

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

In the Matter of the Application of Otter Tail Power Company for an Energy Conversion Facility Permit for the Construction of a Combustion Turbine Generator and Associated Infrastructure Including a Natural Gas Pipeline and Electric Transmission Line near Astoria, South Dakota

EL17-042

**MOTION FOR FINDING OF
SUBSTANTIAL COMPLIANCE WITH
PUBLICATION NOTICE
REQUIREMENT, OR IN THE
ALTERNATIVE, EXTENDING THE
DEADLINE FOR PUBLISHING NOTICE
OF PUBLIC INPUT HEARING**

Applicant Otter Tail Power Company (“Otter Tail”) moves the Public Utilities Commission of the State of South Dakota (“the Commission”) for an order finding that Otter Tail has substantially complied with the notice publication requirements imposed by SDCL 49-41B-5.2 regarding the public input hearing to be held on November 27, 2017. This motion is supported by the Affidavit of Kenneth R. Rieste (“Rieste Aff.”) and the Motion for Judicial Notice filed contemporaneously with this motion.

BACKGROUND

On October 5, 2017, Otter Tail filed the application for an energy conversion facility and related transmission facilities (“the Project”) in the above captioned matter. The Commission entered an order on October 12, 2017, that, among other things, set the public input hearing on November 27, 2017, at 6:30 p.m. (Notice of Application, Order for and Notice Public Input Hearing; Notice of Opportunity to Apply for Party Status).

Once the public input hearing was set, SDCL 49-41B-5.2 places specific notice requirements on Otter Tail. Specifically, the statute states:

The applicant shall notify, in writing, the owner of record of any land that is located within one-half mile of the proposed site where the facility is to be constructed. For purposes of this section, the owner of record is limited to the owner designated to receive the property tax bill sent by the county treasurer. The notice shall be mailed by certified mail. The applicant shall also publish a notice of the proposed facility. Notification shall be published in the official newspaper of each county in which the proposed site is located. The notice shall be published at least once each week for at least two consecutive weeks. The notice shall contain a description of the nature and location of the facility. Any notification required by this section shall state the date, time, and location of the public hearing and shall be made no later than thirty days prior to the date of the public hearing. However, the second published notice shall be made no later than twenty days prior to the date of the public hearing.

SDCL 49-41B-5.2 (emphasis added). The Commission also must publish notification pursuant to SDCL 49-41B-15 of the public input hearing in the newspaper:

Within thirty days following receipt of an application for a permit, the commission shall:

...

(4) Publish a notice of the time, place, and purpose of the public hearing in at least one newspaper of general circulation in counties totally or partially within the area of the proposed facility

Consistent with its statutory obligation, Otter Tail contacted the *Clear Lake Courier*, which is official newspaper in Deuel County, South Dakota, about publishing notice of the public input hearing. (Rieste Aff. at ¶ 2). The Project is located in Deuel County, South Dakota. The *Clear Lake Courier* is the only newspaper in Deuel County, and it is a weekly newspaper that is published each Wednesday. (*Id.* at ¶ 1). Otter Tail requested the *Clear Lake Courier* publish notice of the public input hearing two consecutive weeks, with the publications scheduled to occur on October 25, 2017, and November 1, 2017. (*Id.* at ¶ 2). With this schedule, the first publication would have occurred more than 30 days prior to the public input hearing, and the second publication would have occurred more than 20 days prior to the public input hearing.

Like Otter Tail, the Commission also requested the *Clear Lake Courier* to publish notification of the public input hearing. Specifically, the Commission requested that the *Clear Lake Courier* published the Commission’s notice on November 1, 2017. (Rieste Aff. at ¶ 3). This is the same date that the *Clear Lake Courier* was scheduled to publish Otter Tail’s second notice publication. (*Id.* at ¶¶ 2-3).

The notices published by the Commission and Otter Tail are virtually identical. Compare *Rieste Aff. at Ex. A* with *Ex. B*). Thus, when the *Clear Lake Courier* received two requests to publish virtually the same notification in the same paper on the same day, the paper mistakenly only published the Commission’s notice. (*Id.* at ¶ 4). Upon discovering the newspaper’s mistake, Otter Tail requested that the *Clear Lake Courier* publish Otter Tail’s second notice in the next paper, which was published on November 8, 2017. (*Id.* at ¶ 5). As a result, notice of public input hearing was published three consecutive weeks in the *Clear Lake Courier*—October 25, 2017; November 1, 2017; and November 8, 2017.

ARGUMENT

Otter Tail substantially complied with the notice requires imposed by SDCL 49-41B-5.2.

“Substantial compliance” with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Myears v. Charles Mix County, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474. *See also R.B.O. v. Congregation of Priests of Sacred Heart, Inc.*, 2011 S.D. 87, ¶ 12, 806 N.W.2d 907, 911. In a variety of other settings, the South Dakota Supreme Court has ruled that substantial compliance excuses failure to strictly comply with notice statutes. *See Inlagen v. Town of Gary*, 34 S.D. 198,

199, 147 N.W. 965, 966 (1914) (statute required notice within 60 days to the town clerk of an intent to sue and settlement letter sent to town clerk was substantial compliance); *Walters v. City of Carthage*, 36 S.D. 11, 14, 153 N.W. 881, 882 (1915) (plaintiff providing list of damages to city was substantial compliance of notice of intent to sue); *Myears v. Charles Mix Cty.*, 1997 S.D. 89, ¶ 10, 566 N.W.2d 470, 473 (citing SDCL 2-14-12) (finding that substantial compliance was sufficient to satisfy statutory notice requirement for actions against public entities).

Here, Otter Tail substantially complied with its publication requirement imposed by SDCL 49-41B-5.2. SDCL 49-41B-5.2 required notice of the public input hearing to be published in the *Clear Lake Courier* on October 25, 2017 and November 1, 2017. The intent of this statute is to provide published notice of the impending public input hearing. This intention was satisfied because notice was in fact provided on those two dates in the *Clear Lake Courier*. On both October 27, 2017 and November 1, 2017, the readers of the *Clear Lake Courier* were provided notice of the essential information for the public input hearing. They were told the name and location of the Project, the date and time of the public input hearing, and the deadline for intervention. The only difference between what occurred and what should have occurred is that the readers were provided this notice one time in the November 1, 2017 newspaper rather than receiving the same information two times in the same newspaper. And then, when the newspaper's mistake was discovered, the same information was provided a third week on November 8, 2017. Thus, the readers of the *Clear Lake Courier* actually received more notice than is required by the applicable statutes because the notice was published a third consecutive week.

Moreover, because readers received actual notice of the public input hearing, strict compliance with the notice requirements is not needed. See *Wagner v. Truesdell*, 1998 SD 9, ¶¶

7-10, 574 N.W.2d 627, 629-30 (holding that strict compliance with statute for service of process was not required because actual notice was provided and there was substantial compliance with the statute). Other courts have relied upon actual notice and substantial compliance to waive strict compliance with notice of publication statutes. *See John P. Krupski & Bros., Inc. v. Town Bd. of Town of Southold*, 864 N.Y.S.2d 149, 150 (N.Y. Sup. App. Div. 2008) (holding that plaintiff's actual notice and attendance at hearing waived any argument of improper notice of hearing); *Avelli v. Town of Babylon*, 283 N.Y.S.2d 261, 265 (N.Y. Sup. Ct. 1967); *Cruder v. Westmoreland Cty. Tax Claim Bureau*, 861 A.2d 411, 415 (Pa. Commw. Ct. 2004) (holding actual notice of tax sale waived strict compliance with notice statute); *Blue Ridge Bank & Tr. Co. v. Trosen*, 221 S.W.3d 451, 458 (Mo. Ct. App. 2007) (“[G]enerally, one having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice.”). Here, because the readers received actual notice in the November 1, 2017 newspaper, Otter Tail does not need to strictly comply with SDCL 49-41B-5.2

Alternatively, Otter Tail requests that the Commission extend the deadline for the second publication of notice under SDCL 49-41B-5.2 such that the publication occurring on November 8, 2017, satisfied the statutory deadlines for publication. In a previous docket for an energy conversion facility permit for Deer Creek Station, the Commission previously extended statutory deadlines and waived strict compliance with that deadline. (*See* Motion for Judicial Notice Exs. 1 & 2, which contain orders from the docket *In Matter of the Application by Basin Electric Power Cooperative, Inc. for an Energy Conversion Facility Siting Permit for the Deer Creek Station Project Combined-Cycle Natural Gas Energy Conversion Facility and Associated Infrastructure, Including a Water Supply System and Electric Transmission System*, Docket EL 09-015). Like in Deer Creek, the Commission here should extend the statutory deadlines.

Specifically, the Commission should extend the deadline for Otter Tail's second publication of the public input until November 8, 2017, and waiving Otter Tail's strict compliance with SDCL 49-41B-5.2.

CONCLUSION

Based on the foregoing, Otter Tail requests an order by the Commission indicating Otter Tail substantially complied with its notice requirements under SDCL 49-41B-5.2, or in the alternative, extending the deadlines for publication of notice and waiving Otter Tail's strict compliance with SDCL 49-41B-5.2

Dated this 14th day of November, 2017.



Thomas J. Welk
Jason R. Sutton
BOYCE LAW FIRM, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

Mark Bring
Director of Legislative Affairs & Associate General
Counsel
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56538-0496
(218) 739-8922

CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for Otter Tail Power Company and that on the 14th day of November 2017, a true and correct copy of the foregoing and this Certificate of Service were served via email to the following addresses listed:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us

Ms. Amanda Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
amanda.reiss@state.sd.us

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us

Mr. Jon Thurber
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
jon.thurber@state.sd.us

Mr. Mark Thoma
Manager Environmental Services
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56537
mthoma@otpc.com

Mr. William Swanson, P.E.
Manager, Supply Engineering
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56537
wswanson@otpc.com

Mr. Mark Bring
Associate General Counsel & Director of Legal
Affairs
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56537
mbring@otpc.com

Ms. Vicki Buseth
Finance Officer
Brooking County
Ste. 100
520 E. Third St.
Brookings, SD 57006
vbuseth@brookingscountysd.gov

Ms. Pam Lynde
Auditor
Deuel County
PO Box 616
408 Fourth St. West
Clear Lake, SD 57226
plynde@itctel.com


Jason R. Sutton