BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF OTTER TAIL POWER COMPANY FOR A FACILITY PERMIT FOR THE BIG STONE SOUTH TO HANKINSON TO BISON 345 KV TRANSMISSION LINE PROJECT	)	**STAFF'S RESPONSE TO REQUEST FOR ACCESS TO CONFIDENTIAL INFORMATION PURSUANT TO ARSD 20:10:01:43**
	)	**EL26-028**

INTRODUCTION

On September 8, 2026, the Commission received an Application from Otter Tail Power Company ("Applicant" or "Otter Tail") for a Transmission Facility Permit for an electric transmission line in Grant and Roberts Counties, South Dakota. Additional details of the Project, as well as an interactive route map, can be found on the Commission's website at https://puc.sd.gov/Dockets/Electric/2026/EL26-028.aspx. As part of its application, Otter Tail filed Confidential Appendix F – Desktop Level I Cultural Resources Review and Amendment (hereinafter "Appendix F"). As Otter Tail explained in its Request for Confidential Treatment, filed on September 8, 2026, it filed Appendix F confidentially pursuant to SDCL 1-20-21.2.

On October 2, 2026, Suzie Pratt filed a Request for Access to Confidential Information under ARSD 20:10:01:43 (hereinafter "Request") relating to Appendix F in this docket and the cultural resource reviews in two other PUC dockets.[1] On October 19, 2026, the Commission issued an Order scheduling a hearing date for the Request to occur during the Commission's regularly scheduled meeting on November 4, 2026. Otter Tail filed a response on October 21, 2026. On October 28, 2026, the State Historic Preservation Office and State Archaeologist (SHPO) filed a Response to the Request.

[1] EL25-028 and EL26-026.

ANALYSIS

In the Request, Ms. Pratt asks the Commission to order "a public version of Appendix F redacted only to remove site location information," or a public statement from Otter Tail which answers three questions Ms. Pratt asks regarding Appendix F. *See* Request, ¶ 14. 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) whether Appendix F must be kept confidential in accordance with South Dakota law; and 4) whether the Commission should order Otter Tail to Answer Questions from Ms. Pratt on the record. These will be addressed in order. Staff's ultimate opinion, for the reasons explained 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;
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> (3) "Complainant," a party who files a complaint;
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> . . . .
>
> (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 Authority Over Suzie Pratt and the Request

Addressing Ms. Pratt's request for access to confidential information in EL25-028, the Applicants in that 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 this 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." EL26-028 Applicant's Response, p. 2.

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) Whether Appendix F 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.

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 F 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.

4. Whether the Commission Should Order Otter Tail to Answer Questions from Ms. Pratt on the Record.

Ms. Pratt's Request and Reply both request the Commission to order Otter Tail 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. This Application is at the beginning state of review in a contested case proceeding. Parties to the docket, including Staff, will review the Application and filed materials, and will engage in

discovery to obtain additional facts and details necessary to determine whether the Applicant has met its burden of proof, particularly as it relates to this information, that the proposed facility will "comply with all applicable laws and rules" and "will not pose a threat of serious injury to the environment . . . in the siting area." SDCL 49-41B-22. The PUC welcomes comments regarding the application and the process, and Ms. Pratt may file these concerns in the docket for the Commissioners, Staff, or other parties to follow up in the discovery and testimony phase of this contested case. However, there is no legal mechanism for non-parties to conduct this type of examination of the Applicant in the docket. Otter Tail has provided answers to the questions asked by Ms. Pratt, but Ms. Pratt found the answers unsatisfactory. 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

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