

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

**IN THE MATTER OF THE APPLICATION)
OF OTTER TAIL POWER COMPANY FOR)
AUTHORITY TO INCREASE ITS)
ELECTRIC RATES)
)**

**OTP RESPONSE TO
STAFF MOTION IN
LIMINE - EL 18-021**

A. Introduction and Summary.

On March 21, 2019 Staff filed and served a Motion in Limine seeking to exclude from the hearing evidentiary record (1) matters addressed by the Parties’ Settlement Agreement, and (2) any evidence not directly related to return on equity. Staff also raises a concern about being "deprived of the right to file direct testimony."¹ Other than Staff's objection to any argument that the moratorium on a rate case filing should not be allowed as a justification for a higher return on equity ("ROE"), the motion did not identify any other testimony being objectionable to Staff.

Staff’s motion should be denied and is unnecessary. The pre-filed testimony and exhibits OTP will present at hearing do not concern or relitigate matters resolved by the Settlement Agreement. And, even if OTP was proposing to present testimony on settled issues at hearing, the Settlement Stipulation doesn’t support excluding such testimony. Quite to the contrary, the Settlement Stipulation states that “[t]he Parties to this proceeding stipulate all pre-filed testimony, exhibits, and workpapers on the settled issues be made a part of the record in this proceeding.”²

As described herein all of OTP's pre-filed testimony and exhibits to be presented at hearing are squarely within the scope of facts that relate to the determination of the appropriate ROE for Otter Tail. Staff made a determination of which ROE-related facts and arguments it would discuss in its Direct Testimony. That decision does not narrow the range of facts that the Commission may and should consider when it determines a just and reasonable ROE for Otter Tail.

¹ Staff Motion p. 3.

² Settlement Stipulation p. 3

B. Evidence to be Introduced.

Contemporaneously with this Response, Otter Tail has filed its prehearing exhibit and witness lists identifying the pre-filed testimony/exhibits that OTP will present at hearing. The following is a summary of these witnesses and the scope and purpose of their testimony:

1. **Robert Hevert** is OTP's outside ROE expert. Mr. Hevert has filed Direct Testimony supporting OTP's ROE request and Rebuttal Testimony responding to the Direct Testimony of Mr. Basil Copeland regarding data that relates to the appropriate ROE for OTP. Mr. Hevert explains the flaws in Mr. Copeland's analysis that have produced such large gaps between Mr. Copeland's recommendations and the cost of equity and ROE determinations for other electric utilities made by every other regulatory commission in the United States.
2. **Kevin Moug** is the Chief Financial Officer of Otter Tail Corporation OTP's parent Company. In his Direct and Rebuttal Testimony to Mr. Copeland, Mr. Moug explains OTP's costs of debt, cost of capital and rate of return, the financial requirements related to OTP's prior and planned capital expenditures, and the significant differences between OTP and most other investor-owned utilities. He explains how the Commission's decision in this case will be perceived by capital markets and rating agencies in terms of implications of investing in OTP and other South Dakota utilities.
3. **Bruce Gerhardson** is OTP's Vice President of Regulatory Affairs. Mr. Gerhardson has filed Direct and Rebuttal Testimony describing OTP and its delivery of service in South Dakota. He provides policy testimony and describes facts unique to OTP supporting an ROE consistent with Mr. Hevert's recommendation, which was identified in both Mr. Hevert's Direct and Rebuttal Testimony. These facts include OTP's excellent customer service, cost saving performance including the significant savings achieved by OTP for its customers on the Big Stone Air Quality Control System (AQCS) Project), low electric rates, infrequent rate cases, and substantial investments in South Dakota. Mr. Gerhardson, a licensed South Dakota attorney, explains why an ROE that is below the mainstream of ROEs for other comparable utilities and below the ROEs approved for other South Dakota utilities does not meet applicable standards under South Dakota law. Mr. Gerhardson also explains incentives and disincentives that could result from the Commission's decision in this matter.
4. **Kirk Phinney** is OTP' Manager, Supply Engineering. Mr. Phinney's Direct Testimony provides information on the project execution and final costs of the Big Stone AQCS and Hoot Lake

MATS projects, both of which were identified in Mr. Hevert's Direct Testimony as pertaining to the appropriate ROE for OTP.

5. **Stuart D. Tommerdahl** is OTP's Manager, Regulatory Administration. Mr. Tommerdahl filed Direct Testimony and related schedules addressing major projects, test year revenues, allocation, factors & other regulatory matters. For purposes of this hearing, OTP is presenting only Mr. Tommerdahl's testimony and supporting schedules concerning the cost savings impacts from OTP's management of the Big Stone AQCS project, which was identified as relevant to the appropriate ROE in Mr. Hevert's Direct Testimony.

C. OTP's Evidence to be Presented at Hearing Does Not Conflict with Settled Matters.

It appears that Staff's primary concern relates to the rate case moratorium set forth in the parties Settlement Agreement. Staff states that Otter Tail should not be allowed to present the moratorium as a concession "to influence the single unresolved issue" because to do so "would leave Staff and ratepayers at a disadvantage, essentially stranding the many concessions that were made by Staff."³ Staff misconstrues OTP's testimony.

There are references to the moratorium in Mr. Moug's⁴ and Mr. Hevert's⁵ rebuttal testimonies, but those references are to make the point that whatever ROE the Commission establishes will be in place for at least four years. The existence of a moratorium on rate case filings is a factor considered by rating agencies and capital markets and investors when deciding where to invest, which is directly relevant to the consideration of a just and reasonable ROE. These common financial impacts were certainly well known prior to the parties entering into the Stipulation Settlement.

Notwithstanding these facts, OTP will, if determined to be appropriate by the Commission, stipulate at hearing that the moratorium should not be considered by the Commission and/or provide revised filed testimony removing such references.

³ Staff Motion p. 2.

⁴ Rebuttal Testimony of Kevin Moug, March 15, 2019, pp. 6-7.

⁵ Rebuttal Testimony of Robert Hevert, March 15, 2019, pp. 32-35

D. There is No Basis to Exclude Any of OTP's Evidence on Relevancy Grounds.

Staff argues that “[p]refiled testimony of witnesses not testifying directly on rate of return should be precluded.”⁶ Staff does not further define its view of what is testimony “directly on” rate of return, but narrowing the range of matters that the Commission may consider would be contrary to the scope of SDCL 49-34A-8 which requires that OTP “earn a fair and reasonable return upon the value of its property” and the Commission’s noticed question of “[w]hat is the appropriate return on equity to produce just and reasonable rates.”⁷

It would also conflict with the broad scope of relevance defined in South Dakota law. Under SDCL 19-19-401 evidence is relevant if “(a) [i]f it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action.” The South Dakota Supreme Court has confirmed that this is a broad standard:

“As we have previously noted, ‘Rule 401 uses a lenient standard for relevance. Any proffered item that would appear to alter the probabilities of a consequential fact is relevant, although it may be excluded because of other factors.’ (Citations omitted)⁸

Past Commission hearings, orders and practice also inform this standard. It cannot be disputed that the Commission considers many factors when determining just and reasonable rates. The Commission would not be meeting its statutory obligations otherwise.

It is not clear from Staff what if any relevancy objections Staff may have to OTP’s hearing evidence. In a prehearing conference on March 21, 2019 Staff seemed to suggest that issues demonstrating OTP’s strong performance as a utility, including its strong cost savings performance on the Big Stone AQCS project were not relevant to determining the appropriate return on equity to produce just and reasonable rates. If that is Staff’s position, it would clearly conflict with the Commission’s obligation to determine a ROE that will allow OTP “earn a fair and reasonable return upon the value of its property” as required by SDCL 49-34A-8. Because of OTP’s on-time and under budget management of the AQSC Project, over the 30-year life Project OTP’s South Dakota customers will receive cumulative savings of approximately \$17.2 million (OTP SD) with a net present value of \$7.8 million (OTP SD). To say that this

⁶ Staff Motion p. 3.

⁷ Notice and Order for Hearing, March 7, 2019.

⁸ *St. John v. Peterson*, 804 N.W.2d 71, 75 (S.D. 2011).

Commission may not weigh such performance means the Commission may not incent behavior it deems appropriate or provide disincentives for unwanted behavior.

E. OTP's Rebuttal is not unfair to Staff and does not change the Stipulation Settlement.

While the scope of Staff's objection is not clear, Staff appears to argue that it may be unfair to allow OTP to present the testimony it intends to present at hearing because "when the parties entered into the Settlement Stipulation, the parties stipulated that they 'understand if the issues settled [therein] had not been settled, the Commission Staff would have filed direct testimony on those issues'..."⁹ Staff appears to suggest that it has been prevented from filing testimony addressing the full scope of OTP's ROE arguments.

The Settlement Stipulation language referenced by Staff excludes the unresolved issue of ROE, and Staff *did* file Mr. Copeland's Direct Testimony on that issue after the Settlement was entered. That Staff elected to respond as it did to the contested issue does not determine relevancy or the scope of the Commission's inquiry on Return on Equity or the fairness of OTP commenting on well-known financial effect, and it certainly doesn't mean that Staff has been prejudiced in some fashion.

Finally, the Settlement Stipulation also states that "[t]he Parties to this proceeding stipulate all pre-filed testimony, exhibits, and workpapers on the settled issues be made a part of the record in this proceeding."¹⁰ Nevertheless, as noted above, OTP will offer into evidence only that portion of Mr. Tommerdahl's Direct Testimony where he details cost savings impacts from OTP's management of the Big Stone AQCS Project.

Based on the foregoing, OTP respectfully requests that Staff's Motion in Limine be Denied.

Dated this 22nd day of March, 2019

Cary Stephenson
Associate General Counsel
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56538
Phone: (218) 739-895
cstephenson@otpc.com

⁹ Staff Motion p. 3

¹⁰ Settlement Stipulation p. 3.