

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Application by
Otter Tail Power Company for
Authority to Increase Electric Service
Rates in Minnesota

**ORDER ON MOTION TO
COMPEL COMPLIANCE WITH
MINN. LAWS 2010, CH. 328**

This matter came before Administrative Law Judge Kathleen D. Sheehy on a Motion to Compel Compliance with Minn. Laws 2010, Chapter 328, filed on August 25, 2010, by the Office of the Attorney General, Residential and Small Business Utilities Division (OAG). Otter Tail Power Company responded to the motion on September 16, 2010, and the motion record closed that day.

William T. Stamets, Assistant Attorney General, appeared for the OAG.

Bruce Gerhardson, Associate General Counsel, and Valerie M. Means, Moss & Barnett, P.A., appeared for Otter Tail Power Company (the Company).

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

The OAG's Motion to Compel Compliance with Minn. Laws 2010, Chapter 328, is GRANTED IN PART and DENIED IN PART, as follows:

1. Within ten business days, the Company shall file new public versions of Schedules 6 and 7, which include the names of the sixth through tenth highest paid employees;
2. Because of the need to conduct additional discovery with regard to the business purpose of some expenses, the OAG may file its testimony on this topic in its Rebuttal Testimony, due October 15, 2010.

Dated: September 20, 2010

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Minn. Laws 2010, Chapter 328, contains certain employee expense disclosure requirements for public utilities seeking a rate increase. The law was enacted on May 13, 2010, and it became effective August 1, 2010.¹ Otter Tail Power filed this rate case in April 2010, before the law became effective, but it agreed with the Commission's request to file supplemental testimony and exhibits regarding its travel, entertainment, and related employee expenses consistent with the new law.² The Company filed the supplemental testimony on June 28, 2010.³

On August 25, 2010, the OAG filed and served the instant motion seeking revision of and supplementation of the supplemental testimony and schedules filed on June 28, 2010. Because it did not appear from the motion papers that the OAG had conferred or attempted to confer with the Company in order to obtain the requested information in advance of filing the motion, the Administrative Law Judge required that the OAG file a certification that it had conferred or attempted to confer with the Company about these matters and extended the due date for the Company's response to ten business days after filing of the required certification.

On September 1, 2010, the OAG filed a Certification stating that counsel had engaged in a telephone conference call on August 31, 2010, and were unable to resolve the issues "due to a fundamental disagreement about the manner, scope and detail of information" that must be provided. The Certification also stated that the Company was unwilling to revise or supplement its filing in any respect. In the Company's response, it contended that it had carefully complied with all filing requirements; that it was willing to provide additional information and to revise the format of the filing in response to discovery requests, and in fact had already done so; but that it was not willing to re-file the Supplemental Filing.

Analysis

Minn. Laws 2010, Chapter 328, provides as follows:

Subd. 17. Travel, entertainment, and related employee expenses.
(a) The commission may not allow as operating expenses a public utility's travel, entertainment, and related employee expenses that the commission deems unreasonable and unnecessary for the

¹ See Minn. Stat. § 645.02.

² See *In the Matter of the Application of Otter Tail Power Company for Authority to Increase Electric Service Rates in Minnesota*, MPUC Docket No. E017/GR-10-239, Order Accepting Filing, Suspending Rates, Extending Suspension Period, and Requiring Supplemental Filing (May 27, 2010).

³ See Supplemental Direct Testimony of Peter E. Wasberg and Schedules 5-10, filed June 28, 2010 (Supplemental Filing).

provision of utility service. In order to assist the commission in evaluating the travel, entertainment, and related employee expenses that may be allowed for ratemaking purposes, a public utility filing a general rate case petition shall include a schedule separately itemizing all travel, entertainment, and related employee expenses as specified by the commission, including but not limited to the following categories:

- (1) travel and lodging expenses;
- (2) food and beverage expenses;
- (3) recreational and entertainment expenses;
- (4) board of director-related expenses, including and separately itemizing all compensation and expense reimbursements;
- (5) expenses for the ten highest paid officers and employees, including and separately itemizing all compensation and expense reimbursements;
- (6) dues and expenses for memberships in organizations or clubs;
- (7) gift expenses;
- (8) expenses related to owned, leased, or chartered aircraft; and
- (9) lobbying expenses.

(b) To comply with the requirements of paragraph (a), each applicable expense incurred in the most recently completed fiscal year must be itemized separately, and each itemization must include the date of the expense, the amount of the expense, the vendor name, and the business purpose of the expense. The separate itemization required by this paragraph may be provided using standard accounting reports already utilized by the utility involved in the rate case, in a written format or an electronic format that is acceptable to the commission. For expenses identified in response to paragraph (a), clauses (1) and (2), the utility shall disclose the total amounts for each expense category and provide separate itemization for those expenses incurred by or on behalf of any employee at the level of vice president or higher and for board members. The petitioning utility shall also provide a one-page summary of the total amounts for each expense category included in the petitioning utility's proposed test year.

(c) Except as otherwise provided in this paragraph, data submitted to the commission under paragraph (a) are public data. The commission or an administrative law judge assigned to the case may treat the salary of one or more of the ten highest paid officers and employees, other than the five highest paid, as private data on individuals as defined in section 13.02, subdivision 12, or issue a protective order governing release of the salary, if the utility

establishes that the competitive disadvantage to the utility that would result from release of the salary outweighs the public interest in access to the data. Access to the data by a government entity that is a party to the rate case must not be restricted.

Public vs. Private Data

The OAG's motion contends that the Company's filing is deficient in four respects. First, it argues that the public filing improperly blocks both the names and salaries of the sixth through tenth highest paid employees in the Company, even though the blocked information was provided in a trade secret filing made the same day. The OAG maintains that the public filing contravenes the explicit requirements of the statute, and the information should be re-filed consistently with the statute's public requirements. The Company contends that its filing complied with the express provision of the statute allowing the commission or the administrative law judge to treat the salary of "one or more of the ten highest paid officers and employees, other than the five highest paid, as private data on individuals," if the utility establishes that a competitive disadvantage to the utility would result from the release of the salary.

In Mr. Wasberg's Supplemental Direct Testimony, he provided factual support for the request to treat as private data the compensation paid to and identities of the sixth through tenth highest paid employees.⁴ The Company has determined based on a study completed in 2007 that its base salaries for executives and actual total cash compensation are substantially below the competitive median within the industry. It fears that if the Company is required to publish the names of these employees, who are known within the industry, along with the salary information about the top five employees, they will be targeted for recruitment by other employers within the industry. In addition, the Company contends these individuals have a privacy interest in the information that should be protected by limiting disclosure of their salaries to the parties to this case.⁵

The OAG has not referenced this testimony or offered any contrary evidence as to the competitive disadvantage of associating the names of the sixth through tenth highest paid employees with the names and salaries of the top five. The statute expressly allows for non-public treatment of *salary information* if the utility establishes that the public interest is outweighed by the competitive disadvantage that would result. The Company has established that the salaries of these individuals should be considered private data on individuals, but not that the names should be protected. Accordingly, the Company should

⁴ The Trade Secret version of Schedule 6 contains both the names and salaries of these individuals.

⁵ Wasberg Supplemental Direct at 7.

refile the public version of Schedule 6 to include the names (but not the compensation) of the sixth through tenth highest paid employees.⁶

Removal of Ancillary Expenses

Second, the OAG argues that the Supplemental Filing is unnecessarily cumbersome and confusing because it included expenses relating to fleet vehicles, when it should have included only the total amount of travel expenses, with separate itemization only for those expenses incurred by or on behalf of any employee at the level of vice president or higher and for board members. Essentially, this is an argument that the Company over-disclosed its travel expenses. In addition, the OAG contends the disclosure is confusing because the expenses are not limited to the Minnesota jurisdictional amount, making it difficult to determine the amount of the particular expense that is part of the revenue requirement.

In its response, the Company asserted that it read the statute to require separate itemization of all travel expenses, including fleet vehicle expense, with an additional separate itemization for any expense incurred by employees at the level of vice president or higher and for board members. The Company consequently provided itemization of all travel expenses in Schedule 5, with a separate Schedule 7 for expenses of employees at the level of vice president or higher. In addition, the Company explained that the schedules were created using its project accounting system, which allowed the collection of detail such as specific vendor information that would not have been available from the general ledger system. The Minnesota jurisdictional allocations are made in the cost of service study, downstream of the accounting system, based on aggregated cost categories and not on specific itemized costs. The jurisdictional information can be calculated based on the cost of service study, but there is no standardized accounting report that shows the specific jurisdictional allocation of each itemized expense.⁷

The statute requires the filing of schedules separately itemizing all travel, entertainment, and related employee expenses incurred in the most recently completed fiscal year. If the OAG wants more specific information about the Minnesota jurisdictional allocations for specific expenses, it may obtain that information through discovery. The utility is permitted to use standard accounting reports already in use to generate the required schedules. The Company did not over-disclose the required information, and it is presented in a clear and logical format (for example, Schedule 5 is organized by month; Schedule 7 is organized first by employee name, then by month). There is no reason to require any

⁶ The names of these employees were also redacted from Schedule 7, which discloses expense reimbursements. The public version of Schedule 7 should be refiled as well, to include the names.

⁷ Otter Tail Power Company's Response in Opposition to the OAG's Motion to Compel Compliance at 6-7; Wasberg Supplemental Direct at 4-6.

correction or revision of the entire filing based on the arguments advanced by the OAG.

Format of the Schedules

Third, the OAG argues that the data in the schedules is provided in a .pdf format that is not sortable and is therefore of limited use. In addition, it contends that the Company has not organized the data pursuant to the categories delineated in the statute, meaning separate schedules for travel and lodging expense, food and beverage expense, recreational and entertainment expense, etc. The OAG characterizes the Supplemental Filing as being composed of “thousands of line items [pertaining] to OTP expenses of every stripe arranged in no discernable order.” It asserts that the Company, and all other utilities subject to the statute, should be required to file data in the form of live searchable and sortable Excel spreadsheets.

In response, the Company maintains it has provided live and sortable electronic spreadsheets in response to discovery requests made by the Office of Energy Security (OES) and the OAG. Specifically, on August 18, 2010, the OAG issued Information Request Nos. 265, 266 and 269; in response, the Company provided, on August 30, 2010, live, sortable, and searchable spreadsheets showing all items on Schedules 5-10 of the Supplemental Direct Testimony, as well as a live, sortable spreadsheet excluding fleet vehicle costs.⁸ In addition, the Company stated that during the conference call with the OAG, the OAG confirmed that it is not seeking an Order requiring the provision of additional information, reformatted information, or live-searchable spreadsheets, because it already had this material. Instead, it seeks an order compelling the Company to re-file the Supplemental Filing.

The statute permits the utility to provide the required information using standard accounting reports already utilized, “in a written format or an electronic format that is acceptable to the commission.” The filing was provided in an electronic format (.pdf) that is routinely used to e-file documents on the Commission’s website. The format used complied with the statute; and contrary to the OAG’s characterization, the schedules are clearly and logically organized. The statute does not require that the schedules be filed as Excel spreadsheets. In discovery, the Company has provided the information in an electronic format that will make it easier to sort through and categorize the different types of expense reflected in Schedule 5. There is no basis to require the Company to re-file its Supplemental Filing based on the format of the schedules.

Business Purpose Detail

Finally, the OAG contends that the Company has failed to adequately identify the business purpose of each itemized expense, arguing the business

⁸ Otter Tail Power Company’s Response to OAG Motion to Compel Compliance at 7-8.

purpose descriptions “lack any meaningful detail.” As an example the OAG points to the wireless telephone bills disclosed for the Company’s president on Schedule 7, the business purpose for which is described as “Regulatory Review.” The business purpose of other itemized expenses is described as “Strategic Planning.” The OAG contends more detail regarding the business purpose of each expense is required to comply with the statute.

The Company responds that the accounting system used to generate the schedules contains an “activity description” that is a short identification of the activity category for which the cost is incurred and that this is the extent of the information available through its standard reports. Providing a more extensive description for each and every expense, it argues, would require a burdensome and costly manual process. Such an expense cannot be justified when it is permitted to use its standard accounting reports already in use to generate the schedules.

The OAG has specifically complained only about the detail provided in Schedule 7, which discloses the expense reimbursements of the ten highest paid officers and employees. This is an extremely small subset consisting of about \$55,000 in expenses for these ten employees. Although the business purpose may not be as precisely described as the OAG would like, it is based on the information available in standard reports. Moreover, the business purpose of an expense such as a cell phone is apparent, and there is often sufficient detail in the “vendor” description to determine that expenses are associated with specific business meetings. The Company has made a good faith effort to comply with this requirement, and the Administrative Law Judge concludes the schedule is adequate as filed. In the future, the Company might be able to add more precise descriptors to its standard reports, now that the reports are being used for this purpose; but it should not be required to revise the schedules filed in this case. If the OAG desires more specific information about a particular expense, it can seek that information in discovery.

K.D.S.