

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

In the matter of the Petition of Gevo Net-Zero 1, LLC to have Kingsbury Electric Cooperative, Inc. Assigned as its Electric Provider in the Service Area of Otter Tail Power Company

Docket No. EL24-024

In the matter of the Petition of Dakota Renewable Hydrogen, LLC to have Kingsbury Electric Cooperative, Inc. Assigned as its Electric Provider in the Service Area of Otter Tail Power Company

Docket No. EL24-025

**PETITION TO INTERVENE AND
COMMENTS OF OTTER TAIL
POWER COMPANY**

I. INTRODUCTION

Otter Tail Power Company (“Otter Tail”), hereby petitions to intervene as a party to this matter, pursuant to SDCL § 1-26-17.1 and ARSD §§ 20:10:01:15:02 and 20:10:01:15:03, and provides comments regarding the Petitions of Gevo Net-Zero 1, LLC (“NZ1”) and Dakota Renewable Hydrogen, LLC (“DRH,” and together with NZ1, the “Customers”) seeking to have Kingsbury Electric Cooperative, Inc. (“KEC”) assigned as its electric service provider (the “Petitions”). In support of this petition to intervene, Otter Tail states (i) that the 245-acre proposed site of NZ1’s aviation jet fuel facility and DRH’s hydrogen production facility outside Lake Preston, South Dakota is within the exclusive assigned service territory of Otter Tail; (ii) Otter Tail has already taken steps to market and prepare the surrounding area for additional load; (iii) Otter Tail can and is willing to furnish an adequate and reliable electrical supply to the Customers’ facilities with minimal construction of facilities; (iv) Otter Tail predicts it will incur, and expects to be reimbursed, direct system costs caused by the KEC service plan; (v) nevertheless, recognizing the Customers’ preference to be served by KEC, Otter Tail seeks to intervene and objects only as far as is necessary to protect the economic and reliability interests of its customers and its own service territory. As described more fully herein, Otter Tail seeks to intervene for the limited purpose of ensuring that only as much of its service territory as is actually necessary to serve NZ1 and DRH is reassigned and that the economic interests of Otter Tail’s customers are not adversely impacted by the Petitions.

II. BACKGROUND

The 245-acre parcel (“Project Site”) where NZ1 proposes to build its sustainable aviation jet fuel facility (“NZ1 Facility”) and DRH proposes its hydrogen production facility, which will serve the NZ1 Facility, is east of Lake Preston, South Dakota on US Highway 14 as depicted in NZ1’s Exhibit 2, and is within Otter Tail’s assigned service territory. Otter Tail has been serving this area since the Commission first approved the territory maps. Although much of the land in this part of the state remains undeveloped, Otter Tail has taken steps to promote the site and has planned its system for potential growth in the Lake Preston portion of its service territory. For example, in 2019-2021 Otter Tail added nearly 60 miles of 115 kV transmission line to loop its existing 115 kV transmission network in the Lake Preston portion of its service territory and established a new 345/115 kV source in the area to provide additional load-serving capability and improve reliability to its customers within the area. Potential customers expressing interest to Otter Tail to locate in this I-29 “Dairy Corridor” include poultry, dairy, cheese processing, and other value-add agricultural businesses such as ethanol production. The development the Customers propose is but one example of the growth potential in this region of the state, and Otter Tail reasonably anticipates that its service territory in the Lake Preston region will continue to attract new customers.

Otter Tail worked with the Customers’ parent companies, including Zero6 Energy Inc. for DRH (“Zero6”), for more than a year to reach agreement on terms for electric service to the Customers consistent with South Dakota’s exclusive territory laws while allowing the Kingsbury County Wind Farm (“KCWF”), which is also a Zero6 subsidiary, to provide renewable power to NZ1 and be physically connected to the NZ1 Facility. While Otter Tail remains ready and able to serve the Customers, it understands that it could not reach terms and that the Customers’ preference is now to receive service from KEC. Otter Tail is concerned, however, that the Customers’ requests are overly broad and do not fully address potential impacts of the arrangements for service from Basin Electric Cooperative (“Basin”), East River Cooperative (“East River”) and KEC.

NZ1’s Proposed Project and Petition

NZ1 proposes to take energy from a 99 MW wind farm to be operated by Kingsbury County Wind Fuel LLC (“KCWF”) as well as DRH’s on-site hydrogen production facility and carbon-capture facilities, producing energy to serve firm, electric demand of approximately 40 to 45 MW, with a 90 percent load factor for NZ1 and approximately 20-25 MW for DRH. The KCWF facility will directly serve NZ1 through a new 10-mile 115 kV transmission line to be owned and operated by East River. Because KCWF needs

the ability to sell excess generation, the 115 kV transmission line will be interconnected into the Southwest Power Pool (“SPP”) Market. KCWF has apparently already applied to SPP to interconnect the wind farm to SPP’s grid. If, or when, that application will be granted or what network upgrades will be required is uncertain. However, Otter Tail’s customers likely will see cost impacts from East River’s expanded facilities.

NZ1’s Petition explains that it will also receive electricity from an onsite hydrogen production facility, DRH, which will be a separate customer. NZ1’s Petition further contemplates that another third-party, SCS Carbon Removal LLC (“SCS”), intends to conduct carbon-capture at the NZ1 Facility and that SCS “may also seek to be electric service customers of KEC . . . to the extent its load exceeds 2 MW.”¹

NZ1’s Petition is not clear with respect to the service territory exception it is seeking or precisely whose load it seeks to include in the Petition. While NZ1 is a new customer and the NZ1 Facility is a new load as those terms are used in SDCL § 49-34A-56, the Petition also implies that it is seeking to have KEC serve the entire 245-acre Project Site, including potential third-parties operating inside the Project Site under separate ownership and control. For example, in the introductory section of its Petition, NZ1 describes the entire Project Site as lying within the bounds of Otter Tail’s service territory and then states generically that “KEC is in the best position to provide service to NZ1.”² It goes on to describe the NZ1 Facility as being located on the full 245 acres.³ And it implies that SCS and “other service providers,” whose identity or purpose have not been disclosed may be served by KEC if located on the project site,⁴ leaving open the possibility that these potential service providers may not file a petition for service from KEC and with it the prospect that KEC may nonetheless provide service or that Otter Tail may be expected to provide service to only some portion of the facilities within the bounds of the Project Site.

NZ1 is not clear in its Petition what its long-term intentions are with respect to the development of the Project Site; the ability of entities located on the Project Site to be served by KCWF and if such service is provided in a lawful manner; and if Otter Tail will lose the opportunity to serve load in its exclusive service territory without notice and comment to the Commission. Notably, NZ1’s Petition provided a description of the transmission and related infrastructure planned to be built by East River and KEC with redundant service to the NZ1/DRH load. Based on the information provided in the

¹ *In the matter of the Petition of Gevo Net-Zero 1, LLC to have Kingsbury Electric Cooperative, Inc. Assigned as its Electric Provider in the Service Area of Otter Tail Power Company*, Docket No. EL24-024, NZ1 Petition p. 5 (June 28, 2024).

² *Id.* at 1.

³ *See id.* at 2.

⁴ *Id.* at 5 (“to the extent of their on-site operations”).

Petition, it appears there will be approximately 130 miles of new or upgraded 115 kV transmission line built to bring three transmission sources to the planned new Kingsbury County substation. While Otter Tail requires more information to evaluate the reasonableness of this plan, at first blush the buildout appears excessive for just these two loads based on Otter Tail's estimates of its own service plan.

III. PETITION

South Dakota statute⁵ and the Public Utilities Commission's administrative rules authorize "a person who is not an original party to a proceeding before the commission and who claims an interest in a pending proceeding" to "petition the commission for leave to intervene."⁶ The Commission shall grant the petition "if the petitioner shows that the petitioner is specifically declared by statute to be an interested party to the proceeding, or that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general."⁷

Otter Tail's petition to intervene is timely filed⁸ and demonstrates that Otter Tail has a unique pecuniary interest in the outcome of the Petition, which is distinct from the rights and interests of taxpayers or the general public. Specifically, Otter Tail has a statutory right to be the exclusive electric service provider for the Project Site.⁹

Although the South Dakota Legislature has preserved for large-scale customers the right to request the electric provider of their choice even within the designated service territory of another utility, the right to select a provider is not without limits. And Otter Tail has an interest in protecting as much of its service territory as possible because, when a would-be Otter Tail customer is allowed to use an alternative electric service provider, Otter Tail's ability to economically serve its existing customers and earn a return is directly implicated. Moreover, once a new customer or development receives service from an alternative utility, the change is permanent and the right to serve the development does not return to Otter Tail.¹⁰ In short, NZ1's Petition asks the Commission to authorize

⁵ SDCL § 1-26-17.1.

⁶ ARSD § 20:10:01:15.02.

⁷ *Id.* § 20:10:01:15.05.

⁸ On July 3, 2024, the Commission noticed the filing of the Petitions and established an intervention deadline of July 19, 2024 for each proceeding.

⁹ See SDCL §§ 49-34A-42 through -44.

¹⁰ See *In re Declaratory Ruling of Northwestern Pub. Serv. Co. ("Hub City")*, 1997 SD 35, *3-4 & *19-20, 560 N.W.2d 925 (1996) ("The 'retained right' alluded to by the PUC and NWPS is illusive when reading SDCL § 49-34A-56. There is no express language establishing such a right in the customer. Nor does that provision yield such a right when read in conjunction with other provisions of the Act. The plain language of the statute indicates the legislature intended it to do nothing more than provide a new large load customer at a new location an option to be exercised prior to receipt of service. The successful exercise of the option does not beget another option.").

a transfer of Otter Tail's service territory with the concomitant effect of restricting Otter Tail's right to serve load in this geographic region and earn associated revenues, thereby directly implicating Otter Tail's and its customers' pecuniary interests.

Specifically, Otter Tail believes that NZ1's request seeks to include too much real property and other potential Otter Tail customers without Commission permission as required by SDCL § 49-34A-56. Additionally, Otter Tail is concerned that East River's intended 115 kV buildout will financially impact Otter Tail by requiring Otter Tail to invest in new substation equipment to maintain its interconnection with East River. Last, Otter Tail seeks to ensure that the Commission has an adequate record upon which to base its decision and ensure that the State's service territory and public utility laws and requirements are met.

For these reasons, Otter Tail's petition to intervene should be granted.¹¹

IV. COMMENTS¹²

The Customers' Petitions ask the Commission to modify Otter Tail's statutorily permitted exclusive service territory pursuant to SDCL § 49-34A-56, which states that "new customers at new locations" who meet the 2,000 KW minimum are not obligated to take electric service from the utility with the assigned service territory where the customer is located if the Commission allows, after notice and hearing and consideration of the following factors:

- (1) The electric service requirements of the load to be served;
- (2) The availability of an adequate power supply;
- (3) The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto;
- (4) The proximity of adequate facilities from which electric service of the type required may be delivered;
- (5) The preference of the customer;
- (6) Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

¹¹ See ARSD § 20:10:01:15.05.

¹² Otter Tail provides this brief discussion of its anticipated objections to NZ1's Petition based on the facts known to it at this time and in accordance with the requirement that a petition to intervene set out, "to the extent known, the position of the petitioner in the proceeding." ARSD § 20:10:01:15.03. Otter Tail reserves the right to augment the record in this proceeding as more information becomes known.

The Customers must, therefore, demonstrate that they are (1) new customers at a “new location” and (2) that the six statutory factors favor KEC providing electric service over Otter Tail. The Customers’ Petitions may not fully satisfy this burden, and Otter Tail seeks to intervene in order to develop the record such that the Commission will be in the best position to evaluate these issues.

A. New Customers at New Locations

While the Customers are new customers with a contracted minimum demand of at least 2,000 KW, the NZ1 Petition can be read to reach well beyond the “new location” as that term is used in SDCL § 49-34A-56. NZ1 appears to seek blanket treatment for the entire 245-acre property, despite the fact that the only facility it immediately contemplates for development is the 45 MW NZ1 Facility. Otter Tail cannot discern if the premise to be served occupies the entire 245-acre site, because the NZ1 Petition conflates the NZ1 Facility and the larger Project Site. Furthermore, NZ1 explains that there may be third parties such as, but not limited to, SCS who would be located on the 245-acre parcel and ostensibly be served by KEC. NZ1 does not identify any anticipated load below the 2 MW threshold that could be developed on the 245-acre parcel and it does not proffer that any load over 2 MW would be required to petition the Commission for service by KEC nor even how the Commission, Otter Tail, or any other interested entity would know of any such new loads.

In applying SDCL § 49-34A-56, the South Dakota courts and Public Utilities Commission have looked to see if the area at issue was a new development or structure. For example, a foundry added to a manufacturing facility was a new location.¹³ However, where two structures were being added to a parcel, only service to the two structures could be adjudicated, while service to the larger, undeveloped parcel of land was properly deferred until such time as there was development and a need for electric service.¹⁴ There, the Commission concluded the appropriate course of action was to raise each newly developed structure on a case-by-case basis.¹⁵

This case law supports the conclusion that the only “locations” ripe for consideration are the 45 MW NZ1 Facility and DRH’s hydrogen production facility. Any discussion of who the electric service provider will be for the remainder of the 245-acre

¹³ See *Hub City*, 1997 SD 35, *3-4.

¹⁴ *In the Matter of the Petition for Electrical Service by Dakota Turkey Growers, LLC to Have Dakota Energy Cooperative, Inc. Assigned as its Electric Provider in the Service Area of Northwestern Energy*, Case No. EL04-032, Final Decision and Order Determining Right to Receive Service ¶ 13 (May 23, 2005) (declining to reach the larger parcel when the new load to be served only included two new structures, stating that “[a]t such time as development is actually proposed on this parcel, the parties will have the opportunity, if they wish, to bring before the Commission the issue of whether such development meets the standards for inclusion” within the “location” for purposes of § 49-34A-56).

¹⁵ *Id.*

Project Site and future development thereon is at best premature. The Commission should be clear that the NZ1 petition would allow only for service to the facility identified and not enlarge the service territory area to the entirety of the 245-acre parcel. Any new load that is located on the 245-acre parcel, like DRH, is free to petition the Commission for service by KEC when that load is ready to come on-line; any load under 2,000 KW must be served by Otter Tail.

B. Multi-Factor Analysis

The Customers argue that the Commission should grant their Petitions because customer preference is the most weighty of the statutory factors. Otter Tail does not dispute that customer preference is an important issue in weighing the statutory factors. However, based on the record available to date, it appears many of the factors the Commission must consider need to be weighed against the Customers' preferences. In fact, it appears that in this instance, approval of the Customers' choice of electric service provider could potentially come with unintended consequences with implications that reach beyond the rights and needs of the Customers.

First, as the South Dakota Supreme Court has counseled, a key purpose of "SDCL 49-34A is the 'elimination of duplication and wasteful spending in all segments of the electric utility industry.'"¹⁶ In applying the SDCL § 49-34A-56 factors, the Commission must consider whether the entity proposed to provide service has an adequate power supply and adequate facilities sufficient to accommodate new users.¹⁷ Where possible, the Commission should seek to promote efficiency by allowing the utility with adequate existing facilities to provide service.¹⁸

To the extent there are not sufficient facilities available to provide electric service to a new customer, the Commission must consider the economic factors related to development or improvement of new facilities.¹⁹ Here, the Customers admit that none of the facilities necessary to provide the service they seek currently exist. Instead, KEC and KCWF intend to undergo a substantial infrastructure buildout to provide the service needed. NZ1 asks the Commission to trust that Basin, East River, and KEC will be able to build the necessary infrastructure in a timely manner to meet the need. Otter Tail cannot

¹⁶ *Hub City*, 1997 SD 35, *24.

¹⁷ SDCL §§ 49-34A-56(2) and (4).

¹⁸ *Cf. Willrodt v. Northwestern Pub. Serv. Co.*, 281 N.W.2d 65, 71 (1979) ("A new large user may deprive other customers in a service area of adequate service, or the utility currently providing service to an area may not have sufficient facilities to accommodate the new user. A nearby utility, on the other hand, might have more adequate facilities. Allowing it to serve the large new customer would promote efficiency to both customers and suppliers.").

¹⁹ *See* SDCL § 49-34A-56(3).

deduce if the 115 kV build-out contemplated is sized appropriately for serving only the Customers. In fact, the Customers intimate that the costs of the build out will be larger than the capacity to be allocated to NZ1 and DRH by indicating that NZ1 and DRH will only pay their ratable share of the upgrade costs without identifying who else will cover the remainder of such costs.²⁰ While Otter Tail does not contest KEC's service to the Customers, Otter Tail does want to ensure that such service is consistent with South Dakota requirements and does not want to pass costs onto other customers—including those of Otter Tail. It is unclear if East River's customers will be backstopping those additional costs or if East River is making this additional investment in its system in anticipation of new and additional load which it seeks to serve within Otter Tail's exclusive service territory. Otter Tail notes that it already has existing infrastructure and points of interconnection in the area which can serve new loads that come to Kingsbury County, consistent with its obligation to serve within its exclusive service territory.

Otter Tail is also concerned that should East River undertake the 115 kV buildout contemplated in NZ1's Exhibit 5, some of the ancillary costs may have to be borne by Otter Tail. Specifically, Otter Tail has an established 69 kV to 41.6 kV emergency tie north of Lake Preston, SD that connects Otter Tail's 41.6 kV transmission system to East River's 69 kV transmission system which currently can be closed to support Otter Tail's system during outages. Otter Tail estimates that costs would be approximately \$1.5 to \$2.0 million to maintain the current reliability interconnection. Moreover, Otter Tail's load in the SPP zone pays SPP tariff charges meaning that Otter Tail customers must help to pay for this potentially excessive buildout through pancaked rates. Requiring Otter Tail's customers to bear these costs, is contrary to the public policy that underpins South Dakota's exclusive territory statutes.²¹

While Otter Tail believed it could serve the Customers consistent with the exclusive service territory requirements while still allowing NZ1 to meet its Sustainable Aviation Fuel requirements, it is not clear that the arrangement NZ1 has made with KEC and its partners will also do so. NZ1 readily acknowledges that the electricity it would receive will be generated and delivered directly to the NZ1 Facility from KCWF, which is not a registered South Dakota utility.²² Based on the facts available at this time, it appears that

²⁰ NZ1 Petition p. 10; *In the matter of the Petition of Dakota Renewable Hydrogen, LLC to have Kingsbury Electric Cooperative, Inc. Assigned as its Electric Provider in the Service Area of Otter Tail Power Company*, Case No. EL24-024, DRH Petition p. 10 (June 28, 2024).

²¹ *Hub City*, 1997 SD 35, *15 (“The policy underlying” the South Dakota Territorial Integrity Act codified at Chapter 49-34A, was “elimination of duplication and wasteful spending in all segments of the electric utility industry.”).

²² See NZ1 Petition p. 6.

if the Petition is approved, this arrangement will largely put the relationship outside of the Commission's regulatory authority. Furthermore, because the right to select a service provider does not include the option to switch back to the provider originally assigned or to a new provider,²³ future owners and operators of the facilities at issue may be saddled with electric service that is inconsistent with state law and good utility practice. Given that the transaction the Customers describe in their Petitions is a first of its kind in South Dakota, oversight appears to be all the more important.

Finally, at a minimum a third-party, such as Otter Tail, is in a unique position to ask questions in discovery and frame the issues in a manner that will help the Commission evaluate the application of the SDCL § 49-34A-56 factors. Although customer preference is an important factor in assessing a petition under SDCL § 49-34A-56, in this instance, the Commission may benefit from a meaningful investigation into the facts and a robust debate of these issues.

V. CONCLUSION

Otter Tail does not contest KEC's Petition to serve these two Customers in Otter Tail's service territory. For the reasons stated herein, Otter Tail requests that the Commission grant its Petition and allow it to intervene and be granted status of a party to this proceeding, including the right to conduct discovery on the topics identified herein and any others Otter Tail may learn are appropriate through the course of these proceedings.

²³ See *Hub City*, 1997 SD 35, *20.

Dated this 19th day of July, 2024.

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