

**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**

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**Docket No. EL14-026**

**BLACK HILLS POWER, INC.’S ANSWER TO BHII’S PETITION FOR  
REHEARING AND RECONSIDERATION**

**I. BACKGROUND**

Black Hills Power, Inc. (“Black Hills Power” or “Company”) filed its Application for Authority to Increase Its Electric Rates on March 31, 2014. On June 6, 2014, GCC Dacotah, Inc., Pete Lien & Sons, Inc., Rushmore Forest Products, Inc., Spearfish Forest Products, Inc., Rapid City Regional Hospital, and Wharf Resources (U.S.A.), Inc. (collectively "BHII") filed a Petition to Intervene. Following extensive discovery performed by the Staff of the South Dakota Public Utilities Commission (“Staff”) and BHII, the Company and Staff resolved all issues and entered into a Settlement Stipulation (Joint Exh. 2) that was filed under a Joint Motion with the Commission on December 9, 2014. BHII chose to not be a party to the Settlement Stipulation and filed testimony in opposition.

A hearing was held on January 27 and 28, 2015 (“Hearing”), to afford the South Dakota Public Utilities Commission (“Commission”) the opportunity to resolve two issues. The first issue was whether the Commission should approve the Settlement Stipulation.

The second issue was, if the Commission found that approval was not appropriate, in the alternative, what rates, terms, and conditions are just and reasonable. *See* December 30, 2014 Order for and Notice of Hearing. Related thereto, BHII made the following statements at the Hearing.

Our understanding on the Order and Notice of Hearing in this matter is that there were two issues before the Commission. One, should the Proposed Settlement be approved; and, two, as we're reading, if not, then what rates, terms, and conditions shall the Commission approve?

And our understanding would be then based on everything that came in today and yesterday, the Commission can either approve the Settlement or approve the Settlement as modified. We don't need anymore hearings, is our understanding.

*See* Hearing Transcript at pp. 314-315. In summary, BHII acknowledged that the Commission had the authority to approve a modified settlement.

In an effort to address certain issues that were raised during the Hearing, on February 10, 2015, the Company and Staff filed an Amended Settlement Stipulation.<sup>1</sup> In support of the three modifications reflected therein, Staff filed a memorandum and explanatory schedules. As noted in Staff's memorandum, the modifications did not change the overall revenue deficiency that Staff and the Company agreed to as a term of the

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<sup>1</sup> In particular, Black Hills Power and Staff agreed to: (1) correct the transmission allocation oversight; (2) include an adjustment to the revenue requirement that accounts for a portion of the operation and maintenance costs for the Wyodak facility that were presented in the rebuttal testimony of Jon Thurber; and (3) modify the rate case moratorium to provide that the earliest date that rates could go into effect as a result of a subsequent rate case is January 1, 2017.

Settlement Stipulation. Furthermore, the modifications were discussed in essence in both the pre-filed testimony and at the Hearing.<sup>2</sup>

On February 17, 2015, both the Company and BHII filed post-hearing briefs that addressed issues that were raised at the Hearing and in the Amended Settlement Stipulation. In particular, BHII acknowledged that the Amended Settlement Stipulation, "...represents modifications to the Proposed Settlement that BHP and Commission Staff may accept when the Commission issues its decision on March 2, 2015." See BHII Post-Hearing Brief, p. 2. Although the Company agreed the Commission has the discretion to adopt the terms set forth in the Revised Settlement Stipulation; in an abundance of caution, the Company and Staff filed a Joint Motion for Approval of Amended Settlement Stipulation on February 23, 2015.

On March 2, 2015, the Commission engaged in deliberations regarding the Application and the pending Motions. Following deliberations, the Commission voted to approve the, "... Joint Motion for Approval of the Amended Settlement Stipulation and to approve the terms and conditions stipulated therein." See March 2, 2015 Transcript, pp. 17 and 30.

In response, BHII filed its Petition for Rehearing and Reconsideration ("Petition"). Black Hills Power submits this Answer to the Petition and requests that the Petition be denied under SDAR 20:10:01:29 and 20:10:01:30.01. Denial of the Petition for Rehearing

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<sup>2</sup> *Discussion of transmission allocation oversight:* BHP Exh. 70, Thurber Rebuttal Test. 16-20; Staff Exh. 1, Peterson Test. 19; BHII Exh. 2, Kollen Test. 39; Hr'g Tr. Thurber Test. 130-135; Hr'g Tr. Peterson Test. 284; Hr'g Tr. White Test. 301; Hr'g Tr. Kollen Test. 184,186; *Discussion of Wyodak facility costs:* BHP Exh. 70, Thurber Rebuttal Test. 17-20; Hr'g Tr. Thurber Test. 130-135; Hr'g Tr. White Test. 301; *Modify Rate Case Moratorium:* Hr'g Tr. Peterson Test. 289 – 290; Hr'g Tr. White Test. 301.

is appropriate because the rates that result from the Commission's decision: (1) fall within its statutory obligation to establish just and reasonable rates; (2) are consistent with the issues set forth before the Commission in the Notice of Hearing; (3) do not prejudice BHII because they result from issues that were addressed during both live and pre-filed testimony; and (4) represent modifications to the Settlement Stipulation that BHII agreed could be adopted by the Commission. Additionally, denial is appropriate because the notice provisions set forth in SDCL § 15-6-6(d) were satisfied. As a result, BHII has failed to provide the Commission a sufficient reason to support its request for a re-hearing. Denial of BHII's Petition for Reconsideration is likewise proper, because it: (1) fails to set forth a legal basis for a claim of purported error that has not already been considered by the Commission; and (2) lacks any assertion of newly discovered evidence that would support reconsideration.

## II. BHII'S PETITION FOR REHEARING

BHII erroneously argues that consideration of the Amended Settlement Stipulation after the evidentiary hearing violates the principles of equity and due process. BHII's argument is unpersuasive for several reasons. First, the Commission has a statutory obligation to ensure a utility's rates are just and reasonable. SDCL §§ 49-34A-6 and 49-34A-8. In conformance therewith, the Commission's Notice of Hearing specifically stated that the Commission may either approve the initial Joint Motion or determine what rates are just and reasonable. Due process requires that a notice of hearing must fairly apprise a party of the issues so the party can adequately prepare a defense. *In re One-Time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 628 N.W.2d 332 (S.D. 2001), quoting *In the Matter of Bertram*, 343 N.W.2d, 382, 384 (S.D. 1984).

The Notice of Hearing fairly apprised BHII of the issues to be decided at the Hearing and afforded BHII months to prepare its positions. In accordance with the Notice, on March 2, 2015, the Commission reached a determination that fit squarely within the issues outlined in the notice. More specifically, the Commission reached a determination that resulted in rates that it found to be just and reasonable.

Second, the modifications to the Settlement Stipulation were based entirely upon evidence that was in the record before the Commission. *See* Footnote 2. Additionally, the Amended Settlement Stipulation was filed twenty days before it was considered. Therefore, any claim that BHII was deprived of an opportunity to respond to the same lacks merit. Finally, BHII agreed both at the Hearing and in its post-hearing brief that consideration of modifications to the Settlement Agreement was within the Commission's discretion. *See* Hearing Transcript at pp. 314-315; BHII's Post Hearing Brief, p. 2. As a result, BHII has failed to provide a legal basis to support its argument that the approval of the terms and conditions set forth in the Amended Settlement Agreement violate the principles of equity and due process.

Next, BHII argues that a re-hearing is required because the Joint Motion for Approval of the Amended Settlement Stipulation was not filed ten days before it was approved by the Commission as required by SDCL § 15-6-6(d). BHII's argument ignores the fact that a Joint Motion for approval of the Settlement Stipulation was timely filed on December 9, 2014, and the amendments to the subject stipulation were filed twenty days before the March 2, 2015 hearing. Further, the Amended Settlement Stipulation specifically stated that it was filed with the Commission for approval. Regardless of whether the Commission considered the Amended Settlement Stipulation to be a

modification to the first Joint Motion or a stand-alone filing, the notice requirements set forth under SDCL § 15-6-6(d) were satisfied.

Furthermore, BHII subsequently took no steps to move to postpone the March 2nd hearing. It also previously agreed that the modifications set forth in the Amended Settlement Stipulation were modifications to the Settlement Stipulation that the Commission could adopt as terms and conditions that it found to be just and reasonable. In essence, BHII appears to argue that the Commission was free to adopt the modifications to the Settlement Stipulation on its own accord but it was not free to grant the Joint Motion for Approval of the Amended Settlement Stipulation. Taking this argument to its logical conclusion, we arrive at the same place we are today. A re-hearing on this issue would do nothing more than require the Commission, Staff, BHII, and Black Hills Power to expend additional time and resources to allow the Commission to rule on the second Joint Motion that presented the same issues that were timely presented to the Commission for consideration under the aforementioned filings. Accordingly, BHII's Petition for Re-Hearing is properly denied.

### **III. BHII'S PETITION FOR RECONSIDERATION**

BHII's Petition for Reconsideration is properly denied under SDAR 20:10:01:29 and 20:10:01:30.01, because it: (1) fails to set forth a legal basis for a claim of purported error that has not already been considered by the Commission; and (2) lacks any assertion of newly discovered evidence that would support reconsideration. More specifically, BHII asked the Commission to reconsider five issues. The first three issues pertain to the Commission's interpretation of ARSD 20:10:13:44, SDCL §§ 49-34A-19, and 49-34A-24. BHII's post-hearing brief set forth its proffered interpretation. BHII has not presented any

new legal arguments or a rationale beyond what has previously been argued that would support a finding that the Commission's rejection of BHII's position was in error. Nor has it presented any new evidence that would support an alternate interpretation. BHII has failed to present a sufficient reason to justify reconsideration of the Commission's decision regarding the first three issues.

Turning to the fourth<sup>3</sup> and fifth issues for reconsideration, BHII requested the Commission reconsider its decision regarding incentive compensation and pension expense. Both of these issues were addressed extensively in testimony and fully briefed by BHII and by Black Hills Power prior to the March 2nd hearing. BHII has not presented any new legal arguments, information or evidence that warrants reconsideration. BHII's Petition for Reconsideration is therefore appropriately denied for all five issues under SDAR 20:10:01:29 and 20:10:01:30.01.

#### **IV. CONCLUSION**

Black Hills Power respectfully requests that BHII's Petition for Rehearing and Reconsideration be denied. As set forth above, denial is appropriate because BHII has failed to set forth a persuasive legal basis to support its request for re-hearing and

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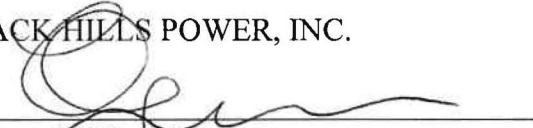
<sup>3</sup> BHII asked the Commission to reconsider the inclusion of \$666,068 in incentive compensation. The Commission's order actually excluded, rather than included, \$666,068 of incentive compensation. Black Hills Power assumes BHII intended to ask the Commission to reconsider the amount of incentive compensation that was allowed under the Commission's decision rather than the amount that was excluded.

reconsideration as required by SDAR 20:10:01:29 and 20:10:01:30.01.

Dated this 17<sup>th</sup> day of April, 2015.

BLACK HILLS POWER, INC.

By

  
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IN THE MATTER OF THE APPLICATION	)	
OF BLACK HILLS POWER, INC., FOR	)	CERTIFICATE OF SERVICE
AUTHORITY TO INCREASE ITS	)	
ELECTRIC RATES	)	Docket No. EL 14-026

I hereby certify that on the 17th day of April, 2015, Black Hills Power, Inc.'s Answer to BHII's Petition for Rehearing and Reconsideration in the above-referenced matter was e-filed with the South Dakota Public Utilities Commission. Copies were also e-mailed to the parties on the attached service list.

  
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