

**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**

*
*
*
*
*
*
*
*
*

**STAFF’S RESPONSE TO
OTTER TAIL’S MOTION FOR
FINDING OF SUBSTANTIAL
COMPLIANCE WITH
PUBLICATION NOTICE
REQUIREMENT, OR IN THE
ALTERNATIVE, EXTENDING
THE DEADLINE FOR
PUBLISHING NOTICE OF
PUBLIC INPUT HEARING**

EL17-042

COMES NOW, the Public Utilities Commission Staff (“Staff”) and hereby files this Response to Otter Tails Motion for Finding of Substantial Compliance with Publication Notice Requirement, or in the Alternative, Extending the Deadline for Publishing Notice of Public Input Hearing (“Motion”).

Background and Facts

On November 14, 2017, Otter Tail Power Company (“Movant” or “Otter Tail”) filed with the Public Utilities Commission (“Commission”), it’s Motion, the Affidavit of Kenneth R. Rieste (“Affidavit”) and Exhibits A, B and C.

This filing was made after Movant became aware that the *Clear Lake Courier* had inadvertently failed to publish the notice requested by Otter Tail for the November 1, 2017 edition. According to the Affidavit filed with the Motion, the Commission also requested the same *Clear Lake Courier* publish an almost identical notice of the hearing in the same edition. Only the

Commission's notice was published. (*Aff. at part 4*). The Affidavit specifies that after the matter was discovered, Otter Tail requested the *Clear Lake Courier* publish the requested notice in the November 8, 2017 edition. The result is that notice of the filing and the public input hearing was published for three consecutive weeks in the *Clear Lake Courier*, twice by Otter Tail, and once by the Commission. Staff notes that the Commission has also requested that the notice be published in the November 22, 2017 edition of the *Clear Lake Courier*.

SDCL 49-41B-5.2 requires that upon application for a facility permit, an applicant must publish notice of the project in the official newspaper of each county in which the proposed site is located for two consecutive weeks with the first notice at least thirty days before the date of the public hearing and the second notice at least twenty days before the public hearing. The statute also requires the notice to contain a description of the nature and location of the facility and the date, time, and location of the public hearing.

Based on the unforeseen events chronicled in the Affidavit and Motion, Otter Tail was unable to fully comply with the publication notice requirements. The notice Otter Tail requested was not technically published for two consecutive weeks. Additionally, Otter Tail's second notice was not published until November 8, 2017, which does not meet the requirement that the second notice be published at least twenty days prior to the Public Input Hearing.

Argument

I. Movant requests the Commission issue a Finding of Substantial Compliance with Publication Notice Requirement.

Movant claims that despite the technical deficiencies in completely complying with the provisions of SDCL 49-41B-5.2, Otter Tail's substantial compliance with the publication notice

provisions are sufficient and requests the Commission issue a Finding of Substantial Compliance with Publication Notice Requirement. Staff supports this request.

The South Dakota Supreme Court has recognized that substantial compliance with notice requirements is sufficient.

"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.

In this case, Otter Tail made every reasonable effort to comply with the provisions of SDCL 49-41B-5.2. However, due to unforeseen events, because Otter Tail's requested notice was not published in the *Clear Lake Courier* on November 1, 2017, Otter Tail did not meet the requirement to publish notice for two consecutive weeks. That being said, although Otter Tail's notice was not actually published in that edition, the Commission's notice was published, giving the public the actual notice required by statute. Because the public was given actual notice as required by the statute, Staff does not believe the public is prejudiced in this situation and the purpose and intent of the law was met. If the statute were complied with strictly, two, seemingly identical, notices would have been published in the exact same edition of the newspaper. Such a repetitive publishing would have provided no actual benefit to the public.

Moreover, the courts have construed statutes to avoid an absurd result. The rules of statutory construction mandate that it is “presumed that the Legislature did not intend an absurd or unreasonable result.” *Martinmaas v. Engelmann*, 2000 SD 85, ¶49, 612 N.W.2d 600, 611. Requiring strict adherence to the publication notice requirements in SDCL 49-41B-5.2 given the facts of this specific case would result in an absurd result. In this case, the statutes require both an applicant and the Commission to publish notice on specific timelines after an application for a facility permit is filed with the Commission. Both Otter Tail and the Commission each took steps to cause notice to be published to meet their respective publishing obligations and through no fault of Otter Tail, their requested notice was not technically published in adherence to the statute.

At this point, short of requiring that Otter Tail refile the entire application, there is no way to actually correct the technical error and allow the Commission and the applicant to meet all of their respective statutory notice requirements. Staff contends that in this case, the public received all of the publication notice required by law. In fact, due to the technical error, an additional notice was published, resulting in published notice for three consecutive weeks instead of the required two. As such, requiring the applicant to refile the application to meet the technical requirements of the statute would be an absurd result when public was not deprived of any actual notice required by law.

Staff does note that the support for Otter Tail’s motion is based on the entirely unique facts in this case. The statutes specifically establish the notice requirements that both the applicant and Commission must meet after an application for a facility permit is filed with the Commission and both parties are responsible for meeting the requirements.

II. In the Alternative, Movant requests the Commission Extend the Deadline for Publishing Notice of Public Input Hearing.

Staff believes it is unnecessary for the Commission to consider the extension of time given that all publication notice requirements were met. Staff takes no position on Movant's argument to extend the notice deadline at this time. At this point, extending the deadline for publishing the notice would not make Otter Tail fully compliant with all publication notice requirements. Extending the deadline would allow the Movant to meet the requirement that the second published notice be made no later than twenty days prior to the date of the public hearing, but it would not technically comply with the requirement that the applicant's notice be published for two consecutive weeks. As such, granting extension would still require a Commission to issue a finding that the Movant substantially complied with the requirement, adding unnecessary confusion to the issue at hand.

Conclusion

Based on Movant's motion and Affidavit, a publishing error was made, through no fault of Otter Tail. The publishing error makes complete compliance with the notice requirements impossible at this point. Otter Tail made every effort to meet the publication notice requirements, and but for the unforeseen error made by the newspaper, would have met all requirements. Beyond this, Otter Tail arranged for additional notice to be published in the next week's paper. Staff does note that in this situation, actual and correct notice was published and the public was not deprived of any notice required by the statute.

Staff respectfully supports Movant's Motion for finding of Substantial Compliance with the Publication Notice Requirement and requests the Commission issue such finding.

Dated this 17th Day of November, 2017.

Amanda M. Reiss

Amanda M. Reiss
Kristen Edwards
Staff Attorneys
South Dakota Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501

**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)**

**CERTIFICATE OF SERVICE
EL17-042**

I hereby certify that true and correct copies of Staff's Response to Otter Tail's Motion for Finding of Substantial Compliance with Publication Notice Requirement, or in the Alternative, Extending the Deadline for Publishing Notice of Public Input Hearing and Certificate of Service were sent electronically to the Parties listed below, on the 17th day of November, 2017, addressed to:

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

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@otpco.com

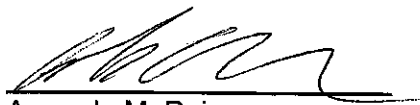
Mr. Mark Bring
Associate General Counsel & Director of Legal Affairs
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls, MN 56537
mbring@otpco.com

Mr. Thomas J. Welk Attorney
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104
tjwelk@boycelaw.com

Mr. Jason R. Sutton
Attorney
Boyce Law Firm, LLP
300 S. Main Ave.
Sioux Falls, SD 57104
irsutton@boycelaw.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



Amanda M. Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501