

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE</b>	)	
<b>APPLICATION OF BLACK HILLS</b>	)	<b>Docket No. EL14-026</b>
<b>POWER, INC., FOR AUTHORITY TO</b>	)	
<b>INCREASE ITS ELECTRIC RATES</b>	)	
	)	

**BLACK HILLS POWER, INC.’S ANSWER TO BHII’S AMENDED  
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 (“Application”) 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) (“Settlement”) 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. 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 ("Amended Settlement").<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 Settlement. 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. In

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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.

<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.

particular, BHII acknowledged that the Amended Settlement, "...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 BHII agreed the Commission has the discretion to adopt the terms set forth in the Amended Settlement, 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. Black Hills Power submitted its Answer to the Petition of BHII on April 17, 2015, and requested that the Petition be denied under SDAR 20:10:01:29 and 20:10:01:30.01. On April 27, 2015, the Commission filed its Final Decision and Order; Notice of Entry ("Final Decision"), which included Findings of Fact and Conclusions of Law.

On May 11, 2015, BHII filed its Amended Petition for Rehearing and Reconsideration ("Amended Petition"), which generally reasserts the arguments that were previously advanced by BHII through both testimony and its post-hearing brief. Black Hills Power submits this Answer to the Amended Petition ("Answer") and renews its request that the Petition be denied under SDAR 20:10:01:29 and 20:10:01:30.01. Denial of the request for rehearing and reconsideration 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. Denial of BHII's request for rehearing and reconsideration is further 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 rehearing or reconsideration.

## II. ARGUMENT AND AUTHORITIES

As a preliminary matter, BHII asserts that rehearing and reconsideration is appropriate because the Commission purportedly mischaracterized the nature of the Amended Settlement as “an agreed resolution of the case” in Finding of Fact No. 59. In particular, BHII appears to argue that Finding of Fact No. 59 is erroneous because BHII and DRA were not parties to the settlement. BHII's argument ignores Finding of Fact No. 12, in which the Commission expressly recognized that BHII and DRA were not parties to the Settlement Stipulation and all subsequent findings that referred to only BHP and Staff as the parties to the settlement. BHII's argument is unfounded and fails to provide a basis to support rehearing or reconsideration.

### **a. Rehearing And Reconsideration Is Not Warranted Because The Commission's Decision Is: (1) Consistent With The Principles Of Equity And Due Process; And (2) Complies With The Notice Requirements Set Forth In SDCL § 15-6-6(d).**

BHII erroneously argues that consideration of the Amended Settlement 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 were based entirely upon evidence that was in the record before the Commission. *See* Footnote 2. Additionally, the Amended Settlement 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 violate the principles of equity and due process.

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 specifically stated that it was filed with the Commission for approval. Regardless of whether the Commission considered the Amended Settlement 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 were modifications to the Settlement 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 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, the Commission's Conclusion of Law No. 11 is not in error and BHII's Amended Petition is properly denied.

**b. BHII's Request For Rehearing Or Reconsideration Is Properly Denied Because BHII Has Not Presented Legal Arguments Or Evidence That Were Not Previously Considered By The Commission.**

BHII asked the Commission to reconsider five issues in its Petition for Rehearing and Reconsideration. Two of the issues pertained to the Commission's interpretation of SDCL §§ 49-34A-19 and 49-34A-24. BHII's post-hearing brief set forth its proffered interpretations. BHII's Amended Petition does not address the Commission's

interpretation of SDCL §§ 49-34A-19 and 49-34A-24. As such, it lacks an identification of the findings of fact or conclusions of law related to the interpretation the Commission afforded these two statutes that BHII now claims is in error. The Amended Petition also lacks reference to any newly discovered evidence that would even arguably pertain to the applicable statutory interpretation. Therefore, the Amended Petition fails to set forth sufficient reason for the Commission to reconsider its interpretation of SDCL §§ 49-34A-19 and 49-34A-24 under SDAR 20:10:01:29 and 20:10:01:30.01.

**i. The Commission has already considered and rejected BHII's arguments related to Black Hills Power's satisfaction of the burden of proof required under SDCL § 49-34A-8.4.**

In its Amended Petition, BHII re-asserts its arguments that Black Hills Power failed in three respects to satisfy the burden of proof required under SDCL § 49-34A-8.4.<sup>3</sup> First, BHII argues Black Hills Power failed to meet its burden of proof because it did not submit a cost of service analysis in connection with the Amended Settlement. BHII appears to argue that the Commission must base its analysis of whether the Company satisfied the burden to establish that its rates are prudent, efficient, economical and reasonable solely upon evidence that it provided rather than upon the record as a whole. This argument was presented by BHII for the Commission's consideration prior to issuance of its decision. *See* BHII's Post-Hearing Brief, pp. 25-26; March 2, 2015 Post-Hearing Transcript, pp. 12-16; Amended Petition, pp. 6-9. Notably, BHII has not provided any legal precedent or Commission decisions that support its position in any of its attempts to advance this argument.

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<sup>3</sup> SDCL § 49-34A-8.4 states, "The burden is on the public utility to establish that the underlying costs of any rates, charges, or automatic adjustment charges filed under this chapter are prudent, efficient, and economical and are reasonable and necessary to provide service to the public utility's customers in this state."

To briefly reiterate Black Hills Power's position on this issue, it submitted its full and complete cost of service analysis as Schedule N attached to its Application. As set forth in Finding of Fact No. 10 in the Final Decision, Staff and its outside consultants conducted an extensive review of the Application and the statements, exhibits, testimony, and working papers filed with the Application. Staff also conducted a thorough analysis of Black Hills Power's responses to discovery requests and determined that there was support for post-test year adjustments. In support of the Settlement, Staff filed its Memorandum, including Schedule BAM-1, which calculated the cost of service and resulting revenue requirement using evidence submitted by Black Hills Power in its Application and responses to discovery requests.

Ultimately, Staff and Black Hills Power entered into the Amended Settlement and Staff filed, on February 10, 2015, its Memorandum supporting the Amended Settlement. Included in Staff's filing was Exhibit BAM-4 Schedule 1, which provides the cost of service in connection with the Amended Settlement using evidence submitted by Black Hills Power in its Application and responses to discovery requests. The Amended Settlement reflects a joint agreement between Staff and Black Hills Power, and to submit two cost of service using the same inputs yielding the same result would be duplicative and unnecessary. The Commission has relied on Staff's cost of service calculation using evidence submitted by Black Hills Power in the past three rate case settlements, Docket EL06-019, Docket EL09-018, and Docket EL12-061. BHII was an intervenor in all three dockets, and never raised this issue when they were a party to the settlement.

There was adequate evidence before the Commission, including the Application and supporting documents, pre-filed testimony, and the Staff memorandums and schedules, to establish Black Hills Power's cost of service and revenue requirement. The Commission



had substantial information to support Finding of Fact No. 61 and more particularly its finding that Black Hills Power met its burden of proof under SDCL § 49-34A-8.4. Furthermore, BHII failed to provide any new legal arguments or evidence that would justify rehearing or reconsideration of BHII's position.

Second, BHII argues Black Hills Power failed to meet its burden of proof because it allegedly did not provide sufficient support for the adjustments that were accepted by Staff. *See* Amended Petition, pp. 9-11. Again, the arguments that are set forth in the Amended Petition were previously provided by BHII for the Commission's consideration at the Hearing and in BHII's filings. *See Generally* Hearing Transcript; BHII's Post-Hearing Brief, pp. 25-50; Amended Petition, pp. 9-11. BHII has not provided the Commission new arguments or evidence that would even arguably support a need for rehearing or reconsideration. Accordingly, BHII has failed to provide a basis to support a finding of error in Findings of Fact Nos. 12 and 40 and Conclusions of Law Nos. 12<sup>4</sup> and 27.

Third, BHII argues Black Hills Power failed to meet its burden of proof because it did not include expected changes in revenue in any of its proposed adjustments to test-year book costs. In support, BHII relies upon its argument that the Commission was obligated to reject the Company's cost of service analysis under ARSD 20:10:13:44. This argument was also presented for the Commission's consideration prior to issuance of its decision. *See* BHII's Post-Hearing Brief, pp. 25-26; March 2, 2015 Post-Hearing Transcript, pp. 12-16; Amended Petition, pp. 6-9. BHII has not presented any new arguments or authority that would justify reconsideration or rehearing on this topic.

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<sup>4</sup> With respect to BHII's argument related to Finding of Fact No. 40 and Conclusion of Law No. 12, BHII ignores the substantial evidence in the record that pertains to incentive compensation. *See* BHP Exhibit 22 – Direct Testimony of Laura A. Patterson; BHP Exhibit 65 – Rebuttal Testimony of Kyle D. White; Hearing testimony of Kyle D. White (p. 47-67 and 76-90); and Staff Memorandum in Support of Settlement (p. 12).

Moreover, as the Commission found in Finding of Fact Nos. 30 and 31, it has been a long standing practice of Staff to exclude all revenue producing plant from the plant annualization and post-test year addition adjustments. This finding is well supported by the record. *See* BHP Exh. 70, Thurber Test. 4; Staff Exh. 1, Peterson Test., 8:22 – 9:14; Hearing Transcript pp. 272-279. In particular, as both the Company and Staff’s expert witness indicated, it would be inappropriate for additional revenues to be reflected in the cost of service because the investment needed to serve the sales growth is not included. *Id.* Instead, it has been Staff policy to reflect any incremental revenue or cost savings associated with post-test year adjustments in the revenue requirement. As a result, the interpretation advanced again by BHII is both inconsistent with past Staff practice, would result in a violation of the matching principle, and is insufficient to support a finding that Black Hills Power failed to satisfy the burden of proof required under SDCL § 49-34A-8.4.

**ii. The Commission has already considered and rejected BHII’s arguments related to the proper interpretation of ARSD 20:10:13:44.**

BHII has not presented any new legal arguments or rationale that would support a finding that the Commission’s interpretation of ARSD 20:10:13:44 was in error. To illustrate, BHII addressed the interpretation of this administrative rule in Sections F and G of its Amended Petition. It begins in Section F with the argument that the Commission violated ARSD 20:10:13:44 by failing to reject adjustments to Black Hills Power’s cost of service that were not known with reasonable certainty and measurable with reasonable accuracy at the time Black Hills Power filed its Application. *See* Amended Petition, p. 13. This argument was presented for the Commission’s consideration in the direct and live testimony of BHII’s expert witness Lane Kollen and in BHII’s Post-Hearing Brief, pp. 8-21, 25-26. It was also addressed in oral arguments during the Commission’s March 2,

2015 proceedings. *See* Hearing Transcript, pp. 12-16. As the Company fully briefed its position in its post-hearing brief, it will not reiterate its responsive arguments and instead incorporates them through this reference.

In support of this argument, BHII continues to assert that the Commission is required to analyze the completeness and accuracy of a cost of service that comports with the Settlement Agreement. *See* BHII's Post-Hearing Brief, pp. 25-26; March 2, 2015 Post-Hearing Transcript, pp. 12-16; Amended Petition, pp. 6-9. During the March 2, 2015 proceedings, Commission Nelson specifically asked BHII what language in ARSD 20:10:13:44 places this obligation upon the Commission. *See* Hearing Transcript, pp. 12-16. BHII failed to direct the Commission to any particular language at that time. *Id.* In its Amended Petition, BHII now relies upon the phrase, "...[N]o adjustments shall be permitted unless..." to support its position. BHII's emphasis on this phrase has not changed the position it asserted in pre-filed testimony, direct testimony, or in its Post-Hearing Brief. Nor does it provide a legally sufficient basis to find error in Findings of Fact Nos. 11, 15, 19, 23, 26, 27, 32, 33, 34, 43, 47, 49, or 53. Furthermore, the position is not supported by any legal authority or reference to past Commission practices or decisions.

Next, BHII challenges the Commission's interpretation of ARSD 20:10:13:44 in Section G of its Amended Petition by re-asserting its argument that adjustments must be rejected unless they are supported by corresponding changes in revenue. This argument was presented in the direct and live testimony of BHII's expert witness Lane Kollen and in BHII's Post-Hearing Brief, pp. 22-24. This argument was also reiterated by BHII in support of its claim that Black Hills Power failed to satisfy the burden of proof required under SDCL § 49-34A-8.4. As reflected in Conclusion of Law No. 10, the Commission

has already had an opportunity to consider and rejected BHII's proffered interpretation of ARSD 20:10:13:44. BHII has not provided sufficient reason to support its request for reconsideration under SDAR 20:10:01:29 and 20:10:01:30.01.

#### IV. CONCLUSION

Black Hills Power respectfully requests that BHII's Amended 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 or sufficient reason to support its request for re-hearing and reconsideration as required by SDAR 20:10:01:29 and 20:10:01:30.01.

Dated this 22<sup>nd</sup> day of May, 2015.

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