BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF BLACK HILLS POWER, INC. FOR AUTHORITY TO INCREASE ITS ELECTRIC RATES	**)** **)** **)** **)**	**EL14-026** **BRIEF OF INTERVENOR DAKOTA RURAL ACTION**

1. <u>IS THE PUBLIC UTILITIES COMMISSION ALLOWED TO APPROVE A STIPULATION WHICH CONTAINS A KNOWN ERROR?</u>

No.

In raising and answering this question, it is necessary to look at the potential legal ramifications of a decision in which the South Dakota Public Utilities Commission (hereinafter PUC) approves a settlement stipulation, in this case, in which the testimony of Black Hills Power (hereinafter BHP) witnesses and PUC staff acknowledged that the written and signed settlement stipulation entered into by BHP and PUC staff contains an error. More specifically, a $ 286,000 error, under Operating Income, as to the amount in the Proforma Increased Affiliate Allocations from BHUH. The proposed settlement includes an increase in the revenue requirement in the amount of $527,000, however, Black Hills Industrial Intervenors (hereinafter BHII) witness Lane Kollen determined that the increase should be $ 241,000 (Testimony, page 147, lines 14-25) (Exhibit # 9, Table 6).

This error was acknowledged by witnesses and to the extent that Commissioner Hanson asked a BHP witness whether or not the PUC could approve a stipulation which had an error in it -- a question that was never answered. To answer that question, it is necessary to not only review the power and authority of the PUC to approve stipulations, but the standards to which the basis for the approval is held by an appellate court.

Further, witness Kollen has correctly asserted that BHP "erroneously included $2.200 million (total plant and total Company) CPGS spare parts inventory in both the CPGS plant in service amounts shown on Schedule D page 2, Schedule D-11, and in the materials and supplies amount shown on Schedule F-4." (Kollen Pre-filed Direct testimony, p 9, lines 13-16.)

> SDCL 49-34A-62 places appeals from the PUC under the provisions of SDCL 1-26. SDCL 1-26-36[1] controls the scope of review and, at the time this case was decided, provided that the court shall not substitute its judgment for that of the administrative agency regarding the weight of the evidence on questions of fact. It allowed, however, reversal or modification of the decision of the agency if it is unsupported by substantial evidence on the whole record or is an arbitrary exercise of discretion. Matter of Certain Territorial Electric Boundaries, 281 N.W.2d 65 (S. D.1979); Dail v. South Dakota Real Estate Commission, 257 N.W.2d 709 (S.D.1977).

South Dakota Public Utilities Commission v. Otter Tail Power Company, 291 N.W.2d 291, 292 (1980).

South Dakota Codified Law provides under SDCL § 1-26-20: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default." This statute was created by legislative action in 1996 and has not been amended or revised since that date. Past cases clearly demonstrate that the PUC has the power and authority to approve stipulated settlements in rate cases.

South Dakota law also states how an appellate court would review PUC decisions. Great deference is shown to the findings of the SD PUC. "Public utility commissions were viewed as a solution to the partisan and often corrupt interference of state and local governments and the excesses of public utilities. Public utility commissions were viewed as 'incorruptible,enlightened, and non-partisan agencies' exerting 'just, impartial, and unprejudiced control of public service corporations and public utilities generally.'" Armiger, Jonathan, "Judicial Review of Public Utility Commissions", 86 Indiana Law Journal, 1163, 1166 (2011).

SDCL § 1-26-36 states:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand

> the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The first question under this analysis then is whether any of the six basis upon which a reviewing court could reverse or modify the PUC's decision exists in this case. Arguably, Intervenor Dakota Rural Action (hereinafter DRA) believes only subsection (5) or (6) would potentially apply, but the statute also requires that these basis can only be applied if "substantial rights of the appellant have been prejudiced." This appears to require that significant or considerable or material rights be involved.

Intervenor DRA asserts to the Commission that it is not the monetary amount alone that determines the substantial nature of the rights, but the right itself. Intervenor DRA, as represented by its membership living in the geographic area serviced by BHP, depends upon the PUC to insure that its decisions are fair and reasonable and supported by the facts presented to the PUC. All customers of BHP, whether residential or industrial, will be affected by any proposed rate change. Obviously, for customers who earn lower incomes, utility cost increases result in those customers having to shift money from food, transportation, medical care, child care, and other budgetary expenses to cover those increases. Errors in accounting which can impact the calculation of the appropriate rate are material and substantial.

In the Utah Public Commission docket no. 08-057-11, the Utah PUC noted:

> Utah law supports settlement stipulations to resolve disputed matters. Stipulations may be approved by the Commission after considering the interests of the public and other affected persons where the proposal is just and reasonable in result and supported by adequate evidence. In reviewing the Settlement Stipulation presented by the Stipulating Parties, we consider a number of interests: the interests of the individual customers who were underbilled, the interests of other customers, the interests of Questar, and the interests of the State in pursuit of its public policies

In considering the interests of customers of BHP, and the State of South Dakota, it is incumbent upon the PUC to insure that its decisions are supported by the evidence. "Substantial evidence" means such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion. SDCL 1-26-1(8). South Dakota Public Utilities Commission v. Otter Tail Power Company, 291 N.W.2d 291, 293 (1980).When the evidence shows that errors exist in the proposed stipulation, approval of the stipulation would set a precedent for approving clearly erroneous facts, in violation of the applicable statute.

2. IS A PROPOSED SETTLEMENT STIPULATION BEFORE THE PUC ALLOWED TO INCORPORATE ADJUSTMENTS NOT OCCURRING WITHIN THE TEST YEAR AND/OR WHICH ARE NOT SUPPORTED BY EVIDENTIARY DOCUMENTATION?

No.

SDAR 10:10:13:44 states: The statement of the cost of service shall contain an analysis of system costs as reflected on the filing utility's books for a test period consisting of 12 months of actual experience ending no earlier than 6 months before the date of filing of the data required by §§ 20:10:13:40 and 20:10:13:43 unless good cause for extension is shown. The analysis shall include the return, taxes, depreciation, and operating expenses and an allocation of such costs to the services rendered. The information submitted with the statement shall show the data itemized in this section for the test period, as reflected on the books of the filing public utility. Proposed adjustments to book

costs shall be shown separately and shall be fully supported, including schedules showing their derivation, where appropriate. However, no adjustments shall be permitted unless they are based on changes in facilities, operations, or costs which are known with reasonable certainty and measurable with reasonable accuracy at the time of the filing and which will become effective within 24 months of the last month of the test period used for this section and unless expected changes in revenue are also shown for the same period. (emphasis added)

Source: 2 SDR 90, effective July 7, 1976; 9 SDR 55, effective November 7, 1982; 12 SDR 151, 12 SDR 155, effective July 1, 1986.

General Authority: SDCL 49-34A-4.

Law Implemented: SDCL 49-34A-10, 49-34A-12, 49-34A-41.

Within the rule as to adjustments, the utility can "normalize" certain expenses which are subject to a great deal of variance and volatility from year to year, but there is a limitation on the time period in the rate case during which these normalizations can be submitted. In other words, the utility cannot keep asking to make changes to the test year numbers throughout the case.

Additionally, as stated by BHII witness Lane Kollen in his written testimony, the spreadsheet developed by BHP and PUC Staff regarding adjustments "did not include all calculations or source all adjustment amounts." Kollen, Direct Tesimony, pg. 3, lines 21-23. Mr. Kollen testified, and DRA agrees, that any "post-test year adjustments [to costs during the test year be limited] to the twelve month period immediately following the historic test year ending September 30, 2013." Kollen, Direct Testimony, pg. 7, lines 18-20. This would be in compliance with the governing statute, as there was not documentation submitted during that time showing the costs were known with reasonable certainty nor measurable with reasonable accuracy at the time of BHP's filing of its application for a rate increase. No changes to test year costs should have been allowed unless known and measurable at the time of filing which was March 31, 2014.

BHII expert witness Lane Kollen stated: "BHP has continually modified its revenue requirements since filing its case in March 2014, both in response to discovery and as the company and Staff converged on the Proposed Settlement. In some cases BHP even proposed new adjustments. In other cases BHP adjusted its original proposed cost based on presumably actual costs incurred after the end of the historic

test year and based on revisions in its projected costs." (page 153, line 18-25) Witness Kollen went on to note that the test year should start with the use of actual costs which can then be adjusted – "normalized" in certain circumstances for certain costs. (page 155). The first statutory requirement for these adjustments is that they were known and measurable as of the date of the filing of the application for the rate increase. [1]

Witness Kollen asserted and the lack of documentation would appear to support that the PUC staff did not require BHP to provide documentation to support its claimed adjustments.

> More specifically, the Company did not include all potential corresponding increases in revenues or reductions in costs that would offset the adjustments for projected increase in costs beyond the twelve month post-test year period. By failing to include such revenue increases and cost reductions in its Application, the Company unjustly and unreason--ably skewed the proposed base rate increase upward.

Kollen, Pre-filed Direct Testimony, pg. 8 lines, 3-8.

The Illinois Administrative Code is substantially similar to the SDAR section at issue in that it requires starting with the costs incurred in a 12-month test year. As in South Dakota, Illinois allows for *pro forma* adjustments "which are estimated or calculated adjustments that reflect certain known and measurable changes in post-test-year data as specified by the rules". In the case of Commonwealth Edison Company v. Illinois Commerce Commission et al., in the Appellate Court of Illinois, Second District, No. 07-0566, (2010) the utility (ComEd) also sought to include certain new plant costs for a plant that had entered or would enter service after the test year. ComEd and the Commission Staff entered agreements which were approved by the Commission, but thereafter appealed to the appellate Court by intervenors. One of the appealed issues was ComEd's failure to make a matching adjustment to ComEd's asserted increase in accumulated depreciation. "Effron, GC Petitioners' expert, opined that the growth in accumulated depreciation during the post-test-year period is a change that is known and measurable with absolute certainty. Therefore, he opined, it is "clearly inconsistent" for the rate base to reflect plant in service through the end of the post-test-year period

[1] Although PUC staff witness David Peterson made a specious argument that the word "filing" in this context could mean any filing during the rate case, it is clear that such a reading would not only be in conflict with common statutory interpretation, it would result in a case which the test year limit could continue endlessly and never be resolved as long as one party or another just kept filing documents.

but reflect a balance of accumulated depreciation only through the end of the test year." Id. at p. 26.

"Consistent with the ComEd/Staff stipulation, the Commission's order included in the rate base "pro forma" capital additions through June 2008 with no reflection of the increase in the accumulated reserve for depreciation embedded [existing] plant. Thus, the Commission allowed ComEd to avoid the offset for accumulated depreciation of existing plant during the post-test year period in exchange for forfeiting recovery of the cost of the third quarter plan additions." Id. at p. 27.

The appellate court, reviewing the administrative law and principles, noted that "to determine just and reasonable rates, a utility's rate base, operating costs, and revenues are matched over the test year." Id. at p. 28. The court agreed with intervenors that the costs and revenues cannot be separated in the calculations: "contemporaneous increases and decreases to rate base are not severable items that can be given disparate treatments." Id. at P. 20.

Equally relevant to the case herein, the Illinois appellate court noted that the administrative rule gives a utility the discretion to request pro forma adjustments to historical date in the post-test-year period, but those adjustments must account for "all known and measurable changes." P.29 The appellate court cited to Business & Professional People for the Public Interest v. Illinois Commerce Commission (BHP II), 146 Ill. 2nd at 237-38 (1989), where the utility argued that depreciation is not subject to test-year principles because, if those principles applied, utilities would be forced to choose between filing yearly rate cases or forgoing recovery of the costs of construction incurred during that year. P. 30.

Allowed adjustments which are outside the parameters of the test year, as dictated by state law, or which were not supported adequately or at all by documented evidence should not have been made or allowed. These existence of these adjustments leads to an unfair and unreasonable result.

WHEREFORE, for all of the reasons stated herein, Intervenor Dakota Rural Action requests that the South Dakota Public Utilities Commission not approve the settlement stipulation entered into by Black Hills Power and the PUC staff.

Dated this 17th day of February, 2015.

/s/ Caitlin F. Collier

Attorney for intervenor Dakota Rural Action
P.O. Box 435
Vermillion, SD 57069
(605) 202-0281
collierlawoffice@gmail.com

CERTIFICATE OF SERVICE

I, Caitlin F. Collier, hereby certify that I have this day e-filed a copy of the foregoing document with the South Dakota Public Utilities Commission.

Copies were emailed on the parties as follows:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission

500 E. Capitol Ave.
Pierre, SD 57501
Patty.vangerpen@stat.sd.us

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us

Ms. Brittany Mehlhaff
Staff Analyst
South Dakota Public Utilities Commission
brittany.mehlhaff@state.sd.us

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
patrick.steffensen@state.sd.us

Ms. Robin Meyerink
Staff Analyst
South Dakota Public Utilities Commission
robin.meyerink@state.sd.us

Mr. Eric Paulson
Staff Analyst
South Dakota Public Utilities Commission
eric.paulson@state.sd.us

with copies sent to:

Mr. Jon Thurber
Manager of Regulatory Affairs
Black Hills Power, Inc.
Jon.Thurber@blackhillscorp.com

Ms. Amy Koenig
Corporate Counsel
Black Hills Corporation
amy.koenig@blackhillscorp.com

Mr. Todd L. Brink
Senior Counsel
Black Hills Power, Inc.
Todd.brink@blackhillscorp.com

Mr. Lee A. Magnuson
Lindquist & Vennum, LLP
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
lmagnuson@lindquist.com

Chad Marriot
Stoel Rives LLP
ctmarriot@stoel.com

Mark Morena
Attorney at Law
mmoreno@pirlaw.com

Andrew P. Moratzka
Stoel Rives LLP
apmoratzka@stoel.com

Dated February 17, 2015.

/s/ *Caitlin F. Collier*
Caitlin F. Collier