BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY WESTERN MINNESOTA MUNICIPAL POWER AGENCY AND MISSOURI RIVER ENERGY SERVICES FOR A FACILITY PERMIT FOR AN ENERGY CONVERSION FACILITY AND ASSOCIATED FACILITIES INCLUDING AN ELECTRIC TRANSMISSION LINE IN DEUEL COUNTY, SOUTH DAKOTA	)))))))	**STAFF'S RESPONSE TO REQUEST FOR ACCESS TO CONFIDENTIAL INFORMATION PURSUANT TO ARSD 20:10:01:43** **EL25-028**

INTRODUCTION

On August 7, 2025, the Commission received an Application for an Energy Facility Permit from Western Minnesota Municipal Power Agency and Missouri River Energy Services (Applicants). Applicants propose to construct an energy conversion facility and electric transmission line in Scandinavia Township, Deuel County, South Dakota, known as the Toronto Power Plant (Project). Included in the Application as Appendix G – Level III Cultural Resource Records Search. This Cultural Resource information was filed as a confidential document. On October 7, 2026, Suzie Pratt, a non-party to the docket, filed a Request for Access to Confidential Information under ARSD 20:10:01:43 (hereinafter "Request"). On October 19, 2026, Applicants filed a Response to the Request. On October 27, 2026, Ms. Pratt filed a Reply to Applicants' Response. On October 28, 2026, the State Historic Preservation Office and State Archaeologist (SHPO) filed a Response to the Request.

ANALYSIS

In the Request, Ms. Pratt asks the Commission to order either "a public version of Appendix G redacted only to remove site location information, or, if the Commission finds that impractical, a public statement from the Applicants" which answers questions from Ms. Pratt about the cultural resource survey for this docket. The request raises several issues that must be

addressed: 1) Ms. Pratt's standing before the Commission; 2) the Commission's jurisdiction over Ms. Pratt and the Request; 3) the lack of a request for confidential treatment of the Appendix G pursuant to ARSD 20:10:01:41, which Ms. Pratt raises in the Request; 4) whether Appendix G must be kept confidential in accordance with South Dakota law; and 5) whether the Commission should order the Applicants to answer questions from Ms. Pratt on the record. These will be addressed in order. Staff's ultimate opinion, for the reasons below, is that Ms. Pratt's request should be denied.

1. Ms. Pratt's Standing before the Commission

Ms. Pratt is not a party to either docket EL25-028, EL26-026, and EL26-028. A party is a "person by or against whom a proceeding is commenced or a person admitted by the commission or properly seeking and entitled as of right to be admitted as a party." ARSD 20:10:01:01(5). By law, a party to a docket is

> entitled to notice of hearing, to appear at the hearing, to examine and cross-examine witnesses, to present evidence in support of the person's interest, to compel attendance of witnesses and production of evidence, to submit briefs, to make and argue motions and objections, and to all other rights granted to parties by statute or this chapter.

ARSD 20:10:01:15.05. As a non-party to the docket, Ms. Pratt is not able to exercise these options. Furthermore, as has been argued by the Applicants in this proceeding, Ms. Pratt is not entitled to file requests for access to confidential documents under ARSD 20:10:01:43. Staff recognizes while this rule does not specifically limit requests for access to confidential information to come from only parties on the proceeding, ARSD Chapter 20:10:01 is specific to participation in proceedings that alludes to those who are parties to a docket. Definitions provided in ARSD 20:10:01:01.01 are illustrative of this fact:

> (2) "Applicant" or "petitioner," a party seeking approval, authority, or other relief; or any person who notifies the commission of a proposed change in gas, electric, or common carrier rates;
>
> (3) "Complainant," a party who files a complaint;
>
> . . . .
>
> (5) "Party," a person by or against whom a proceeding is commenced or a person admitted by the commission or properly seeking and entitled as of right to be admitted as a party;
>
> (6) "Respondent," a party who is complained against, or a party investigated or ordered to show cause.

Id. The most reasonable interpretation of ARSD 20:10:01:43 is that it refers to parties of a docket.

2. The Commission's Jurisdiction Over Ms. Pratt and the Request

The Applicants in this docket argued that the Commission lacks jurisdiction over Ms. Pratt and her request. *See* EL25-028 Applicants' Response, p. 1-2. The Applicants further argue that any protective order the Commission would issue pursuant to ARSD 20:10:01:43 would not be enforceable against Ms. Pratt because she is not a party to the docket. *Id.* at 2. Otter Tail makes a similar argument in the Request for that docket (EL26-028), stating, "Because she is not a party to this proceeding, it remains uncertain whether any protective order entered by the Commission pursuant to ARSD 20:10:01:43 would bind her. There is a very real risk that nothing would legally prevent Ms. Pratt from disclosing this information after receiving Appendix F."[1] EL26-028 Applicant's Response, p. 2.

[1] Appendix F, in docket EL26-028, is of the same nature as Appendix G in this docket in that it includes the confidential cultural resources review for that docket.

Staff agrees with these arguments regarding the Commission's authority, or lack thereof, over Ms. Pratt and her request. "An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *O'Toole v. Board of Trustees of South Dakota Retirement System*, 648 N.W.2d 342, 346 (S.D. 2002) (citing *Lee v. Div. of Fla. Land Sales & Condominiums*, 474 So.2d 282, 284 (Fla. App. 5 Dist. 1985). The Commission certainly has the authority to bind parties to a protective order as authorized by SDCL Chapter 1-26, Chapter 49-1, and administrative rules promulgated thereof. With non-parties, however, the Commission's authority is not established in law.

3. Lack of Request for Confidential Treatment of the Appendix G pursuant to ARSD 20:10:01:41

Ms. Pratt is correct that ARSD 20:10:01:41 does require a submitting party provide certain information when requesting confidential treatment of a document. Specifically, the submitting party must identify the document, or portion of the document, the length of time for which confidentiality is requested, contact information of the associated contact person, the legal basis and the factual basis that qualifies the information for confidential treatment. Staff agrees this information was not specifically provided by Applicant when Appendix G was filed. However, the Applicants' Letter Regarding Application noted that Appendix G was filed confidentially. Appendix G was specifically marked confidential in accordance with PUC requirements and included contact information of the Applicants' attorney and staff associated with the filing, meeting the document identification and contact information requirements in ARSD 20:10:01:41. Though the Applicant did not include a public document specifying the legal and factual basis for confidential treatment, Staff is well aware of the statutory

requirements that prevent disclosure of the location of cultural resources, and of any records that may reveal the location or character of known archeological sites in South Dakota. With this recognition, Staff had no reason to challenge the legal or factual basis of Appendix G when it was filed. The procedural defect of not filing the request for confidentiality pursuant to ARSD 20:10:01:41 is not a basis for the Commission to order the document to be treated public.

4. Whether Appendix G Must Be Kept Confidential In Accordance With South Dakota Law

The statute at the heart of this matter is SDCL 1-20-21.2, which states:

> Any records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site shall remain confidential to protect the integrity of the archaeological site. The state archaeologist may make the information from the records of an archeological site available to any agency of state government and any political subdivision of the state or to any tribe, which, in the opinion of the state archaeologist, may conduct an activity that affects any such site. The state archaeologist shall also make the information from the records of an archeological site available to the owner of the land that is an archeological site and may make the information available to any qualified researcher or research entity.

The Applicants in EL25-028, EL26-026, and EL26-028 argue that this statute necessitates confidential treatment of the entirety of the cultural resources appendices filed in each docket. This has been the standard practice for siting dockets in previous years, as can be seen in the footnote of the EL26-028 Applicant Response, p. 2. SHPO came to the same conclusion as the Applicants. Alternatively, Ms. Pratt argues that the entire report should not be filed confidentially, but that a public version can be filed with redactions. Her position is that the Appendix can be redacted so that the location, character, or ownership of an archeological site is kept confidential.

Staff agrees with the positions stated by the Applicants that the Appendices should remain confidential in full. While Staff appreciates Ms. Pratt's desire for as much public

information as possible, Staff shares the interpretation by the Applicants and SHPO that the Appendix G constitutes "records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site[,]" and must remain confidential according to the law. SDCL 1-20-21.2. SHPO is the keeper of this information and are responsible for maintaining its confidentiality and making determinations as to whether information falls within statutes under SHPO's purview. As indicated, SHPO released this information to Applicant under a specific exemption in statute, and Ms. Pratt does not fall within that same exemption. As a result, the Commission should defer to SHPO's assessment that ordering Applicant to submit a redacted copy of the appendix is not practical, and would be in violation of state law.

5. Whether the Commission Should Order Applicants to Answer Questions from Ms. Pratt on the Record

Ms. Pratt's Request and Reply both request the Commission to order Applicants to provide answers to questions asked by Ms. Pratt. As explained earlier in this response, Ms. Pratt is not a party to the docket and does not have a legal basis to make this demand. The Applicants have asked the Commission to withdraw its Application, which in fact will be decided at the November 4, 2026, Commission meeting. In addition to the fact that there is no legal mechanism for non-parties to conduct this type of examination of the Applicants, it seems imprudent for the Applicants to have to answer such questions about an Application they seek to withdraw. Therefore, the Commission should not grant this request.

CONCLUSION

For the reasons stated above, Staff respectfully asks that the Commission deny Ms. Pratt's Request.

Dated this 29th day of October, 2026.

Logan D. Schaefbauer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605) 773-3201
Logan.Schaefbauer@state.sd.us