to recover the incremental litigation costs above the litigation costs recovered in rates. The Department has revised its calculation for the litigation costs to exclude the MDU contribution of \$250,930 and the approximately 11% of wholesale jurisdiction. The Department did this by using the adjusted \$884,341 (which excludes the two items above) and allocating in proportion to the Knife River litigation costs used in Department's original comments in Attachment No. 3. The result was a recommended recovery of \$670,872⁶ in litigation costs net of the settlement award of \$2,576,511.⁷

IV. RECOMMENDATION

The Department recommends based on its original and supplemental comments that the Commission:

- allow Otter Tail to recovery the estimated incremental outside legal costs of \$670,872 as provided in DOC Attachment No. 3;
- grant Otter Tail a waiver of Minnesota Rules 7825.2400-.2600 to allow Otter Tail to refund the settlement award of \$2,576,511 net of the \$670,872 litigation costs through their FAC; and
- require Otter Tail to work with the Department in determining the method of refunding the net settlement to ratepayers before actually making the refund

/jl

⁶ Minnesota's jurisdiction portion is approximately \$362,271, as shown in Exhibit No. 1.

⁷ Minnesota's jurisdiction portion is approximately \$1,391,316, as shown in Exhibit No. 1.

CONTINUATION # [3]

ADJUSTED LEGAL COSTS & SETTLEMENT AWARD

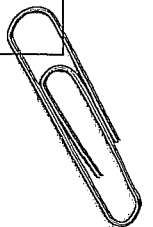
	Adj. Knife River Legal Costs for MDU/wholesale juris.	OT's Other Legal Costs	Total Legal Costs	Cost-of-Service Legal Costs
Adjusted Legal Costs Incurred (Per OT Exh. No.1)	\$ 624,341			
1996 Legal Costs Incurred	\$ 107,624	\$ 236,344	\$ 343,968	\$ 117,000 1/
% of Total Legal Costs	31%	59%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	36,608	80,392		
Allowed Legal Cost Recovery - 1996	\$ 71,016			
1997 Legal Costs Incurred	\$ 231,786	\$ 318,891	\$ 550,677	\$ 117,000 1/
% of Total Legal Costs	42%	58%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	49,247	67,753		
Allowed Legal Cost Recovery - 1997	\$ 182,539			
1998 Legal Costs Incurred	\$ 330,478	\$ 190,172	\$ 520,650	\$ 117,000 1/
% of Total Legal Costs	63%	37%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	74,265	42,735		
Allowed Legal Cost Recovery - 1998	\$ 256,213			
1999 Legal Costs Incurred	\$ 214,453	\$ 255,860	\$ 470,313	\$ 117,000 1/
% of Total Legal Costs	46%	54%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	53,350	63,650		
Allowed Legal Cost Recovery - 1999	\$ 161,103			
Sum of Allowed Legal Cost Recovery for Retail Sales	\$ 670,872			
MN Jurisdiction (Per OT Exh. 1, Fn 3.)	54%			
Approx. MN Jurisd. Amount for Legal Costs	\$ 362,271			
Adj. Settlement Award (Per OT Exh. 1)	\$ 2,576,511			
MN Jurisdiction (Per OT Exh. 1, Fn 3.)	54%			
Approx. MN Jurisd. Amount for Award	\$ 1,391,316			

1/ This is based on Account 923, Outside Services Employed,
balance in the rate case of \$731,248*16% (portion of legal costs).

Continuation

4

of pages





MINNESOTA DEPARTMENT OF COMMERCE

RECEIVED

February 24, 2000

FEB 24 2000

MN PUBLIC UTILITIES COMMISSION

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

RE: **Comments of the Minnesota Department of Commerce**
Docket No. E017/M-00-25

Dear Dr. Haar:

Attached are the comments of the Energy Division of the Minnesota Department of Commerce (Department or DOC) in the following matter:

Otter Tail Power's petition for approval for a waiver of Minnesota Rules 7825.2400-2600 (Fuel Clause Adjustment Rules).

The petition was filed on January 10, 2000 by:

Bernadeen Brutlag
Manager, Regulatory Services
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, Minnesota 56538-0496
218-739-8289

The Department recommends approval based on the conditions set forth in our comments and is available to answer any questions the Commission may have.

Sincerely,

Nancy A. Campbell

NANCY A. CAMPBELL
FINANCIAL ANALYST

NAC/jl
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E017/M-00-25

I. BACKGROUND

On January 10, 2000, Otter Tail Power Company (Otter Tail or the Company) filed a petition requesting that the Minnesota Public Utilities Commission (Commission) approve a waiver of Minnesota Rules 7825.2400-2600 (the Fuel Clause Adjustment Rules) to allow the pass-through of litigation expenses that have resulted in ratepayer savings.

Otter Tail states that this petition arises out a dispute over the pricing provisions of a 35-year coal supply agreement (Agreement) that governs the purchase of lignite coal by the owners of the Coyote Power Plant from the Knife River Coal Company (Knife River). Owners of the plant include Otter Tail, Northwestern Public Service, and the Northern Municipal Power Agency (Owners).¹ The plant, located in Beulah, North Dakota, is a 400-megawatt, mine-mouth power plant, meaning that it takes its coal directly and exclusively from Knife River's adjacent Beulah Mine. The owners began taking regular deliveries under the Agreement in May 1981 when the plant began commercial operation.

Otter Tail states that the issue in the litigation was the price of coal as fixed under the Agreement. The Owners sought relief from the Agreement's pricing adjustment provisions that required the prices to remain "fair and equitable" throughout its term. To guarantee this promise the Agreement, among other things, requires that the price of coal be compared to prices in similar coal "agreements under generally similar mining conditions."

¹ Montana-Dakota Utilities Co. (MDU) is also a partial owner in the plant, and is the parent company of Knife River. MDU did not join the Owners in its claim against Knife River.

Otter Tail indicates in its filing that after extensive negotiations failed, the Owners pursued a claim in North Dakota District Court in November 1995.² The matter was referred to arbitration, which commenced in September 1996. By an Order dated March 26, 1999, the arbitration panel agreed that the price charged for coal by Knife River was not fair and equitable. In accordance with the Agreement's adjustment provisions, the panel reduced the price beginning with the fourth quarter of 1996 (to coincide with the start of arbitration) through the first quarter of 1999 (to coincide with the March decision). The panel also required the parties to propose revisions to the Agreement to reduce the future price of coal and minimize the risk of future pricing disputes.

On August 6, 1999, the panel adopted revised adjustment provisions (reduced the price of future deliveries) and awarded damages to the Owners in the amount of \$5,901,776, with interest from March 26, 1999. The damages represented the difference between the price of coal as reduced by the panel and the actual price of coal charged by Knife River from the fourth quarter of 1996 through the first quarter of 1999.

On September 1, 1999, Knife River remitted to Otter Tail \$2,741,773, which represented Otter Tail's share of damages in accordance with its fuel usage at the Coyote Plant. On December 21, Knife River remitted to Otter Tail \$142,399, for post-judgement interest on the award, bringing Otter Tail's total award to \$2,884,172.

Otter Tail provides in its filing that in addition to the damage award, the reduced prices for future coal deliveries means future fuel savings to Otter Tail ratepayers. Both the \$2.8 million damage award and the future savings will be passed on to ratepayers through the fuel adjustment clause.

Otter Tail indicates in its filing that it has incurred \$1,240,870 as its share of litigation expenses, primarily for outside attorneys and experts. As a result, in this petition Otter Tail seeks to net its \$1.2 million in arbitration expenses against its \$2.8 million damage award and to pass the remaining \$1.6 million through the fuel adjustment clause as a credit to ratepayers.³

² Minnesota Power Cooperative, Inc., et al. V. Knife River Coal Mining Company et al. Civil No. 95-C-2945.

³ Minnesota customers are approximately 50 percent of the jurisdiction with North and South Dakota and Federal Energy Regulatory Commission (wholesale) customers making up the remaining 50 percent.

II. DEPARTMENT ANALYSIS

A. FUEL ADJUSTMENT CLAUSE AND REQUIRED MINNESOTA STATUTES AND RULES

The purpose of the fuel adjustment clause (FAC) is to keep utilities whole with regard to changes in the costs of fuel. It allows utilities to pass through to ratepayers increases or decreases in the cost of fuel (from the base levels set in the utility's previous rate case)⁴ without having to make separate rate filings that reflect each change in fuel cost and without having to obtain prior approval from the regulatory commissions of each change in fuel cost.⁵

- Various Minnesota statutes and rules define the parameters of the FAC. Minn. Stat. § 216B.16, subd. 7 allows the Commission to permit the automatic adjustment of rates for the costs of fuel used in the generation of electricity. Minn. Rules, part 7825.2390 et seq. implement the automatic adjustment of charges, known as the FAC when referring to the provision of electric service. Minn. Rules, part 7825.2920, subpart 2 requires that errors in the FAC will be refunded to the consumer.

Minnesota Rules do not allow utilities to pass through, automatically, litigation expenses,⁶ as such, Otter Tail would need a waiver to the FAC regulations to pass through the litigation costs in the FAC.

Minn. Rule part 7829.3200 sets forth the criteria for evaluating waiver requests:

- (1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule.
- (2) Granting the variance would not adversely affect the public interest.
- (3) Granting the variance would not conflict with the standards imposed by law.

B. ANALYSIS OF THE FUEL ADJUSTMENT CLAUSE WAIVER

The Department considered the following options related to Otter Tail's request for a waiver of Minnesota Rules 7825.2400-2600 (the Fuel Clause Adjustment Rules) to allow the pass-through of litigation expenses related to the coal contract settlement:

- Deny the waiver and disallow recovery of legal costs through the FAC.

⁴ The base cost of fuel is defined in Minn. Rules, part 7825.2400, subparts 4 and 5 as the cost per kilowatt-hour in the base period where the FAC is set to zero. Minn. Rules, part 7825.2400, subpart 8 defines the cost of fuel as the current period withdrawals from Account 151.

⁵ See e.g., Kansas City Power & Light, 51 FERC ¶ 61,285 (1990).

⁶ See DOC Attachment 1, p. 1, for a description of the Uniform System of Accounts and specifically Account 151.

- Allow the waiver and allow the legal costs to be netted against the coal contract settlement and recovered through the FAC;
- Allow recovery of estimated incremental outside legal costs that are above estimated legal outside costs recovered in rates.

The Department will discuss the merits of each option, including some relevant FERC and state cases and other information.

Deny waiver and disallow recovery of legal costs through the FAC.

The Department considered the following arguments in support of denying the waiver. First, as discussed above in the Minnesota statutes and rules, legal costs are not allowed to be passed through the FAC, absent a waiver. This point is not disputed by Otter Tail in its filing. However, Otter Tail's filing is a request for a waiver made in advance of including these costs in the FAC.

Second, the FERC on audit has required FAC refunds when utilities have included litigation and/or outside legal costs and other costs that are not actual fuel costs.⁷ However, the Department also notes that there have been cases before the FERC that have allowed a waiver of FAC requirements, which the Department will address further in the next section of its analysis. Because there is differing case history, FERC does not offer definitive guidance.

Third, legal costs are not trued-up or tracked to guarantee dollar-for-dollar recovery. Instead, legal costs are built into general rates much like depreciation, taxes or other cost-of-service items. These cost-of-service items change outside of a rate case, sometimes as a benefit to the company and sometimes as a benefit to ratepayers. However no attempt to track these changes or collect these differences is made absent a rate case. The Department recognizes that some level of legal costs is built into Otter Tail's current rates.

Balancing these arguments is the concern that fully disallowing all legal costs incurred for this Knife River litigation to obtain the settlement received by Otter Tail could be a disincentive for Otter Tail to litigate unreasonable fuel costs in the future. Since under the present regulatory scheme Otter Tail would be fully compensated for fuel costs through the FAC, there would be no incentive for Otter Tail to litigate unreasonable fuel costs in the future.

As a result of these considerations, the Department concludes that it would not be in the public interest to deny the waiver. However, it does seem reasonable to address, in some manner, the legal costs included in rates.

⁷ See DOC Attachment 1, pp. 2 to 7.

Allow the waiver and allow the legal costs to be netted against the coal contract settlement and recovered through the FAC.

The Department considered the following arguments regarding this option. First, Otter Tail was upfront in its filing to the Commission and the Department by bringing the \$2.8 million refund for ratepayers to our attention. Otter Tail is also requesting approval to net the litigation costs against the refund prior to passing them through the FAC.

Second, FERC Orders on remand have allowed recovery of litigation expenses in the FAC by virtue of a waiver. In its petition Otter Tail relies on a Commission and FERC decision, (Minnesota Power & Light (MP&L) M.P.U.C. Docket No. E015/M-89-42, Minnesota Power & Light, 45 FERC ¶ 61,369 (1988), following remand by the D.C. Circuit, 852 F. 2d 1070). In this case FERC initially had found on audit that MP&L had improperly included certain attorney fees and other related administrative and general expenses (A&G expenses) in Account 151, Fuel Stock, and therefore through the FAC. After shortened procedures for this contested matter FERC issued a May 21, 1987 order which denied inclusion of attorney fees and A&G expenses in Account 151 and denied recovery through the FAC. This order also denied MP&L's request for a retroactive waiver of its FAC.

MP&L sought a rehearing of this order, which was denied by operation of law.⁸ MP&L appealed the FERC's orders. On August 1, 1988, the Court of Appeals in Minnesota Power & Light v. FERC, *supra.*, remanded the matter to the FERC. In FERC Docket No. FA84-15-003, order on remand, dated December 6, 1988,¹⁰ the FERC indicated that it was concerned about granting a waiver in a situation where the utility failed to seek an interpretation of FERC regulation (waiver of FAC or request from the Chief Accountant), however, FERC nevertheless granted the waiver under the limited facts of the case and based on the court's instructions. The court, in affirming the Commission's decision on the merits, did so stating that its affirmance "will assure that in the future only proper expenses will be included in Account 151."¹¹ FERC stressed that "our action today is based on the unique circumstances presented by the court opinion."

In another FERC order¹² on remand by the Court of Appeals, the FERC indicated that "the court directed the Commission to permit Central Illinois to recoup its litigation expense from the settlement proceeds".¹³ FERC states in this order that "our fuel adjustment clause regulation, Account 151, and Account 518 are narrowly drawn, and that we have long had a policy - which has been upheld in the courts - of strict

⁸ 39 FERC ¶ 61,192 (1987).

⁹ 40 FERC ¶ 61,042 (1987).

¹⁰ See copy of remand order in DOC Attachment 2.

¹¹ 852 F.2d at 1073.

¹² 58 FERC ¶ 61,136 dated February 20, 1992.

¹³ 941 F. 2d at 630.

construction of the fuel adjustment clause regulation and Account 151. We also note litigation expenses, auditing fees and administrative and general expenses, are not listed in the fuel adjustment clause regulation, Account 151 or Account 518."

FERC also clarified that "in order to resolve any ambiguity that may exist as to the future treatment of litigation expenses, auditing fees, and administrative and general expenses, in light of our longstanding policy of strict construction, we clarify that, effective upon publication in the Federal Register, litigation expenses, auditing fees, and administrative and general expenses are not properly included in Accounts 151 and 518 and also not, absent prior waiver by the Commission, properly recoverable through a fuel adjustment clause."

The Department notes in both of these cases that the FERC denied recovery of litigation expenses at the audit level, in the initial FERC order, at the FERC rehearing level. Only when these cases were remanded back to FERC from the Court of Appeals, was FERC persuaded to allow recovery of litigation costs through the FAC. It is also clear in these two cases that the FERC requires utilities to file and make their case to FERC prior to including any costs through the FAC other than the actual cost of fuel.

Third, the Department believes an important consideration in Otter Tail's petition is that there is a clear net benefit for ratepayers. Specifically, that the refund is greater than the litigation costs.

The fourth issue concerns how much legal expenses are recovered, given that rates already include recovery of legal expenses. Otter Tail's petition does not address the fact that some legal expenses are incorporated in rates that were set in Otter Tail's last rate case (Docket No. E017/GR-86-244,380).

Allow recovery of an estimated incremental outside legal costs that are above estimated legal outside costs recovered in rates.

It is the Department's view that the public interest is best satisfied by balancing the possible disincentive for Otter Tail to litigate future unreasonable fuel costs¹⁴ and the fact that legal costs are a cost-of-service item appropriately addressed in a rate case and are not costs that are to be trued-up. The Department recommends allowing Otter Tail to net \$935,728 instead of the approximately \$1.2 million in litigation costs against the settlement amount. The Department's figure is based on the estimated incremental legal costs above those recovered in rates pursuant to Otter Tail's last rate case. The Department also excluded the 1994 and 1995 litigation expenses because they were not material and there were no benefits related to 1994 and 1995.¹⁵ The Department has attached a copy of its calculation as DOC Attachment 3.

¹⁴ In the event the Commission disallows recovery of Knife River litigation costs.

¹⁵ The Knife River settlement was for the period 1996 to 1999.

The Department supports this approach because: 1) Otter Tail filed a request for waiver of the Minnesota Rules 7825.2400-2600 and 2) Otter Tail showed net benefits (i.e. the refund is greater than the litigation costs) for 1996 to 1999. The Department recommends that the decision in this case be based on the unique facts of this case and not be precedent setting.

C. WAIVER REQUEST

In considering the three criteria for evaluating waiver requests as provided in Minnesota Rule part 7829.3200, the Department believes Otter Tail has met such criteria.¹⁶

First, the Department believes disallowing the waiver would impose an excessive burden and may create a disincentive for Otter Tail to litigate unreasonable fuel prices in the future. Second, granting the variance would not adversely affect the public interest since ratepayers still receive a net benefit of a refund through the FAC. Moreover, this treatment would encourage Otter Tail to seek further, effective, decreases in fuel costs. Third, this waiver does not conflict with standards imposed by law.

D. DISPOSITION OF THE REFUND

Because Minnesota customers make-up approximately half of the FAC sales¹⁷ the Department would expect that approximately half the coal contract settlement and half of the litigation costs approved by the Commission would be netted and refunded to Minnesota ratepayers through the FAC.

Because the implementation of the refund may be complex due to multiple jurisdictions, the Department also requests that the Commission require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

IV. RECOMMENDATION

The Department recommends that the Commission:

- allow Otter Tail to recover the estimated incremental outside legal costs of \$935,728 as provided in DOC Attachment No. 3

¹⁶ See pages 8-10 of Otter Tail's petition.

¹⁷ As stated by Otter Tail on page 7 of their petition and as noted by the Department in Otter Tail's monthly FAC filings.

- grant Otter Tail a waiver of Minnesota Rules 7825.2400-2600 to allow Otter Tail to refund the settlement net of the \$935,728 litigation costs through their FAC; and
- require Otter Tail to work with the Department and other interested parties in determining the method of refunding the net settlement to ratepayers before actually making the refund.

/jl

Minn. Rules part 7825.0300 states that the Uniform System of Accounts (USofA) adopted by the FPC (Federal Power Commission, now known as the Federal Energy Regulatory Commission, or FERC) shall be implemented as the Minnesota USofA.

The USofA provides that receipts of fuel by electric utilities shall be recorded in Account 151, Fuel Stock, which is an inventory account. The cost of fuel consumed is then recorded in Account 501. The USofA describes Account 151 as follows:

This account shall include the book cost of fuel on hand.

Items

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.
3. Excise taxes, purchasing agents' commissions, insurance and other expenses directly assignable to the cost of fuel.
4. Operating, maintenance and depreciation expenses and ad valorem taxes on utility-owned transportation equipment used to transport fuel from the point of acquisition to the unloading point.
5. Lease or rental costs of transportation equipment used to transport fuel from the point of acquisition to the unloading point.

A. FOSSIL FUEL1. Accounting and fuel adjustment clause (FAC) billing of legal expenses

The Company improperly included payments of \$234,282 to outside attorneys in Account 151, Fuel Stock, and in FAC billings to wholesale customers.

The attorneys represented the Company in litigating the constitutionality of the Montana coal severance tax. During 1978, 1979 and 1980, the Company paid under protest approximately \$3.0, \$4.6 and \$4.9 million, respectively, in Montana coal severance taxes.

In June 1978 the Company joined with eleven other utilities and coal suppliers in filing a suit in the State District Court in Helena, Montana, against the State of Montana challenging its coal severance tax, which equaled 30 percent of the mine price of coal before application of the tax. The suit alleged that the tax violated National energy policies and violated a series of Federal and state compromises under which Federal coal reserves were set aside for the permanent benefit of the people of the entire country, not just the state in which the coal was located. The suit sought to recover any payments of the coal severance tax made under protest, as well as to obtain an injunction against further collection of the tax.

In July 1979, the Montana State District Court granted a motion by the State of Montana to dismiss the suit. The Company and other plaintiff utilities appealed the dismissal to the Montana Supreme Court and in July 1980, this Court upheld the District Court's dismissal. The plaintiffs next appealed to the United States Supreme Court, which granted a writ of certiorari to fully review the merits of the arguments that the severance tax was unconstitutional. In July 1981, the United States Supreme Court rendered an opinion upholding the Montana Courts.

Account 151, Fuel Stock, of the Uniform System of Accounts, states in part: "This account shall include the book cost of fuel on hand." Among the items included in the account instructions are:

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.

Account 151 does not refer to legal expenses.

The Company should have recorded the legal expenditures in Account 923, Outside Services Employed. The instructions to Account 923 state:

It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered as an employee of the utility.

Among the items included in the listing for Account 923 are attorney fees.

Section 35.14 (a)(6) of the Commission's regulations covering fuel adjustment clauses states: "The cost of fossil fuel shall include no items other than those listed in Account 151"

The Commission has acted on a number of cases which addressed the issue of non-fuel items in the FAC. For example, FAC treatment has been denied for limestone, 1/ an agent used in the pollution control process. In its Order, the Commission stated, "Policy considerations support a narrow construction of the expenses listed in Account 151."

FAC treatment has also been denied for operation and maintenance expenses, depreciation and property taxes on oil storage tanks, financing charges, and exploration and development costs. 2/ Deferred fuel expenses have been denied FAC treatment. 3/ Even displaced fuel values are not includable in the FAC, absent specific Commission approval. 4/ The Commission denied FAC treatment for all of these expenditures even though they were related to the cost of fuel.

-
- 1/ Re: Docket EL81-2-000, Declaratory Order issued February 26, 1981, Electric Coops of Kansas (14 FERC 61,176).
 - 2/ Re: Docket E-8570, Initial Decision on Fuel Cost Adjustment Issues, Southern California Edison Co., July 20, 1976 (3 FERC 63,001). Affirmed April 26, 1978 (3 FERC 61,075).
 - 3/ Re: Docket ER76-285, Opinion No. 790, Public Service Company of New Hampshire, March 21, 1977 (57 FPC 1754).
 - 4/ Re: Docket ER82-493, Opinion No. 176, Pennsylvania Power & Light Co., June 22, 1983 (23 FERC 61,395). Also, Docket ER83-301, Southern California Edison Co., April 1, 1983 (23 FERC 61,002).

Recommendation

We recommended that the Company revise procedures to ensure that it does not charge legal expenses to Account 151 or include them in FAC billings to wholesale customers. The Company agreed to refund \$25,626 plus interest overcollected from wholesale customers as a result of including the legal expenses in the wholesale FAC.

19. Accounting and Fuel Adjustment Clause (FAC) Billing for Legal Expenses

The Company improperly included payments of \$1,242,268 for outside attorneys and consultants and other minor related costs in Account 151, Fuel Stock. Also, the Company included the payments in FAC billing to wholesale customers.

The Company hired attorneys and consultants to represent it in legal actions against coal suppliers related to Reid Gardner Units 1 through 4. The following summarizes the legal actions:

1. In 1985, the Company refused delivery of coal from Beaver Creek Coal Company (Beaver Creek) because of alleged poor quality of coal that Beaver Creek provided. Also, Beaver Creek sued the Company contending that the coal was up to contract standards. The litigation was continuing at December 31, 1987.
2. In April 1986, the Company notified U.S. Fuel Company that it would not accept any further deliveries under a coal supply agreement. The Company's specific complaint against U.S. Fuel Company related to the method of determining the cost of coal under the supply contract.

U.S. Fuel filed suit against the Company in the Third Judicial Court in Salt Lake City (Court), Utah, seeking specific performance of the contract. The Company filed a counterclaim seeking damages in overcharges on the payments to U.S. Fuel and to pay to the Court the withholdings pending settlement of the case.

The Company subsequently reached a settlement with the U.S. Fuel Company. It agreed to pay \$23,500,000 to U.S. Fuel Company in exchange for a reduction in both the quantity and price (from approximately \$45 per ton to \$23.50 per ton) of coal.

3. The Company entered into three suits in the Fall of 1987 to renegotiate and reduce the price of coal under the inequities and hardship clauses in the various contracts. Two of the suits relate to contracts with ARCO. The third suit involved Cyprus Western Coal Company. The three suits were pending at December 31, 1987.

The Company recorded \$1,242,268 of payments made to outside attorneys, and consultants and other minor related costs in litigating the above suits in Account 151, Fuel Stock. Also, the Company included the payments as a cost of fuel for determining billings through the FAC to wholesale customers.

The instructions to Account 151, Fuel Stock, of the Uniform System of Accounts state in part: "This account shall include the book cost of fuel on hand."

Among the items included in the account instructions are:

1. Invoice price of fuel less any cash or other discounts.
2. Freight, switching, demurrage and other transportation not including, however, any charges for unloading from the shipping medium.

The instructions to Account 151 do not refer to legal expenses or other expenses incurred in litigating fuel contractual arrangements.

The Company should have recorded the legal and other expenses incurred in resolving fuel contractual disputes in Account 923, Outside Service Employed. The instructions to Account 923 state in part:

It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstance where the person so engaged is not considered as an employee of the utility.

Among the types of expenses listed in Account 923 are attorney fees.

Section 35.14 (a)(6) of the Commission's Regulations covering fuel adjustment clauses states in part:

The cost of fossil fuel shall include no items other than those listed in Account 151

Since the above costs were not properly includible in Account 151, the Company should not have included these amounts as a component of fuel cost in computing wholesale FAC billings.

On June 27, 1988, the Company filed a petition with the Commission (Docket No. EL88-32-000) requesting waiver of the fuel clause regulations to permit recovery of the aforementioned costs in FAC billings. On December 13, 1988, the Commission denied the Company's request.

Recommendations

We recommended that the Company:

- (1) revise its procedures to ensure that it records payments for legal expenses, contract renegotiation expenses and other non-fuel expenses in Account 923 and does not include them as a component of fuel cost for FAC billings to wholesale customers.
- (2) recompute the wholesale FAC calculations by eliminating the legal and other expenses, including minimum charges for mine operating costs and for coal transportation costs, and refund with interest, any amounts overcollected from wholesale customers.

DEC 23 1988

DEPT. OF PUBLIC SERVICE

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

35647A

Before Commissioners: Martha O. Hesse, Chairman,
Charles G. Stalen, Charles A. Trabandt,
Elizabeth Anne Moler and Jerry J. Langdon.

Minnesota Power & Light Company) Docket No. FA84-15-003

ORDER ON REMAND

(Issued December 6, 1988)

This case is before the Commission on remand from the United States Court of Appeals for the Eighth Circuit. 1/ The case concerns Commission orders finding that Minnesota Power & Light Company (MP&L) improperly included certain attorney's fees and other related administrative and general (A&G) expenses in Account 151, Fuel Stock. 2/ The Commission also denied MP&L's alternate request for a waiver of the fuel adjustment clause (FAC) regulations in the event the Commission ruled that the fees and expenses were not properly accounted for in Account 151. The effect of the Commission's orders was to disallow the recovery of these expenses in MP&L's FAC billings.

The court affirmed the Commission's decision that the fees and expenses were not properly included in Account 151. 852 F.2d at 1073. However, the court remanded to the Commission, for further meaningful consideration in light of the court's opinion, the question of whether waiver of the FAC regulations is appropriate in these circumstances. *Id.* at 1074.

Background

On September 18, 1985, the Commission issued a letter order informing MP&L of the results of a staff audit of MP&L's books and records for the period between January 1, 1979, and December 31, 1983. 3/ In the order, the Commission noted MP&L's disagreement with the portions of the staff audit report concerning the inclusion of outside legal fees and A&G expenses in Account 151.

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- 1/ Minnesota Power & Light Company v. FERC, 852 F.2d 1070 (8th Cir. 1988).
 - 2/ Minnesota Power & Light Company, 39 FERC ¶ 61,192 (1987), rehearing denied, 40 FERC ¶ 61,042 (1987).
 - 3/ Minnesota Power & Light Company, 32 FERC ¶ 61,506 (1985).

MP&L consented to the disposition of the contested matters through the shortened procedures set forth in section 41.3 of the Commission's regulations. 4/ By order issued on January 24, 1986, the Commission directed MP&L to show why it should not be required to change its accounting practices and make appropriate refunds of any amounts collected due to improper accounting practices of the items questioned by the audit staff. 5/ The January 24 order also required MP&L to propose an allocation among its customers of any refunds, and set a procedural schedule for the submission of briefs. 6/

On May 21, 1987, the Commission issued an order finding that: (1) the terms of Account 151 should be strictly construed because of the Commission's limited review of FAC adjustments; (2) the attorney's fees and A&G expenses were not "directly assignable to the cost of fuel" within the meaning of Account 151; and (3) therefore, such fees and expenses "are not properly accounted for in Account 151 or properly recovered through MP&L's fuel adjustment clause." 39 FERC at 61,708. The Commission observed that the attorney's fees are properly accounted for in Account 923 and the A&G expenses in Accounts 920 and 921. *Id.* Further, the Commission rejected MP&L's request for waiver of its regulations and stated the need for strict construction of the rules regarding Account 151. *Id.*

MP&L sought rehearing of the May 21 order, which was denied by operation of law. 40 FERC ¶ 61,042 (1987). MP&L appealed the Commission's orders. On August 1, 1988, the court in Minnesota Power & Light Company v. FERC, *supra.*, remanded the matter to the Commission.

The court remanded the case to the Commission concerning its determination not to grant MP&L's request for waiver of the FAC regulations to permit recovery through MP&L's FAC of the attorney's fees and A&G expenses at issue. 7/ While acknowledging that the Commission's desire for strict compliance with its FAC regulations is a legitimate and necessary goal and recognizing that granting waiver of the regulation in this case

4/ 18 C.F.R. § 41.3 (1988).

5/ Minnesota Power & Light Company, 34 FERC ¶ 61,072 (1986).

6/ Briefs were filed by MP&L and the Commission's trial staff. MP&L disputed staff's interpretation of Account 151 and the appropriateness of strict construction in these circumstances. MP&L also requested a waiver should the Commission find that the fees and expenses were not properly included in Account 151.

7/ 852 F.2d at 1073-74.

would have weakened the force of our decision, the court, nevertheless, found that MP&L had presented a logical and reasonable good faith, albeit incorrect, argument for inclusion of the fees and expenses in Account 151. 8/ The court apparently was persuaded by the fact that this case may have presented a question of first impression before the Commission concerning whether legal expenses are directly assignable to the cost of fuel and thus properly accounted for in Account 151. The court also observed that the Commission in recent years has granted waiver of its FAC regulations or recognized that it would be inappropriate to require refunds where costs, which were improperly booked and recovered through a utility's FAC, were legitimate costs which a utility was otherwise entitled to recover through its wholesale rates. 9/ In these circumstances, the court was concerned about the inequity of requiring MP&L's shareholders to bear the burden of expenses to obtain a refund benefiting MP&L's wholesale customers. The court also stated that, in light of its opinion on the merits, the Commission should have very little concern that granting the waiver in this case will weaken the force of the Commission precedent and ruling on the merits. 10/

The court, therefore, remanded the case to the Commission for reconsideration of the requested waiver, giving "meaningful consideration" of present circumstances, including the court's affirmance on the merits. The court also observed that if the Commission grants the waiver it possesses the discretion to determine the prudence, propriety and reasonableness of the attorney's fees and expenses claimed by MP&L. 11/

Discussion

We originally denied MP&L's request for waiver in this case based on a concern that to grant the waiver would undermine the integrity of our fuel clause regulations, and would weaken the force of our precedent that our FAC regulations are to be strictly construed. A utility that has a legitimate question concerning whether an item is properly accounted for in Account

8/ Id. at 1073.

9/ The Commission has infrequently granted waiver of its FAC regulations. In cases where the Commission has granted a waiver of the FAC regulations, it has done so only upon a timely, before-the-fact request for a waiver or upon a request incorporated in a settlement or otherwise not objected to by the affected customers.

10/ 825 F.2d at 1074.

11/ Id.

151, or in any other account, has two procedural avenues available to resolve any uncertainties. It should promptly bring its question to the Commission by either requesting an opinion from the Commission's Chief Accountant 12/ or by filing a petition for declaratory order with the Commission. 13/ In this case, MP&L did neither. Rather, it determined on its own that the attorney's fees and A&G expenses were properly accounted for in Account 151 and thus could be recovered through its FAC.

As a general matter, we believe that it is appropriate to hold the management of utilities accountable for their actions. We presume that all utilities subject to our jurisdiction are familiar with the Commission's procedures, discussed above, that allow questions of doubtful interpretation concerning our accounting regulations to be resolved. In addition, utilities are presumed to know the fuel adjustment clause waiver provisions. See 18 C.F.R. § 35.14(a)(10) (1988). We have serious concerns that allowing management to escape the consequences of not availing themselves of these procedures, through retroactive waivers of our regulations, will weaken our policy of strictly construing our accounting and fuel adjustment clause regulations.

We also note that fuel adjustment clauses are permitted to track changes in allowable base period and current period fuel cost component amounts on an amount per kwh basis. Fuel adjustment clauses may not automatically track the introduction in the current period of new fuel cost components without prior Commission approval. This is the case whether or not the new cost item may be recorded in Account 151.

Although we remain concerned about granting a waiver in a situation where the utility has deliberately failed to seek an interpretation of our regulations, we will nevertheless grant the waiver under the limited facts of this case and based on the court's instructions. The court, in affirming the Commission's decision on the merits, did so stating that its affirmance "will assure that in the future only proper expenses will be included

12/ The Commission's Chief Accountant may issue interpretations of the Uniform Systems of Accounts and pass upon certain proposed accounting matters. 18 C.F.R. § 375.303(a) and (b) (1988).

13/ 18 C.F.R. § 385.207(a)(2) (1988). See also General Instruction No. 5 to Part 101 of the Commission's regulations (Uniform System of Accounts) which provides in accordance with Part 101 [a]: "To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision."

in Account 151." 852 F.2d at 1073. At the same time, with that assurance fixed, the court also recognized that in this case "the inequity remains of requiring the shareholders to bear the burden of expenses to obtain a refund benefiting the wholesale customers of MP&L." 852 F.2d at 1074. Balancing this perceived inequity against our serious concerns about maintaining the integrity of our FAC regulations, and given the court's recognition of the need for strict compliance with our regulations and its affirmance of our legal interpretation of the regulations, we conclude that a waiver in this case is appropriate.

In granting this waiver, we stress that our action today is based on the unique circumstances presented by the court opinion. We do not intend that it establish any precedent with respect to other utilities' requests for retroactive waiver of the fuel clause regulations. We affirm our past policy of not granting retroactive waivers of our regulations in cases where the item in question is in a "grey area" of the FAC regulations and the utility fails to take the necessary procedural step to clarify the proper treatment of the item.

On March 21, 1988, MP&L submitted a compliance report detailing its refund payments to its customers, including interest pursuant to 18 C.F.R. § 35.19a (1988). In these circumstances, we will allow MP&L to recover the refunded amounts, with interest, over a 12-month period from the affected wholesale customers. Interest shall be applied to any unbilled balance at rates calculated in conformance with section 35.19a. However, we will allow MP&L's customers the option of repaying the remaining balance due at any time in order to avoid the imposition of additional interest.

The Commission orders:

(A) MP&L's request for waiver of the FAC regulations is hereby granted.

(B) MP&L shall recover the refunded amounts with interest pursuant to section 35.19a, over a 12-month period from the affected wholesale customers. MP&L's customers shall have the option of repaying the remaining balance due at any time during the 12-month period.

(C) Docket No. FA84-15-003 is hereby terminated.

By the Commission.

(S E A L)

Lois D. Cashell

Lois D. Cashell,
Secretary.

	Knife River Legal Costs	OT's Other Legal Costs	Total Legal Costs	Cost-of-Service Legal Costs
1996 Legal Costs Incurred	\$ 143,765	\$ 236,344	\$ 380,109	\$ 117,000 1/
% of Total Legal Costs	38%	62%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	44,252	72,748		
Allowed Legal Cost Recovery - 1996	\$ 99,513			
1997 Legal Costs Incurred	\$ 309,601	\$ 318,891	\$ 628,492	\$ 117,000 1/
% of Total Legal Costs	49%	51%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	57,635	59,365		
Allowed Legal Cost Recovery - 1997	\$ 251,966			
1998 Legal Costs Incurred	\$ 441,368	\$ 190,172	\$ 631,540	\$ 117,000 1/
% of Total Legal Costs	70%	30%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	81,768	35,232		
Allowed Legal Cost Recovery - 1998	\$ 359,600			
1999 Legal Costs Incurred	\$ 286,449	\$ 255,860	\$ 542,309	\$ 117,000 1/
% of Total Legal Costs	53%	47%	100%	
Times Cost of Service	\$ 117,000	\$ 117,000		
Incremental Cost Provided in Rates	61,800	55,200		
Allowed Legal Cost Recovery - 1999	\$ 224,649			
Sum of Allowed Legal Cost Recovery	\$ 935,728			

1/ This is based on Account 923, Outside Services Employed.
balance in the rate case of \$731,248*16% (portion of legal costs)

Otter Tail Power Company

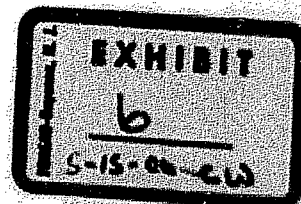
Knife River Coal Negotiations - W.O. 5027

Costs by Vendor

<u>Description</u>	<u>Total</u>
Pemberton, Sorlie, attorneys	45,864
Donelan, Cleary, attorneys	1,065,987
Vogel, Kelly, attorneys	38,663
Greene Espel	3,169
Energy Ventures	13,360
Peabody	22,293
Vehicle/plane	14,974
OTP Labor	33,196 *
Miscellaneous	3,364 *
	<u>1,240,870</u>

Costs by year

	<u>Total</u>
1994	40,983
1995	18,704
1996	143,765
1997	309,601
1998	441,368
1999	286,449
	<u>1,240,870</u>



**STATE OF SOUTH DAKOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

**In the Matter of NorthWestern Public
Service's Proposed Plan for Adjustment
Clause Treatment of Coyote Coal
Agreement Arbitration Damage Award**

Docket No. EL00-009

**REVISED PETITION OF
NORTHWESTERN PUBLIC SERVICE**

I. INTRODUCTION

NorthWestern Public Service ("NorthWestern"), a division of NorthWestern Corporation, is pleased to submit this Revised Petition for approval of a proposed plan to credit \$674,652.47 to its retail electric customers in the State of South Dakota. The Petition has been revised following discussions with the PUC Staff Analyst, Michele Farris, concerning the cost calculations in the exhibits attached to this Revised Petition.

The NorthWestern plan is based on the results of an arbitration proceeding (the "Arbitration Case") involving a contract for the sale and delivery of lignite coal, pursuant to a long-term contract, the Coyote Plant Coal Agreement, dated January 1, 1978 (the "Coal Agreement"), to the Coyote I Generating Station near Beulah, North Dakota ("Coyote"). In the Arbitration Case, NorthWestern and two other owners of Coyote, Otter Tail Power Company ("Otter Tail"), and the Northern Municipal Power Agency (through its agent and representative Minnkota Power Cooperative, Inc., "Minnkota") challenged certain contract provisions of the Coal Agreement with Knife River Coal Mining Company ("Knife River"). This filing is being made pursuant to South Dakota Codified Laws, the Administrative Rules of the State of South Dakota, and NorthWestern's tariff schedules previously approved by the South Dakota Public Utilities Commission (the "Commission").



In this Petition, NorthWestern will provide background information on the results of the Arbitration Case conducted pursuant to the arbitration provisions of the Coal Agreement and will present a proposed plan for Commission approval that would credit the net proceeds from a favorable result (an award of damages and post-judgment interest) in that proceeding. While a Confidentiality Agreement among the parties to the Arbitration Case, approved by the three-person arbitration panel handling that matter (the "Panel"), prohibits NorthWestern from disclosing details of the Arbitration Case (other than "as required by law"), NorthWestern can provide details on the results of the Panel's decision and NorthWestern's proposed plan to implement that decision to provide the benefits to NorthWestern's electric customers.

NorthWestern's proposed plan would utilize its adjustment clause to credit to its retail electric customers (all of whom it serves in South Dakota) the retail portion of the arbitration damage award and interest, less its costs related to its efforts in receiving not only the damage award, but also ongoing coal price reduction and other favorable Coal Agreement provision changes.

II. GENERAL FILING INFORMATION

Pursuant to ARSD 20:10:01:02:03, the names, addresses, and phone numbers for the contact persons for NorthWestern in this matter are:

Alan D. Dietrich
NorthWestern Corporation
125 South Dakota Avenue
Sioux Falls, SD 57104-6403
Phone (605) 978-2907
Fax (605) 978-2840

Richard J. Green
NorthWestern Public Service
600 Market Street West
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Thomas P. Hitchcock
NorthWestern Energy
33 Third Street SE
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Phone (605) 353-8235
Fax (605) 353-8216

Jeffrey Decker
NorthWestern Energy
33 Third Street SE
Huron, SD 57350-1605
Phone (605) 353-8315
Fax (605) 353-8216

III. COYOTE ARBITRATION CASE RESULTS

As a result of the recent final decision of the Panel, NorthWestern has received a number of benefits for its electric customers. Those benefits include:

- (A) Effective with the implementation of the Arbitration Decision, the price of lignite coal delivered to Coyote by Knife River was reduced from \$11.23 per ton to \$10.20 per ton. This savings was included in NorthWestern's quarterly adjustment clause filings with the Commission (Section 3, various Revised Tariff Sheets No. 33a). Based on this savings of approximately \$1.00 per ton, and assuming an estimated purchase at Coyote of 250,000 tons per year for NorthWestern's 10% ownership share of Coyote, the successful re-pricing of coal will produce an annual savings for NorthWestern's retail and wholesale electric customers of approximately \$250,000 or \$4,000,000 over the remaining 16-year term of the Coal Agreement.
- (B) Revisions to other contract provisions were approved and have been implemented to the Coal Agreement which will provide stronger control of price changes and more competitive generation at Coyote, as compared to other coal-fired generating plants, enabling NorthWestern to continue to serve its customers with low-cost electricity and to assist NorthWestern in its sale of surplus power through wholesale transactions, further benefiting retail customers from better utilization of Coyote.
- (C) The Panel's decision in the Arbitration Case included, among other findings, a ruling that the damages should be awarded for charges for coal by Knife River during the period of the Arbitration Case in excess of the price of comparable coal mines in North Dakota. A comparison of the charged prices and comparable prices determined by the Panel is included in Exhibit A to this Petition.

NorthWestern received an award of damages of \$815,993 plus interest of \$42,350 paid by Knife River from the date of the Arbitration Decision related to such difference in coal prices. The damages were calculated based upon the Coyote owners' share of fuel expense at the plant during the months for which the award was based (no part of the Panel's damage award was related to Montana-Dakota Utilities Co.'s ["MDU's"] portion of those purchases.) This Petition presents NorthWestern's proposed plan for treatment of its share of the damage award.

IV. NORTHWESTERN'S PROPOSED PLAN FOR CREDITING TO CUSTOMERS THE DAMAGES AND INTEREST AWARDED IN THE ARBITRATION CASE

NorthWestern provided a significant investment of its resources through the efforts of its executives and other employees participating in the strategy sessions among the three Coyote owners, expert witnesses, and attorneys; the attempts at negotiations with Knife River related to these issues; a North Dakota court proceeding that was stayed pending the Arbitration Case but which was utilized to implement the Panel's decision; and the Arbitration Case itself.

NorthWestern undertook those efforts in an attempt to bring the benefits of lower fuel costs and resulting lower charges for electricity to its customers. NorthWestern's customers have benefited greatly from the efforts involved in the Arbitration Case and related steps and proceedings in ongoing price reductions and Coal Agreement provision changes [III(A) and (B)], and under NorthWestern's proposed plan, the customers will realize a further significant benefit from their portion of the damages and interest NorthWestern has received.

To calculate the appropriate benefit, which it proposes in this plan to credit through its adjustment clause, to its retail customers, NorthWestern has determined the portion of the fuel use attributable to Federal Energy Regulatory Commission ("FERC") jurisdictional sales (NPS' FERC WS-1 rate) and retail sales for each month for which damages were awarded. Using those calculations (detailed on Exhibit B to this Petition), NorthWestern has calculated the benefit as

follows: (i) determine the damages and interest obtained from Knife River, (ii) add interest for the time NorthWestern has had these payments until the proposed inclusion of the sums in the adjustment mechanism on April 30, 2000, (iii) subtract NorthWestern's costs in securing the Panel's decision (details of these costs are shown on Exhibit C to this Petition), and (iv) the resulting amount is the net benefit to be provided to NorthWestern retail and wholesale electric customers (the "Net Benefit"). The calculations related to this formula are shown in Exhibit D to this Petition. NorthWestern notes that the costs it has included in item (iii) above of this formula represent solely out-of-pocket costs of expert witnesses, attorneys, American Arbitration Association fees and costs (including the fees of the Panel members), and incidental travel expenses for NorthWestern executives to attend the meetings and proceedings related to the Arbitration Case. The costs do not include any allocation or assignment of costs for the time of NorthWestern's executives and other employees.

NorthWestern proposes treating the Net Benefit as a "variance in actual qualified costs incurred and costs recovered," which under NorthWestern's adjustment clause are assessed a "carrying charge based upon the overall rate of return allowed by the Commission in the Company's last general rate filing" and "amortized into rates over the last twelve months of the subsequent thirteen month period," NorthWestern South Dakota Electric Rate Schedule, Section 3, 1st Revised Sheet No. 33.1, Paragraph (5).

As noted above, NorthWestern's customers have already received the benefit of the price reduction ordered by the Panel in the Arbitration Case. NorthWestern used its adjustment clause to automatically pass those savings along "in direct relation to changes in . . . delivered costs of fuel," (SDCL 49-34A-25). NorthWestern's customers will also benefit over the life of the Coal Agreement from the other language changes approved during the Arbitration Case, which will help keep the costs of fuel at Coyote more competitive with other comparable generating plants.

While the treatment of the ongoing price reduction is specifically addressed by statute (SDCL 49-34A-25 speaks to "automatic adjustment of charges for public utility service in direct relation to changes in . . . the delivered costs of fuel used in generation of electricity") and in NorthWestern's adjustment clause tariff, the treatment of an arbitration damage award is not. The Panel's damage award that NorthWestern and the other Coyote owners participating in the Arbitration Case were able to achieve is extraordinary in nature and not related to ongoing costs of fuel, but to past performance under the Coal Agreement.

The instant situation is not discussed in SDCL 49-34A-25, in administrative rules adopted by the Commission, or in the tariff sheets of NorthWestern filed with and approved by the Commission. All of these governing imperatives contain language that deals with the periodic adjustment of rate schedules for current changes in the cost of fuel. They do not specify how a large refund or damage award should be treated by NorthWestern. NorthWestern proposes, in light of the lack of specific authority on this subject, that the Commission issue an order authorizing NorthWestern to use its adjustment clause and that clause's 12-month crediting mechanism, to credit to its retail electric customers (all of whom are subject to the jurisdiction of the Commission) the retail portion of the damage award and interest on such award (after subtracting their share of the costs incurred by NorthWestern in achieving that result).

Commission adoption of NorthWestern's proposed plan will allow NorthWestern's electric customers to benefit from the efforts successfully undertaken by NorthWestern, Otter Tail, and Minnkota. Those customers will benefit from the current price reduction, other Coal Agreement provision changes, and the damages received (together with interest on the funds provided by Knife River - both the interest paid by Knife River and interest paid by NorthWestern for any time period such funds are held by it).

It is appropriate that NorthWestern be reimbursed for the costs that it advanced in support of the efforts to realize fuel cost savings for its customers. NorthWestern's customers benefit

from lower costs of energy from Coyote. NorthWestern believes that it has a responsibility to provide just and reasonable rates, and its executives' efforts to take steps to insure such result are part of its cost of service and its obligations as a public utility, however, when extraordinary steps are taken to institute legal proceedings to challenge a producer in a long and complex matter, such as the Arbitration Case, the out-of-pocket costs related to such effort should be an off-set to the recovery achieved. Failure to allow such reimbursement will have a chilling effect on such efforts by other public utilities in South Dakota, to the ultimate detriment of utility customers.

Although, as mentioned above, there are no statutes, rules or tariffs that directly address the treatment of a damage award related to costs at a generating plant, NorthWestern submits that the situation here is analogous to the Commission's participating in a proceeding (such as an interstate natural gas pipeline rate case) at the Federal Energy Regulatory Commission which results in a refund to a jurisdictional public utility. Under SDCL 49-34A-72, the Commission is entitled to reimbursement for its litigation expenses, including "reasonable attorney's fees, expert witness fees, and all other associated costs." In this Petition, NorthWestern is asking for precisely that result, reimbursement for its out-of-pocket attorney's fees, expert witness fees, and other associated costs (the American Arbitration Association fees, fees of the Panel members, and specific travel costs of executives of NorthWestern participating in the Arbitration Case).

NorthWestern urges the Commission to order the use of its adjustment clause to credit the damage award and interest, utilizing the formula provided above (including recognition of costs involved in realizing the award), as the fairest, most reasonable approach to deal with this extraordinary result. The plan is also consistent with the intent of SDCL 49-34A-25, which was enacted to provide for the adjustment of charges to customers to reflect changes in the cost of the components of service to them, including changes in the cost of fuel used to generate electricity.

V. CONCLUSION

For the reasons outlined in this Petition, NorthWestern requests that the Commission enter its order adopting the plan for Arbitration Case damage and interest crediting to NorthWestern's retail electric customers through NorthWestern's adjustment clause presented in this Petition and directing NorthWestern to file a revised tariff schedule, Section J, Sheet 33(a) to implement that decision.

Dated this 9th day of May, 2000.

**RESPECTFULLY SUBMITTED,
NORTHWESTERN PUBLIC SERVICE.**

a division of NorthWestern Corporation

By: 

Alan D. Dietrich

Attorney for NorthWestern Public Service

CERTIFICATE OF SERVICE

An original and ten copies of this Petition were mailed this 9th day of May, 2000, to William Bullard, Executive Director, SD Public Utilities Commission, 500 East Capitol Ave., Pierre, SD 57501, and a copy of this Petition was mailed to each of the following:

Mr. Cameron Hoseck
Assistant Attorney General
SD Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Mr. Todd J. Guerrero
Associate General Counsel
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56538

Mr. Donald R. Ball
Director of Regulatory Affairs
Montana-Dakota Utilities Co.
400 N. 4th St.
Bismarck, ND 58501

Mr. Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.
400 N. 4th St.
Bismarck, ND 58501

Ms. Michele Farris, Staff Analyst
SD Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

NorthWestern Public Service

By: 

Its Attorney

**ARBITRATION PANEL DECISION
COAL PRICE**

(per ton at 45,000 tons per week)

<u>Time Period</u>	<u>Delivered Cost</u>	<u>Panel Determined Cost</u>
4Q96	\$11.53	\$9.83
1997	11.61	9.83
1998	11.48	10.20
1Q99	11.23	10.20

ALLOCATION OF DAMAGE AWARD

EXHIBIT B

Period	Damage Award	S. Dakota		S. Dakota		S. Dakota		Allocation of Damage Award	
		WS-1 Mwh Sales		Retail Mwh Sales		Total Mwh Sales		S. Dakota WS-1 Sales	S. Dakota Retail Sales
Sep-96	\$ 11,438.00	195	1/	61,188	1/	61,383	1/	\$ 36.34	\$ 11,401.66
Oct-96	\$ 28,308.00	299		77,744		78,043		\$ 108.45	\$ 28,199.55
Nov-96	\$ 36,789.00	480		83,178		83,658		\$ 211.08	\$ 36,577.92
Dec-96	\$ 27,563.00	1,352		95,013		96,365		\$ 386.71	\$ 27,176.29
Jan-97	\$ 34,092.00	1,654		115,059		116,713		\$ 483.14	\$ 33,608.86
Feb-97	\$ 32,678.00	1,697		102,152		103,849		\$ 533.99	\$ 32,144.01
Mar-97	\$ 38,951.00	1,282		86,580		87,862		\$ 568.34	\$ 38,382.66
Apr-97	\$ -	1,199		82,135		83,334		\$ -	\$ -
May-97	\$ -	824		83,975		84,799		\$ -	\$ -
Jun-97	\$ 14,792.00	492		81,532		82,024		\$ 88.73	\$ 14,703.27
Jul-97	\$ 28,567.00	574		96,974		97,548		\$ 168.10	\$ 28,398.90
Aug-97	\$ 29,414.00	720		109,801		110,521		\$ 191.62	\$ 29,222.38
Sep-97	\$ 30,302.00	680		96,637		97,317		\$ 211.73	\$ 30,090.27
Oct-97	\$ 33,761.00	573		82,108		82,681		\$ 233.97	\$ 33,527.03
Nov-97	\$ 36,899.00	591		85,869		86,460		\$ 252.22	\$ 36,646.78
Dec-97	\$ 42,751.00	949		91,370		92,319		\$ 439.46	\$ 42,311.54
Jan-98	\$ 38,137.00	1,046		103,542		104,588		\$ 381.41	\$ 37,755.59
Feb-98	\$ 28,044.00	1,135		94,245		95,380		\$ 333.72	\$ 27,710.28
Mar-98	\$ 29,106.00	726		90,198		90,924		\$ 232.40	\$ 28,873.60
Apr-98	\$ 32,314.00	828		88,960		89,788		\$ 297.99	\$ 32,016.01
May-98	\$ 34,390.00	554		81,611		82,165		\$ 231.88	\$ 34,158.12
Jun-98	\$ 30,827.00	440		85,415		85,855		\$ 157.99	\$ 30,669.01
Jul-98	\$ 21,583.00	453		106,973		107,426		\$ 91.01	\$ 21,491.99
Aug-98	\$ 22,593.00	679		108,189		108,868		\$ 140.91	\$ 22,452.09
Sep-98	\$ 8,621.00	597		107,595		108,192		\$ 47.57	\$ 8,573.43
Oct-98	\$ 26,660.00	485		83,156		83,641		\$ 154.59	\$ 26,505.41
Nov-98	\$ 24,667.00	461		84,903		85,364		\$ 133.21	\$ 24,533.79
Dec-98	\$ 24,028.00	721		88,638		89,359		\$ 193.87	\$ 23,834.13
Jan-99	\$ 27,409.00	975		112,583		113,558		\$ 235.33	\$ 27,173.67
Feb-99	\$ 19,048.00	1,201		90,284		91,485		\$ 250.06	\$ 18,797.94
Mar-99	\$ 22,261.00	731	2/	69,851	2/	70,382	2/	\$ 231.21	\$ 22,029.79
Totals	\$ 815,993.00	24,593		2,827,258		2,851,851		\$ 7,027.03	\$ 698,968.97
	100.0000%							0.8612%	99.1388%

Note 1 - September 13 thru 30, 1996 Only

Note 2 - March 1 thru 26, 1999 Only

**COYOTE COAL ARBITRATION CASE
NORTHWESTERN'S COSTS**

Attorney Fees

Donelan, Cleary, Wood & Maser, P.C.	\$106,365.56
Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd.	8,451.13

Expert Witness Fees

L. E. Peabody & Associates, Inc.	53,984.21
Price Waterhouse	18,306.90
Energy Ventures Analysis, Inc.	15,449.52
W. Craig Kuhl, CPA	6,058.12

American Arbitration Association Fees	14,940.43
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NorthWestern Travel Expenses	<u>13,218.22</u>
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Total Costs	\$236,774.09
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NorthWestern's share of the total common costs (attorney fees, expert witness fees and AAA fees) was calculated based on its 10% ownership share of Coyote. During the pendency of the arbitration proceeding, NorthWestern actually contributed 13.3% representing its share of the 75% interest Coyote of NorthWestern, Otter Tail and Minnkota because MDU was not participating in that proceeding. After the proceeding was concluded, MDU paid to the other owners its share of the arbitration case expenses (a reimbursement of \$70,775.13 to NorthWestern).

**COYOTE COAL ARBITRATION DAMAGE AWARD
CALCULATION OF PROPOSED CREDIT FOR
NORTHWESTERN RETAIL ELECTRIC CUSTOMERS**

<u>Item</u>		<u>Total</u>	<u>Wholesale</u>	<u>Retail</u>
Damage Award		\$815,993.00	\$ 7,027.03	\$808,965.97
Plus Knife River Interest	+	<u>42,380.00</u>	<u>364.98</u>	<u>42,015.02</u>
Total Received	=	858,373.00	7,392.01	850,980.99
Plus North Western Interest (through 4/30/00)	+	<u>58,914.14</u>	<u>507.37</u>	<u>58,406.77</u>
Total Funds Available	=	917,287.14	7,899.68	909,387.46
Less Out-of-Pocket Costs	-	<u>236,774.09</u>	<u>2,039.10</u>	<u>234,734.99</u>
Total Net Funds	=	680,513.05	5,860.58	\$674,652.47
				To be Credited to Retail Customers Through Adjustment Clause

CONFIDENTIAL

In the Matter of the Arbitration between)

Northern Municipal Power Agency, by and)
through its agent and representative for)
the Coyote Coal Plant, Minnkota Power)
Cooperative, Inc., Otter Tail Power Company.)
Northwestern Public Service Company.)

Claimants,)

v.)

Knife River Coal Mining Company.)

Respondents.)

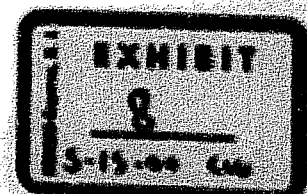
AAA Case No. 56 198 00373 96

MEMORANDUM OPINION

Claimants in this case are Northern Municipal Power Agency, Otter Tail Power Company and Northwestern Public Service Company, collectively referred to herein as Northern Municipal, Claimants or the Buyers. The respondent is Knife River Coal Mining Company, also referred to as Knife River or the Seller.

Effective January 1, 1978, Claimants and Knife River entered into the agreement at issue here whereby Knife River dedicated to the Buyers about 75 million tons of coal reserves at the Beulah Mine. Buyers agreed that for a 35 year period they would purchase from the Beulah Mine the fuel requirements for a coal fuel generating plant to be built by Buyers adjacent to the mine.

The Coyote generating plant was built and the contract has governed the not always harmonious relationship of the parties thereafter. At issue in the instant arbitration is the price of coal as fixed under the agreement.



Claimants seek relief from the present price adjustment structure and assert a right to a new price under Sections 7.1(b) and 8.3(f) which mandate changes to the contract if three (3) prerequisites are satisfied. Whether they have been is subject to disagreement between the parties, an issue discussed fully hereinafter.

The signing of the contract was accompanied by the simultaneous execution of an addendum expressing an overriding agreement that prices remain fair and equitable and that the basic guideline for determining the continuing fairness of the agreement would be a comparison of contract prices with prices in comparable coal agreements under generally similar mining conditions, which became effective at approximately the same time as the Coyote agreement. The identity of such mines and the true extent of their comparability is another contested issue in the case.

The price of coal for volumes in excess of 45,000 tons per week is fixed in Section 6.3 of the 1978 agreement at \$6.272 per ton. The contract recognizes the necessity for a price adjustment mechanism over the 35 years of its term, and so provides in Sections 7 and 8. In Section 7 of the agreement, it is anticipated that economic factors and conditions different from those extant on January 1, 1978 will require adjustment of the base price, and the components subject to periodic adjustment are listed with a provision for quarterly adjustment and a 1.4286 multiplier to provide the seller with a satisfactory average return.

Section 7.1 recognizes that the adjustments described above may not exactly match current economic changes and 7.1(b) provides that in the event of the operation of forces not within the reasonable control of the parties which bring about extreme or radical, temporary or long term change from the economic factors or conditions which existed in January, 1978, and

in the event that this circumstance renders clearly inequitable the methods of adjustment for base prices set forth in Section 7.2, then revised methods of adjustment of the base price shall be adopted.

7.1(c) defines the purpose of the above-described adjustment to be to allow the Buyers to purchase coal at a reasonable price and to allow the Seller a reasonable return "... as measured by net income as a percent of total sales revenue of Seller's Beulah Mine."

Section 8 of the agreement again addresses the price issue, this time with an agreed profit limit range for Knife River in the event that the variables in the base price determination result in a seller profit unreasonably high or unreasonably low. Knife River agrees based upon its past experience, as set forth in Paragraph 8.2, to a maximum net profit from sales of coal to Buyer of 22 % of total sale revenue and a minimum net profit of not less than 15%.

As noted above, contemporaneously with the execution of this agreement and to satisfy the express concerns of the Buyer, an addendum to the agreement was signed. It recited that Knife River was a low cost producer and was expected to continue to be a low cost producer compared to comparable coal supply agreements. The addendum recites that the continuing fairness of the prices throughout the agreement will be measured by prices in other comparable coal agreements under generally similar mining conditions effective at approximately the same time.

The overall picture which emerges from the agreement is a provision for flexibility in the coal price to address changing circumstances over a 35 year term of the contract. The contract sets a price per ton, and a complex method of quarterly adjustment based upon the

cumulative adjustments to several components which are elements of Knife River's costs and net income.

Section 8.3 defines the determination of "... net income ..." in considerable detail and concludes with a recognition of the possibility that there may occur outside the parties control extreme or radical changes from the economic factors and conditions which existed in January, 1978. If such changes distort or render clearly inequitable the method of determining the net income of Seller such as to produce for either party material injury or loss, then revised methods of profit limits imposed on the seller shall be adopted so as to produce, by some method other than set forth in the agreement a reasonable and equitable return to the Seller.

Finally, to satisfy lingering concerns of the Buyers, the addendum to the contract took still another approach to preventing an unfair price with the proviso that the continuing fairness of the price shall be determined by comparison to prices in similar coal agreements.

The pricing provisions of the agreement incorporate some flexibility by way of the determination of the several components which go into the price calculation, and the contract clearly recognizes that if this method of calculation produces unfair results it may be revised. The triggering of this revision of the Section 7 methodologies is the occurrence of extreme or radical changes from the economic factors and conditions which existed in January, 1978, and which changes seriously distort or render clearly inequitable the method provided for determining Seller's net income with the result that either party would suffer material injury or loss. If the panel finds this to have been the case, then the "revised methods of profit limits imposed on Seller shall be adopted by the parties."

The parties argue extensively whether the differing economic circumstances since January, 1978 are such as to trigger the price revision aspect of the agreement. These arguments addressed to the meaning of Sections 7.1(b) and 8.3(f) of the agreement are relevant to an extent, but do not completely address the issue. The contract as a whole, after addressing these conditions, superimposes a broader and overriding test of price fairness and Sections 7 and 8 cannot be read in isolation.

The overriding test of whether extreme or radical changes have caused the agreement's pricing mechanisms and limitations to become distorted and subject to change, and a test clearly within the contemplation of the parties, is the comparison of the current price with that of comparable mines. That the current price is too high is apparent, and indeed Knife River's voluntary unilateral price reduction reinforces that conclusion.

Taking the contract as a whole, including the addendum, the issue is whether the detailed pricing methodology of the agreement continues to be binding or whether there is justification for an abandonment of this methodology in favor of the general provisions of the contract mandating reasonableness and fairness determined by comparability. The evidence supports the latter conclusion.

The parties contend strenuously over the issue whether the three pronged test of Sections 7 and 8 have been met as the threshold event justifying a price change. But this test cannot be considered in any context other than subject, as it is in the addendum, to the overriding consideration of prices remaining equitable, and subject to the basic guideline of comparability.

Thus, it can be said that if the evidence indicates an inequitable price or a price not comparable to similar North Dakota mines, this conclusion embodies the basic assumption that the three pronged test has been met and the contract price is subject to adjustment. Accordingly, based on the overall evidence, the standards of Sections 7.1(b) and 8.3(f), as interpreted in accordance with the addendum, have been satisfied.

There is a confirmation of this conclusion in the fact that Knife River has unilaterally recognized the circumstances justifying a one dollar per ton decrease in price. The parties are not now operating under the price fixing methodology of the contract, as a result of changes and distortions which call the fairness and comparability clauses into play.

A study of the evidence relevant to comparability reveals three mines deserving consideration. They are the Center Mine, Falkirk and Freedom. The Center Mine price (based on the average of the Milton Young 1 and Milton Young 2 contract) must be adjusted because at the time of signing the agreement the parties knew that Center price was 29% lower than the original price. That relative difference must be preserved in seeking comparability.

The totality of the comparability evidence supports an equitable price effective January 1, 1998 of \$10.20 per ton for the highest volume level. The prices for the lower volume levels should be adjusted proportionally.

This determination cannot be a continuous fixed price for the future. The contemplation of the parties to the agreement was a flexible price with a variety of components reflecting changing circumstances. It becomes necessary therefore to revise the price adjustment terms of Section 7 as amended and the profit limitation terms of Section 8 as

amended to bring about the \$10.20 per ton price and to allow future quarterly changes to that price as the revised formula may dictate.

The parties are instructed to confer and to agree within 30 days, if possible, on the revisions to Sections 7 and 8, as heretofore amended, that are appropriate in light of the reduction of the price to \$10.20 per ton. If the parties cannot agree within 30 days, they are instructed to notify the Panel and the Panel will convene a hearing to consider the proposed contract revisions by each party and will determine the appropriate revisions.

Northern Municipal seeks damages for an extensive past period of overcharge by Knife River. The power company acquiesced in the price until it raised the issue in this arbitration on September 13, 1996, and damages, if any, must be calculated beginning on that date, thus requiring the use of only the 1996 comparable price which is \$9.83, the equitable price for the coal. The difference between \$9.83 per ton and the actual price charged by Knife River from September 13, 1996 through December 31, 1997 is the amount of damages for that period. The difference between \$10.20 per ton, and the actual price charged by Knife River from January 1, 1998 until the date of this Opinion, is the amount of damages for that period. The sum of the numbers for those two periods is the amount of damages due Northern Municipal. The power company is asked to make that calculation to be incorporated into a final judgment.

Dated: 3/26, 1999.

Frank J. McGarr
CA Michael Loftis
Joseph W. Morris

In the Matter of the Arbitration between)

Northern Municipal Power Agency, by and)
through its agent and representative for)
the Coyote Coal Plant, Minnkota Power)
Cooperative, Inc., Otter Tail Power Company,)
Northwestern Public Service Company,)

Claimants,)

v.)

Knife River Coal Mining Company,)

Respondents.)

AAA Case No. 56 198 00373 96

MEMORANDUM OPINION

In this Panel's Memorandum Opinion of March 26, 1999, the parties were instructed "to confer and agree ..., if possible, on revisions to Sections 7 and 8, as heretofore amended, that are appropriate in light of the reduction of the price to \$10.20 per ton." The parties were further instructed that if they were unable to agree, they should notify the Panel so that a hearing could be convened to consider the contract revisions prepared by each party. The Panel also requested the power companies to calculate the amount of damages due under the Opinion.

By letter dated May 21, 1999 the parties notified the Panel that they had met and exchanged various proposals and counterproposals but had been unable to reach agreement. Accordingly a hearing was scheduled for July 26, 1999 to consider the parties respective proposals for revision to Sections 7 and 8 of the Coal Agreement. In addition, the parties filings revealed certain issues concerning the calculation of damages.

Prior to the hearing, Northern Municipal Power Agency, Otter Tail Power Company and Northwestern Public Service Company ("Buyers") accepted the revisions to Section 7 proposed by Knife River Coal Mining Company ("Knife River"). As a result, the



issues addressed at the hearing and before the Panel for decision are:

- (1) the revisions to Section 8 of the Coal Agreement that are appropriate in light of the reduction in the price to \$10.20 per ton;
- (2) whether damages should include any amounts attributable to Montana Dakota Utilities Company ("MDU");
- (3) whether Buyers are entitled to pre-judgment interest on the damages award; and
- (4) whether the Panel's use of a price of \$9.83 for calculation of damages for 1997 was inadvertent.

Section 8 Revisions

The parties present very different proposals for revising Section 8 of the Coal Agreement. Claimants propose to replace the net income based standard currently contained in Section 8 with an entirely new standard based upon a Comparable North Dakota Coal Price equal to a three year simple average of coal prices from the three mines the Panel selected as comparable in its March 26th Opinion. This average price would be calculated following the methodology employed by the Panel. To produce a minimum and maximum price, Buyers would allow a range of five percent above to five percent below the calculated comparable price. If the price as adjusted under Section 7 fell outside of this range, the calculated comparable price would be charged.

Knife River proposes revisions to Section 8 that would retain its basic structure but make several changes in line with revisions that Buyers had proposed at the October, 1998

hearings in this matter. Specifically, Section 8.2 would be revised to provide that the first application of the revised profit limitations would be for the year 2000 (i.e., there would be no profit limitation applied for the year 1999), see Tr., p. 1318; Section 8.2(a) and (b) would be revised to change the maximum annual Net Income figure to 15 percent and the minimum annual Net Income figure to 10 percent; Section 8.3(a)(3) would be deleted; Section 8.3(b)(2) and (3) would be deleted to eliminate reliance on "deemed" numbers in favor of actual numbers for depreciation and royalty expense; a new Section 8.3(b)(2) would be added to impose a cap on certain overheads; and Section 8.5 would be revised to limit the Section 8 profit limitation solely to revenues, costs and taxes attributable to Buyers. Finally, Knife River would revise Section 8.1 to delete 8.1(b), (c) and (d); revise Section 8.3(f) to change the date January, 1978 to March, 1999; and revise Section 8.4 to change the maximum annual Net Income and minimum annual Net Income percentage figures in 8.4(a), (b), (d) and (e) from 22 and 15%, respectively, to 15 and 10%, to change the adjusted maximum annual Net Income percentage figure in 8.4(d) to 14% and the adjusted minimum annual Net Income percentage figure in 8.4(e) to 11%, and to eliminate references in 8.4(a) and (b) to Appendix B.

The Panel is persuaded that the approach to revising Section 8 proposed by Knife River is more consistent with the intent of Section 8 and therefore more appropriate than the approach advocated by Buyers. In particular, the Buyers' proposal would not assure Knife River a reasonable minimum return - a goal explicitly enunciated in Section 8.3(f), the provision of the contract addressing the adoption of revised methods of profit limits. In presently pertinent part Section 8.3(f) states that "...revised methods of profit limits imposed on Seller shall be adopted ... so as to produce in the light of the then-existing and prospective circumstances, a reasonable and

equitable return to the Seller, as measured by some other method than set forth above." Although the Panel therefore adopts, in general, the revisions to Section 8 proposed by Knife River, it concludes, based upon the evidence, that the minimum annual Net Income percentage should be set at 7.5% rather than the 10% proposed by Knife River.

MDU Damages

Buyers have included MDU in their calculation of damages because MDU is a part owner of the Coyote Station and a party to the Coal Agreement. Knife River objects to the inclusion of any damages for MDU because MDU is not a party to this proceeding. The Panel concludes that MDU should not be included in the damage award, and that the award should be limited to the damages incurred by Northern Municipal Power Agency, Otter Tail Power Company and Northwestern Public Service Company.

Pre-Judgment Interest

Buyers have included pre-judgment interest in their calculation of damages. Knife River objects to the imposition of pre-judgment interest on the grounds that it is not recoverable under applicable North Dakota law. Upon a review of N.D.C.C. § 32-03-04 and the other statutory provisions and authorities cited by the parties, the Panel concludes that pre-judgment interest is not recoverable due to uncertainty as to the amount of damages prior to the Panel's March 26th Opinion.

1997 Damages

The March 26th Opinion stated that "[t]he difference between \$9.83 per ton and the actual price charged by Knife River from September 13, 1996 through December 31, 1997 is the amount of damages for that period." Knife River has requested the Panel to examine whether

there may have been an inadvertent oversight in relying upon \$9.83 for the determination of damages for 1997. The use of the \$9.83 figure was not inadvertent and this figure has been properly utilized by Buyers in their calculation of damages.

* * *

Accordingly, it is hereby ordered that:

- (1) Knife River's revisions to Section 8 as contained in its Exhibit AAA, a copy of which is attached hereto, are adopted with the following exceptions:
 - i. the figure in the third line of Section 8.2(b) is changed from 10 to 7.5 percent;
 - ii. the figures in the third line and in the sixth line of Section 8.4(b) are changed from 10 to 7.5 percent; and
 - iii. the figure in the fourth line of Section 8.4(e) is changed from 10 to 7.5 percent, and the figure in the sixth line of that same provision is changed from 11 to 8.5 percent.
- (2) Damages are awarded to Buyers in the amount of \$5,901,776 with interest after March 26, 1999 at the rate of 12 percent per annum until the judgment is satisfied.

Dated: August 6, 1999.

Paul J. McGary
Mike Loftis &
Joseph W. Morris

In the Matter of the Arbitration between
NORTHERN MUNICIPAL POWER AGENCY, by and
through its agent and representative for
the Coyote Coal Plant, MINNKOTA POWER
COOPERATIVE, INC.; OTTER TAIL POWER
COMPANY; NORTHWESTERN PUBLIC SERVICE
COMPANY,

Claimants,

and

KNIFE RIVER COAL MINING COMPANY,

Respondent.

AAA Case No. 56 198 00373 96

CONFIDENTIALITY AGREEMENT

The parties to this Arbitration, through their counsel,
enter into the following Confidentiality Agreement:

1. This Arbitration shall be conducted as a
confidential proceeding. The parties agree that, other than
referring to the fact that this arbitration exists, they will use
their best efforts to keep strictly confidential the record of
this arbitration. The phrase "keep strictly confidential" as
used above means that the parties will disclose the record of the
arbitration only to those persons to whom disclosure is necessary
for purposes of preparing or litigating the case, as more fully
set forth below, and will otherwise not disclose any portions of
the record to anyone. The word "record" refers to all
transcripts of arbitration proceedings, as well as exhibits,
motions, briefs, documents and correspondence filed with the
American Arbitration Association ("AAA") or the arbitrators or
exchanged between the parties in the course of the arbitration.

2. In light of the confidential nature of this arbitration, no information received by a party from the opposing party (including from the opposing party's consultants and experts) shall be provided or disclosed to any person other than an "Authorized Person." Authorized Persons include only the following: (1) attorneys working on this Arbitration (and legal assistants and clerical employees working under the direction of such attorneys in connection with this Arbitration); (2) consultants retained by a party or its attorneys to provide testimony, consultation, advice, or assistance in or for this Arbitration (and their assistants or employees working under the direction and control of such consultants in connection with this Arbitration); (3) employees, officers, and directors of a party who have actual responsibility in or for this Arbitration (and clerical employees working under the direction and control of said employees, officers and directors in connection with this Arbitration); and (4) the arbitrators impaneled for this proceeding and employees of the AAA who have responsibility for the administration of this Arbitration (and clerical employees working under the direction and control of said arbitrators or AAA employees). All Authorized Persons who receive such information shall ensure that all Authorized Persons working under their direction comply with this Agreement.

3. Neither a party nor any Authorized Person shall disclose or use information received in this Arbitration or any portion of the record for any purpose other than in connection with this Arbitration or related proceedings (e.g., any

proceeding seeking to enforce a decision or award herein); provided, however, that the Claimants or Respondent may disclose such information as required by applicable laws and/or regulations.

4. Nothing in this Agreement is intended to prevent any use by any person of any information that is rightfully obtained by such person other than through this Arbitration or related proceedings (see paragraph 3 above).

5. The parties intend and agree that this Confidentiality Agreement will apply to all rulings and decisions of the arbitrators. The parties agree to keep strictly confidential any such rulings and decisions and intend that the arbitrators and the AAA will do likewise; provided, however, that (1) the parties may disclose such information as required by applicable laws and/or regulations and (2) the parties may disclose the result of the arbitrators' final decision (but shall not disclose any text of the decision or comment publicly thereon).

6. This Confidentiality Agreement shall be effective as an agreement of the parties upon signature by the counsel for the parties and shall remain in effect indefinitely unless and until amended or terminated by mutual action of the parties.

STIPULATED AND AGREED this 9th day of July, 1998.


Peter C. Williams
Thelen Reid & Priest LLP
Counsel for Respondent

Dated: July 9, 1998


Jeffrey O. Moreno
Donelan Cleary Wood & Maser, P.C.
Counsel for Claimants

Dated: July , 1998

In the Matter of the Arbitration between
NORTHERN MUNICIPAL POWER AGENCY, by and
through its agent and representative for
the Coyote Coal Plant, MINNKOTA POWER
COOPERATIVE, INC.; OTTER TAIL POWER
COMPANY; NORTHWESTERN PUBLIC SERVICE
COMPANY,

Claimants,

and

KNIFE RIVER COAL MINING COMPANY,

Respondent.

AAA Case No. 56 198 00373 96

ORDER

The panel of arbitrators in this proceeding, having reviewed the attached Confidentiality Agreement between the parties, and having been requested by the parties to enter the terms of the Confidentiality Agreement as an order, hereby order that the terms of that Agreement are entered as an order of the panel.

Frank J. McGarr
Frank J. McGarr

Dated:

July 13, 1998

C. Michael Loftus
C. Michael Loftus

Dated:

July 16, 1998

Joseph W. Morris
Joseph W. Morris

Dated:

July 29, 1998



MONTANA-DAKOTA

UTILITIES CO.

A Division of MDU Resources Group, Inc.

400 North Fourth Street
Bismarck, ND 58501
(701) 222-7900

February 9, 2000

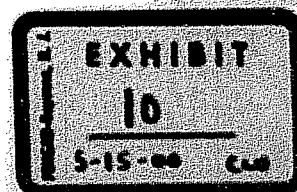
Mr. William Bullard
Executive Director
South Dakota Public Utilities
Commission
State Capitol Building
500 East Capitol
Pierre, SD 57501-5070

Re: Waiver of FCA Rate 58
Docket No. EL00-_____

Montana-Dakota Utilities Co. (Montana-Dakota), a Division of MDU Resources Group, Inc., herewith seeks Commission approval of a waiver of Fuel Clause Rate 58. The waiver is requested to allow the pass-through, in the fuel cost adjustment (FCA), of arbitration costs that have resulted in savings to retail customers. The arbitration costs relate to the recently completed Coyote coal contract arbitration between three of the Coyote Station owners and Knife River Coal Mining Company (Knife River).

An arbitration decision between Knife River and the other three owners of the Coyote Station was confirmed by the North Dakota South Central District Court on January 5, 2000. Although Montana-Dakota was not a party to the arbitration, Montana-Dakota's retail electric customers will receive the same benefit as if Montana-Dakota had been a party to the arbitration. Knife River, in accordance with the arbitration decision, will remit the proper dollar amounts to Montana-Dakota for pass-through to Montana-Dakota's retail customers.

Montana-Dakota has paid approximately \$412,000 in arbitration costs related to its retail operations to date. These costs were billed by the Coyote operator for Montana-Dakota's 25% ownership of the Coyote Station. Montana-Dakota believes it proper to net the incurred costs of the arbitration against the savings in fuel costs produced by the arbitration. Absent the costly arbitration proceeding, such savings would not have materialized, i.e., there is a direct cause and effect. Granting the waivers sought herein to recover the arbitration costs through the FCA will be in the public interest. The customers are directly benefited by the pass-through of a net benefit of \$2,746,000 and the ongoing coal price reduction described below. Montana-Dakota and its shareholders' interests are upheld through the ability to recover the incurred costs of obtaining the benefits for retail customers. Absent the inclusion of arbitration costs in the FCA process, Montana-Dakota and its shareholders would be unfairly penalized and retail electric customers would receive a benefit while escaping the incurred cost of providing that benefit.



The total net benefit applicable to Montana-Dakota's retail electric customers is \$2,746,000. Attachment A shows the calculation of the net benefit. There is an amount related to the Heskett Station as the Heskett coal prices are tied to the Coyote coal agreement. Montana-Dakota proposes to include the \$2,746,000 net benefit in the first fuel adjustment filing following the issuance of an order granting the waiver sought herein. The approximate amount of the net benefit applicable to South Dakota electric retail customers is \$185,000.

In addition to the immediate benefit described above, current fuel costs already reflect the price reduction dictated by the arbitration agreement and that price reduction will provide future fuel cost savings to retail customers of about \$519,000 per year for the Coyote agreement. This represents a net present value savings of \$4.7 million over the remaining life of the Coyote coal agreement.

Please refer all inquiries regarding this filing to:

Mr. Donald R. Ball
Director of Regulatory Affairs
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, ND 58501

Also, please send copies of all written inquiries, correspondence and pleadings to:

Mr. Douglas W. Schulz
Senior Attorney
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, ND 58501

The original and ten (10) copies of this Letter of Transmittal has been provided to the South Dakota Public Utilities Commission in accordance with ARSD 20:10.13.27.

Montana-Dakota respectfully requests that this filing be accepted as being in full compliance with the filing requirements of this Commission.

Please acknowledge receipt by stamping or initialing the duplicate copy of this letter attached hereto and returning the same in the enclosed self-addressed, stamped envelope.

Sincerely,



Donald R. Ball
Director of Regulatory Affairs

Attachments

cc: D. Ball
D. Schulz

Montana-Dakota Utilities Co.
Net Benefit Amounts \$(000)

<u>DESCRIPTION</u>	<u>AMOUNT</u>
Coyote Station	\$1,842
Heskett Station	<u>1,316</u>
Total	\$3,158
<u>Adjustments</u>	
Arbitration Costs-Retail Portion	<u>(\$412)</u>
Total Net Benefit to Retail Customers	<u>\$2,746</u>

Montana-Dakota Utilities Co.
Net Benefit Amounts \$(000)

<u>DESCRIPTION</u>	<u>AMOUNT</u>
Coyote Station	\$1,842
Heskett Station	<u>1,316</u>
Total	\$3,158
<u>Adjustments</u>	
Arbitration Costs-Retail Portion	<u>(\$416)</u>
Total Net Benefit to Retail Customers	<u>\$2,742</u>
South Dakota Portion:	
Interconnected system % of kwh sales	<u>6.7%</u>
Amount to South Dakota	<u>\$184</u>

CONTINUATION # [5]

FILING SUMMARY

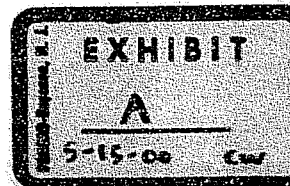
KNIFE RIVER/ COYOTE PLANT COAL ARBITRATION AWARD

	Otter Tail Power Company	Northwestern Public Service Company	Montana-Dakota Utilities Company
Damage Award*	\$2,884,172	\$858,373	\$4,069,587 **
Received 9-1-99	\$2,741,773	\$815,993	
Received 2-28-00			\$4,069,587
Interest received 12-21-99	\$142,399	\$42,380	
Litigation expense	\$1,101,235	\$307,549	\$536,175 ***
Reimbursed from MDU	\$250,930	\$70,775	
Retail sales	89%	99.14%	77.60%
Wholesale sales	11%	0.86%	22.40%
Percentage of customer base in SD	7%	100%	6.70%

* The damage award does not include any interest the company is currently earning on the award while awaiting distribution of the refund.

** Includes \$2,373,711 award for MDU's portion of the Coyote Plant and \$1,695,876 award for Heskett Station which operates under the same coal contract as the Coyote Plant.

*** The litigation expenses MDU paid include those paid to Northern Municipal Power Agency (\$214,470), who is the fourth owner in the Coyote Plant.



REFUND CALCULATION

KNIFE RIVER/COYOTE PLANT COAL ARBITRATION AWARD

	Otter Tail Power Company (a)	Northwestern Public Service Company (b)	Montana-Dakota Utilities Company (c)
1 Total damages awarded to Company*	\$2,884,172	\$858,373	\$4,069,587 **
2 Company requested litigation expenses	(\$850,305)	(\$236,774)	(\$536,175) ***
3 Total net damage award	\$2,033,867	\$621,599	\$3,533,412
4 Percentage of retail sales included in PAC	59	99.14	77.6
5 Total Refund	\$1,810,142	\$616,253	\$2,741,928
6 Percentage of customer base in SD	7	100	6.7
7 Total amount of refund to SD Customers	<u>\$126,710</u>	<u>\$616,253</u>	<u>\$183,709</u>

Sources:

Column a, Line 1: EL00-002 Petition of Otter Tail Power Company (OTP) filed January 27, 2000

Column b, Line 1: EL00-009 Petition of NorthWestern Public Service Company (NWPS) filed March 20, 2000

Column c, Line 1: EL00-003 Request for Waiver of FCA Rate 58 of Montana-Dakota Utilities (MDU) filed February 10, 2000

Column a, Line 2: Litigation expenses of OTP minus the portion reimbursed from MDU, (supplement to petition dated March 28, 2000)

Column b, Line 2: Litigation expenses of NWPS minus the portion reimbursed from MDU, (supplement to petition dated May 9, 2000)

Column c, Line 2: Litigation expenses of MDU, (data request response dated February 24, 2000)

Column a,b,c, Line 3: Net damage award after removing litigation expenses

Column a, Line 4-7: OTP's supplement to petition dated March 28, 2000 and stipulated amounts

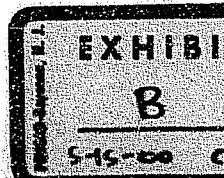
Column b, Line 4-7: NWPS's supplement to petition dated May 9, 2000

Column c, Line 4-7: MDU's data request response dated February 24, 2000

* The damage award does not include any interest the company is currently earning on the award while awaiting distribution of the refund.

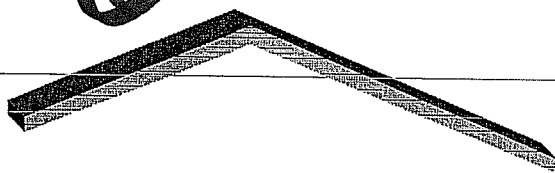
** Includes \$2,373,711 award for MDU's portion of the Coyote Plant and \$1,695,876 award for Heskett Station which operates under the same coal contract as the Coyote Plant.

*** The litigation expenses MDU paid include those paid to Northern Municipal Power Agency, who is the fourth owner in the Coyote Plant.

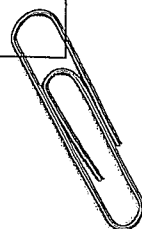


Continuation

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of pages



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF OTTER TAIL POWER COMPANY FOR APPROVAL OF A DEPARTURE FROM ITS FUEL CLAUSE ADJUSTMENT	)))))	FINDINGS OF FACT AND CONCLUSIONS OF LAW: NOTICE OF ENTRY OF ORDER EL00-002
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On January 27, 2000, the Public Utilities Commission (Commission) received a petition from Otter Tail Power Company (Otter Tail) for permission to depart from the specific wording of its Fuel Adjustment Clause to allow the pass-through of litigation expenses that have resulted in ratepayer savings. An intervention deadline of February 18, 2000, was set by the Commission. No petitions to intervene were filed.

On February 10, 2000, the Commission received a petition from Montana-Dakota Utilities Co (MDU) for approval of a waiver of Fuel Clause Rate 58. Docket EL00-003. The petition stated that "[t]he waiver is requested to allow the pass-through, in the fuel cost adjustment (FCA), of arbitration costs that have resulted in savings to retail customers." An intervention deadline of March 3, 2000, was set by the Commission. No petitions to intervene were filed.

On March 20, 2000, the Commission received a petition from NorthWestern Public Service (NWPS) for approval of its proposed plan to credit \$682,996.65 to its South Dakota retail electric customers. Docket EL00-009. The credit is due to an arbitration proceeding involving a lignite coal contract. The petition stated that the "plan would utilize its adjustment clause to credit to its retail electric customers (all of whom it serves in South Dakota) the retail portion of the arbitration damage award and interest, less its costs related to its efforts in receiving not only the damage award but also ongoing coal price reduction and other favorable Coal Agreement provision changes." An intervention deadline of April 7, 2000, was set by the Commission. No petitions to intervene were filed.

On April 27, 2000, the Commission received a Stipulation to Consolidate Dockets EL00-002, EL00-003, and EL00-009. The stipulation stated that Otter Tail, MDU, NWPS, and Commission Staff had agreed to consolidate the dockets due to common questions of law and fact.

The Commission approved the consolidation of the dockets for purposes of the hearing. A hearing was held as scheduled on May 15, 2000, beginning at 10:00 o'clock A.M., CDT, in Room 412, State Capitol Building, 500 E. Capitol, Pierre, South Dakota. The issue at the hearing was whether the Commission should approve, in whole or in part, the petitions filed by Otter Tail, MDU, and NWPS. With respect to Otter Tail's petition, the Commission voted unanimously to approve Commission Staff's recommendation that allowed for the deduction of certain litigation expenses incurred during an arbitration proceeding. The arbitration decision lowered fuel costs retroactively, resulting in a refund being issued to Otter Tail. The Commission also granted the tariff waiver as requested by Otter Tail, and required Otter Tail to issue the refund during the months of June, July, and August, 2000.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 27, 2000, the Commission received a petition from Otter Tail for permission to depart from the specific wording of its Fuel Adjustment Clause to allow the pass-through of litigation expenses that have resulted in ratepayer savings. An intervention deadline of February 18, 2000, was set by the Commission. No petitions to intervene were filed.

2. Otter Tail, NWPS, the Northern Municipal Power Agency, and MDU own the Coyote Power Plant Tr. at 12. They entered into a 35-year contract with the Knife River Coal Company (Knife River) for

delivery of coal. *Id.* To determine the price of the coal, the contract uses various indexed price components, some actual cost price components, with quarterly price adjustments. *Id.* An addendum to the contract required that the pricing mechanism within the contract would result in prices that were comparable to similar mines developed at similar time frames. Tr. at 13.

3. The owners of the Coyote Power Plant, with the exception of MDU, disputed the prices charged by Knife River through an arbitration proceeding. Tr. at 14. MDU was named as an initial party in the arbitration but sought removal from the arbitration proceeding because MDU Resources owns Knife River and, thus, there was a possible conflict of interest. Tr. at 100. The initial arbitration decision in March of 1999, lowered the coal prices charged by Knife River, beginning the fourth quarter of 1996 up until the time of decision. Tr. at 15. The arbitration decision also requested that the parties modify the pricing procedure within the contract. *Id.* The parties were unable to come to an agreement so that issue went back to arbitration and the decision of the arbitration panel was to essentially accept Knife River's pricing procedure modification and to accept the profit limitation recommendations of the Coyote Power Plant owners. *Id.*

4. The prices were adjusted downward and the retroactive adjustment of the prices resulted in a refund to the owners. Tr. at 16. Otter Tail's share of the award was \$2,884,000.00 which was reduced to \$2,576,000.00 to reflect the amount of the award associated with serving Otter Tail's retail load. Tr. at 32, 35. The costs of the arbitration were allocated to the owners based on each owner's plant ownership percentage. Tr. at 21. Otter Tail's South Dakota retail customers' share of the award was around 7% of Otter Tail's retail share. Tr. at 35. Otter Tail requested that it be allowed to deduct its arbitration costs from its share of the refund and then pass the net amount to its customers through the fuel clause. Tr. at 36-37.

5. Otter Tail also estimated that, on a going-forward basis, the result of the arbitration decision would result in additional fuel cost savings of around \$750,000.00 per year. Tr. at 24-25.

6. At the hearing, the Commission was informed that Otter Tail and Commission Staff had entered into a stipulation that reduced Otter Tail's arbitration costs by \$139,635.00. Tr. at 55, 113. Otter Tail agreed to remove \$103,075 in litigation expenses that were not shared by the other owners. Tr. at 113. In addition, Otter Tail agreed to remove labor expenses of approximately \$33,000.00 and miscellaneous expenses of approximately \$3,300.00. *Id.*

7. Michele Farris, utility analyst for the Commission, recommended that Otter Tail be allowed to deduct litigation expenses of \$850,305.00 from its total damage award of \$2,884,172.00. Exhibit B. The net damage award was further reduced by excluding wholesale sales, for a total refund of \$1,810,142.00. *Id.* The amount allocated to Otter Tail's South Dakota customers was 7% which was based on 1998 allocation factors used to allocate fuel costs. Tr. at 35; Exhibit B. The total amount of the refund to Otter Tail's South Dakota customers would be \$126,710.00, plus earned interest. Exhibit B.

8. Ms. Farris also recommended that Otter Tail issue the refund to customers through its fuel clause during the months of June, July, and August. Tr. at 116.

9. The Commission finds that Staff's recommendation is fair and reasonable and will allow Otter Tail to deduct its litigation expenses of \$850,305.00 from its total damage award of \$2,884,172.00. The Commission further finds that Otter Tail shall refund an amount of \$126,710.00, plus interest earned up until the time of the refund, to its South Dakota customers during the months of June, July, and August, 2000. The Commission further grants to Otter Tail a waiver from its fuel adjustment rate schedule to allow the deduction of litigation expenses from the refund.

10. The Commission further finds that this allowance of the deduction of litigation expenses is not to be interpreted as allowing future litigation expenses to be recovered through the fuel clause. The Commission's decision in this case is based on the facts of this case and any future recovery of litigation expenses must be approved by the Commission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-34A specifically 49-34A-2, 49-34A-3, 49-34A-4, 49-34A-6, 49-34A-8, 49-34A-10, 49-34A-11, 49-34A-13, 49-34A-19.2, 49-34A-25, 49-34A-26, and 49-34A-27.
2. The Commission finds that Staff's recommendation is fair and reasonable and will allow Otter Tail to deduct its litigation expenses of \$850,305.00 from its total damage award of \$2,884,172.00. The Commission further finds that Otter Tail shall refund an amount of \$126,710.00, plus interest earned up until the time of the refund, to its South Dakota customers during the months of June, July, and August, 2000. The Commission further grants to Otter Tail a waiver from its fuel adjustment rate schedule to allow the deduction of litigation expenses from the refund.
3. The Commission further finds that this allowance of the deduction of litigation expenses is not to be interpreted as allowing future litigation expenses to be recovered through the fuel clause. The Commission's decision in this case is based on the facts of this case and any future recovery of litigation expenses must be approved by the Commission.

It is therefore

ORDERED, that Otter Tail may deduct its litigation expenses of \$850,305.00 from its total damage award of \$2,884,172.00 and shall refund an amount of \$126,710.00, plus interest earned up until the time of the refund, to its South Dakota customers during the months of June, July, and August, 2000; and it is

FURTHER ORDERED, that Otter Tail is granted a waiver from its fuel adjustment rate schedule to allow the deduction of litigation expenses from the refund.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 28th day of June, 2000. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 28th day of June, 2000.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Alaine Kelbo

Date: 6/29/00

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner