| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
| | :ss | |
| COUNTY OF HUGHES | ) | SIXTH JUDICIAL CIRCUIT |

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION OF BLACK HILLS POWER, INC. FOR AUTHORITY TO INCREASE ITS ELECTRIC RATES | Civ. No. 15-146<br><br>**APPELLANT'S REPLY BRIEF** |

# TABLE OF CONTENTS

Page

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Statutes and Administrative Rules**

# I. INTRODUCTION

BHII appeals from the Commission's approval of the Amended Settlement because the overall cost of service in the settlement incorporates Pre-Filing Adjustments and Post-Filing Adjustments (as defined in BHII's initial brief) that the Commission was legally obligated to reject, either because the adjustments were not (1) "fully supported" in the record, (2) known with reasonable certainty and measurable with reasonable accuracy at the time BHP filed its Application, or (3) both. This reply brief addresses matters raised in the Commission's brief (cited herein as "*SDPUC Br.*") and BHP's brief (cited herein as "*BHP Br.*").

# II. ARGUMENT

## A. The Proper Standard of Review is *De Novo*.

Appellees incorrectly characterize BHII's arguments as questions of fact and accordingly propose the wrong standard of review. As its opening brief clearly demonstrates, BHII is raising only questions of law that should be reviewed *de novo*. All of BHII's arguments involve either the Commission's interpretation or application of its own rule. Part A of BHII's opening brief addresses the Commission's interpretation of ARSD 20:10:13:44 and establishes that adjustments to the utility's cost of service must be "known with reasonable certainty and measurable with reasonable accuracy" when the utility files its application for a rate increase. Parts B and C of that brief address the Commission's improper application of ARSD 20:10:13:44 to BHP's pension expense and incentive compensation adjustments. "The construction of an administrative rule is a question of law which is fully reviewable by the court without deference to the agency determination." *Nelson v. Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D. 1991); *see also Permann v. Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987) (explaining why appellate courts are better suited than agencies to decide questions of law). "Whether the [agency] correctly applied its rules presents a question of law; when resolution of a dispute presents a

question of law we accord no deference to the conclusions reached by the [agency] or the circuit court." *Matter of Sales & Use Tax Refund Request of Media One, Inc.*, 1997 S.D. 17, ¶ 11, 559 N.W.2d 875, 878. Thus, the South Dakota Supreme Court has made clear that the issues raised by BHII are legal questions that receive *de novo* review.

Furthermore, Appellees exaggerate the extent to which the Court should defer to the Commission's interpretation of its own rule. BHP argues, for example, that an agency's interpretation of *a statute* that the agency is charged with administering is entitled to "great weight." *See BHP Br.* at 4, 11. The central issue in this appeal, though, is not the Commission's interpretation of a statute but rather its interpretation of *its own rule*, ARSD 20:10:13:44. In *Nelson*, the South Dakota Supreme Court described only two circumstances where an agency should be given any discretion: "Although the final construction of a rule is a question of law, an agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." 464 N.W.2d at 624. Neither circumstance exists in this case. Accordingly, the Court is not obligated to provide the Commission with any deference at all.

First, the key language of the rule is not technical or ambiguous. It is not technical because it involves a simple phrase, "at the time of filing," rather than complicated industry terms. *Id.* at 625 (noting that medical terms in rules are "technical in nature"). And it is not ambiguous because the meaning of the phrase is clear when viewed in the context of the rule as a whole and State statutes governing a utility's cost of service. Beyond this, the first sentence of the rule refers to a utility's application as the "filing of the data required by §§ 20:10:13:40 and 20:10:13:43." In other words, there is a reference in ARSD 20:10:13:44 that supports BHII's interpretation—"filing" is synonymous with application.

Second, and contrary to Appellees' contention, the Commission's interpretation is not long standing precedent. The Final Decision represents the first time, in any rate case with any utility, that the Commission has actually interpreted ARSD 20:10:13:44. Indeed, BHII challenged Appellees to cite a case where the Commission interpreted ARSD 20:10:13:44. Appellees cited none. Thus, the agency's interpretation "is fully reviewable by the court without deference to the agency determination." *Id.* at 624.

But even if the Court determines that some deference is appropriate, an agency is "allowed a reasonable range of informed discretion" only "as long as its construction is reasonable and not inconsistent with the rules." *Id.* at 625. Here, the Commission's interpretation is unreasonable and is inconsistent with the rule. The interpretation is (1) unreasonable because, as Commission staff concedes, it would allow the utility to submit adjustments up to the date of the Commission's decision, *SDPUC Br.* at 15, and (2) inconsistent with the plain language of the rule because the Commission conflates the rule's two separate tests for post-test year adjustments into one. Any deference to the Commission's interpretation therefore would be improper.

### B. BHII's Interpretation of ARSD 20:10:13:44 Comports With All South Dakota Laws Regarding a Utility's Cost of Service.

Appellees argue that BHII's interpretation of ARSD 20:10:13:44 is not supported by the plain language of the rule or other South Dakota laws that bear on the Commission's analysis of adjustments to test-year book costs. *See, e.g., BHP Br.* at 5-6; *SDPUC Br.* at 13-14. The following analysis establishes that the laws cited by Appellees either support BHII's interpretation or are irrelevant to the question presented to the Court, and demonstrates that Appellees' interpretation requires the Court to ignore critical language in the rule.

**1. BHII's interpretation of ARSD 20:10:13:44 is consistent with both SDCL 49-34A-8.4 and SDCL 49-34A-19**

As discussed in BHII's opening brief, SDCL 49-34A-8.4 places the burden on the utility to establish that each cost underlying the revenue requirement is "prudent, efficient, and economical and [is] reasonable and necessary to provide service." *BHII Br.* at 6-8. In enacting SDCL 49-34A-19, the Legislature set the general parameters for evaluating any proposed revenue requirement filed in a utility's application to increase rates. SDCL 49-34A-19 states, in relevant part, that:

> In determining the revenue requirement the commission *shall* consider revenue, expenses, cost of capital and other factors or evidence material and relevant thereto. The commission *may* take into consideration the reasonable income and expenses that will be forthcoming in a period of twenty-four months in advance of the test year. (emphasis added)

Hence, the Legislature (1) directed the Commission to consider "revenue, expenses, cost of capital, and other [material and relevant] factors or evidence" and (2) gave the Commission the option to consider reasonable income and expenses that "will be forthcoming in a period of twenty-four months in advance of the test year." The Commission exercised that option when it adopted ARSD 20:10:13:44, and cleared up the inherent ambiguity in the phrase "forthcoming in a period . . . in advance of the [historic] test year." It is axiomatic in administrative law that an agency's interpretation of a statute is reflected in the rule it adopts. *See e.g.*, SDCL 1-26-1(8) (defining "rule" as "each agency statement of general applicability that . . . interprets . . . law"); *Krsnak v. Dep't of Env't & Nat. Res.*, 2012 S.D. 89 ¶ 13, 824 N.W.2d 429, 435 (describing how the Legislature delegates power to an agency to interpret and execute a statute). BHII, here, simply relies on the unambiguous and non-technical language of ARSD 20:10:13:44 as the Commission's definitive interpretation of SDCL 49-34A-19.

**2. ARSD 20:10:13:44 does not permit the Commission to accept adjustments that "become known and measurable during the twenty-four month period following the end of the test year."**

In pertinent part, ARSD 20:10:13:44 (diagrammed for purposes of this discussion) states:

> [N]o 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 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.

Appellees blatantly (and conveniently) ignore the plain language of the rule which includes the conjunctive "and," which separates two tests—and two relevant time periods—for each proposed adjustment. A utility must be able to demonstrate that each adjustment (1) was known and measurable when filed and (2) will become effective within 24 months after the end of the test period. Nothing in ARSD 20:10:13:44 supports the Commission's conclusion that "the intent of SDCL 49-34A-19 is to permit . . . cost of service evidence that *becomes known and measurable during the twenty-four month period following the end of the test year*." *Final Decision* at 18, ¶ 9. That reading conflates the two unambiguously separate tests set out by the Commission in its own rule and renders the phrase "at the time of filing" meaningless, contrary to a general principle of statutory construction. *Pete Lien & Sons, Inc. v. Zellmer*, 2015 S.D. 30, ¶ 37 n.16, 865 N.W.2d 451, 463 n.16 ("We do not interpret laws to nullify or make meaningless any of the words actually used.") (citing *State v. Miranda*, 2009 S.D. 105, ¶ 23, 776 N.W.2d 77, 83).

The question before the Court with respect to ARSD 20:10:13:44 involves the first test only—*i.e.*, does the phrase "at the time of filing" mean "*at the time the utility submits the adjustment*," which is Appellees' position, *see Final Decision* at 8, ¶ 26, *BHP Br.* at 7-11; or does it mean "*at the time the utility files its application*," which is BHII's position? This appeal

is not concerned with the second test. BHII does not appeal any adjustments approved by the Commission on the grounds that they would not "become effective within 24 months of the last month of the test period" and Appellees' discussions of the 24-month period are therefore irrelevant to the question presented and only cloud the issue.

**3. ARSD 20:10:13:01(11) is irrelevant to the Court's analysis of the phrase "at the time of filing."**

BHP criticizes BHII for reading ARSD 20:10:13:44 "in isolation" because BHII did not cite or discuss SDCL 49-34A-19 or ARSD 20:10:13:01(11). *BHP Br.* at 9. That argument is a red-herring and misses the mark. First, the discussion above demonstrates that BHII's interpretation of ARSD 20:10:13:44 is harmonious with SDCL 49-34A-19. The Commission adopted the rule to implement SDCL 49-34A-19 and establish the criteria the Commission must use to determine whether a utility's filed costs are "prudent, efficient, and economical and are reasonable and necessary to provide service" under SDCL 49-34A-8.4. Second, ARSD 20:10:13:01(11) defines the "test period" as "the test period outlined in ARSD 20:10:13:44, except that if additional material is filed by the utility, a test period is any 12 consecutive months beginning no later than the proposed effective date of the rate application." But, as the diagrammed rule above shows, the term "test period" only bears on when an adjustment must become effective under the second test in ARSD 20:10:13:44. BHII did not discuss ARSD 20:10:13:01(11) in its initial brief because that rule has no bearing on the proper interpretation of "at the time of filing" in the first test.

**4. SDCL 49-34A-8 does not extend the timeframe for submitting known and measurable adjustments to test-year book costs.**

BHP separately cites SDCL 49-34A-8 to support its argument that "[p]ost-test year adjustments that will become effective in the 24 months following the test year are necessary so that the utility's current costs will be met." *BHP Br.* at 9. That statute relates to the criteria for

determining rates and states that the Commission "shall give due consideration . . . to the need of the public utility for revenues sufficient to enable it to meet its total *current cost* of furnishing such service." BHII does not argue that BHP or any other utility should not be permitted to include adjustments to the historical test year that *become effective* within 24 months of the end of the test period. That is precisely what the second test described above is designed to check.

BHP cites no support for its argument that the phrase "current cost" in SDCL 49-34A-8 allows a utility to submit adjustments that are not known and measurable when the utility files its application to increase rates. BHII explained in its opening brief that a 12-month historical test year is not a perfect predictor of future costs and emphasized that each utility controls the 12-month period it chooses and the date on which it files its application. *BHII Br.* at 8. BHII also showed that ARSD 20:10:13:44 takes into account the imperfect nature of the historical test year by incorporating two mechanisms that ensure test-year data is representative of the utility's cost of service on the date if files its application—i.e., that the cost of service filed with the application is the utility's "current cost." *Id.* at 8-9. That the Commission protected against stale cost of service data in ARSD 20:10:13:44 supports BHII's interpretation of "current cost" in SDCL 49-34A-8 and its interpretation of "at the time of filing" in the rule.

### C. The Commission's Alleged "Long Standing Policy" Does Not Comport With South Dakota Law and Would Violate Principles of Equity and Due Process.

Appellees interpret the phrase "at the time of filing" to mean "at the time the utility submits its adjustment." *See Final Decision* at 8, ¶ 26; *BHP Br.* at 7-11. Appellees say that their interpretation is consistent with State law and should be given deference simply because it has been Commission Staff's "long-standing policy." *See, e.g., BHP Br.* at 6; *SDPUC Br.* at 7. The Court should reject Appellees' reading of ARSD 20:10:13:44 because it is unsupported by the rule's plain language (as demonstrated above and in BHII's initial brief) and because it violates the principles of equity and due process in rate case proceedings, as further described below.

**1. ARSD 20:10:13:44 does not provide for adjustments to be made up to the date of the Commission's decision in a rate case proceeding.**

Appellees' interpretation of "at the time of filing" would permit a utility to propose adjustments up to the date of its decision in the case, even adjustments that were not known and measurable on the date the utility filed its application. *SDPUC Br.* at 15.[1] The Commission supports its position, in part, with a distorted view of the discovery process. Specifically, the Commission believes that "[t]he purpose of discovery is to be able to get . . . updated adjustments as they become known with reasonable certainty and measurable with reasonable accuracy." *SDPUC Br.* at 12. To the contrary, the purpose of discovery is to allow for the verification of the cost of service included with the utility's application. Discovery is not a vehicle for introducing new costs. If Commission Staff needs additional information to prove that a utility's proposed adjustment was known and measurable when the application was filed, then it can request that information through discovery. If Staff rejects an adjustment included in a utility's application because the adjustment was not known and measurable when the application was filed, then that should end the discussion. Nothing in ARSD 20:10:13:44 or in any other South Dakota law permits a utility to (1) resurrect a rejected cost or (2) introduce a new cost at any time during the proceedings. If the utility is unable to verify through discovery that an adjustment was known and measurable at the time its application was filed, then ARSD 20:10:13:44 obligates the Commission to reject it.

---

[1] BHII notes that adjustments are not "filed" with the Commission unless they are part of the utility's application. Information produced through the discovery process is "served." Post-Filing Adjustments only become part of the record if entered into evidence by one of the parties. Thus, the Court could reject Appellees' interpretation of ARSD 20:10:13:44 simply because the word "filing" cannot, in the context of administrative proceedings, mean "adjustment."

To permit a utility to continually update its cost of service during the pendency of the case, and then only for selected cost increases, would undermine due process and incentivize utilities to "throw in the kitchen sink" with their applications in hopes that they would be able to prove some of the costs later. This is the fundamental issue underlying BHII's argument that a utility should not be able to resurrect Pre-Filing Adjustments that are entirely unsupported by submitting Post-Filing Adjustments long after the hearing and submittal of briefs (and, according to Appellees, up to the day before the Commission issues its order). *See BHII Br.* at 11-12.

Appellees seem to think such a result should be permitted because, under SDCL 49-34A-21, the Commission cannot approve a rate increase higher than that proposed in the utility's application. *SDPUC Br.* at 15-16; *BHP Br.* at 13. It is not enough, however, for ratepayers to know the maximum potential increase if the utility's application is padded with budgets and estimates it cannot prove at the time of filing. BHII's interpretation would, in fact, give SDCL 49-34A-21 greater meaning because the proposed cost of service in a utility's application would better reflect the costs it could prove. One only needs to compare BHP's proposed $14.6 million rate increase to the $6.89 million rate increase approved by the Commission in this case to understand how wildly exaggerated a utility's filed cost of service can be. The utility's application, and the Commission's analysis of that application, should be based on the 12-month historical test year, as adjusted for changes that become known and measurable between the end of the test year and the date the utility files its application. To conclude otherwise would be arbitrary and fundamentally unfair to ratepayers.

**2. The Commission's prior interpretations violate the plain language of ARSD 20:10:13:44.**

Regardless of how long Commission Staff has interpreted ARSD 20:10:13:44 to permit ongoing adjustments to a utility's filed cost of service, that reading violates the plain language of the rule, as demonstrated above, and no party has ever challenged it before the Commission or in

any court. Thus, the Commission's interpretation is unsettled as a matter of law. Appellees nevertheless cite witness testimony from distinguishable cases in an effort to save their cause.

There is a difference between (1) appropriately relying on precedent where the relevant question was asked and definitively answered and (2) misguidedly relying on cases where no answer at all was given because the salient question was never asked. Appellees do the latter. For example, the Memorandum Decision of the Circuit Court in *In re Application of Northern States Power Co.*, No. F-3382 (S.D.P.U.C. 1981) cited by BHP can be easily distinguished. *BHP Br.* at 12-13.[2] In its initial brief in that case, NSP notes that "[t]he filed increase was based on a 1980 historical test year, as required by PUC Rules 20:10:13:44, adjusted for certain known and measurable changes. The filing also developed revenue requirements based upon forecast 1981 and 1982 test years, as permitted by PUC Rules 20:10:13:01(11)." Reply App. 59. The fundamental question before the Commission in the NSP case was whether forecast test years and associated budgets were permitted for ratemaking purposes under the rule, not whether Post-Filing Adjustments should be permitted. Indeed, NSP observed in its opening brief that "[i]n accordance with current Commission practices, the Company based *its requested increase* on 1980 book data adjusted extensively but conservatively for known and measurable changes." *Id.* at 63-34. Not only was the Commission faced with a fundamentally different fact pattern than in the present case, it never expressed an opinion on the meaning of "at the time of filing," which is the question now before the Court.

**D. <u>BHII's Expert Witness, Mr. Kollen, Did Not Proffer Legal Conclusions.</u>**

BHP's references to BHII witness Kollen's testimony are inapposite. *See BHP Br.* at 15-16. Mr. Kollen suggested a number of adjustments that, if accepted, would have resulted in a

---

[2] BHP did not include the order in its appendix. BHII attaches it as Reply App. 1-54.

reduction in BHP's base rates of at least $5.258 million. *Kollen Direct* at 4, BHII App. A-139. Mr. Kollen is not a lawyer and is not qualified to make legal arguments. Such arguments were proffered through post-hearing briefs, which the Commission specifically sought pursuant to BHII's request. *Evid. Hrg. Tr.* at 307-308; Reply App. 156-57.

## E. Appellees' Arguments Regarding Pension Expenses Misstate the Record and Misapply the Law.

Appellees' arguments with respect to the Commission's approval of a five-year average pension expense using 2010-2014 data should be rejected.

### 1. BHII timely raised the issue of normalizing pension expenses using 2015 data.

Contrary to the Commission's allegation, *SDPUC Br.* at 20, BHII raised the issue of normalizing pension expenses by using 2011-2015 data in its post-hearing brief, BHII App. A-124-125, its Petition for Reconsideration, Reply App. 166, and in its Amended Petition for Reconsideration, Reply App. 191-92. BHII argued strenuously before the Commission that the 2014 data alone should be used because it was known and measurable at the time BHP filed its Application and would not require a change in the method of calculating pension expenses. *See, e.g., Kollen Direct* at 33, BHII App. A-168. Furthermore, BHII argued that BHP had already received the benefit of the lower pension expense in 2014 and did not offer to defer the difference between the pension expense reflected in its requested rates and the actual 2014 expenses to share the savings with its customers. BHII App. A-112. BHII then argued in its post-hearing brief (as it does here) that ARSD 20:10:13:44 does not permit Post-Filing Adjustments that were not known and measurable at the time BHP filed its Application; therefore, as a legal matter, the 2015 pension expense data should be rejected. BHII also argued that if the Commission rejected that interpretation, then the Commission should incorporate 2015 data into the five-year average. BHII App. A-124-125. Those two positions, one taken in direct

testimony and at the hearing and the other pursuant to the Commission's request for post-hearing briefs, are consistent.

BHII concedes that the Commission had discretion to allow BHP to normalize its pension expenses using a five-year average and acknowledges that it lost the argument to use only 2014 data. The Commission, though, simultaneously rejected BHII's interpretation of ARSD 20:10:13:44, thereby allowing Post-Filing Adjustments that were not known and measurable at the time BHP filed its Application. Had the Commission consistently applied its interpretation of the rule, this appeal would not be concerned with the pension expense normalization at all. Instead, the Commission exercised clearly unwarranted discretion by cherry picking which Post-Filing Adjustments it would include.

BHP's application called for a normalization adjustment based on "*the most recent* 5 year average of actual costs." BHII App. A-406 (emphasis added). Assuming, *arguendo*, that the Court adopts Appellees' interpretation of ARSD 20:10:13:44, then the most recent five-year average of actual costs is 2011-2015, and it should be self-evident that a 2011-2015 normalization period would be the best representation of BHP's "current cost" under SDCL 49-34A-8. To that point, it is important to note that both the five-year average calculated using 2010-2014 data ($2,336,305) and the five-year average calculated using 2011-2015 data ($2,162,450) are higher than the 2015 cost alone ($2,056,581). Thus, normalization will allow BHP to over-recover for its 2015 cost regardless of the data used. For the Commission to allow unnecessary over-recovery by using 2010-2014 data is both a clear case of unwarranted exercise of discretion, as a matter of law, and fundamentally unfair to ratepayers, as a matter of equity.

**2. The Commission's argument that 2015 data violates ARSD 20:10:13:44 conflicts with its interpretation of SDCL 49-34A-19.**

The Commission argues in Part A of its brief that ARSD 20:10:13:44 allows a utility to propose adjustments to test-year book costs up to the date of the Commission's decision because

"an adjusted test year should be 'forward looking'." *SDPUC Br.* at 15. The Commission also believes, as mentioned above, that "the intent of SDCL 49-34A-19 is to permit . . . cost of service evidence that *becomes known and measurable during the twenty-four month period following the end of the test year.*" *Final Decision* at 18, ¶ 9. The normalization of pension expenses is an adjustment to BHP's test-year book costs. Neither the Commission nor BHP disputes that BHP witness Thurber offered definitive evidence of 2015 pension expenses in his rebuttal testimony dated January 15, 2015. BHP thus demonstrated that the cost was known and measurable prior to the Commission's decision and within the 24-month period following the end of the test year. If the Court accepts the Commission's reading of SDCL 49-34A-19 and ARSD 20:10:13:44, conflating the two tests in the rule, then the 2015 data must be included. Indeed, the Commission included the Wyodak O&M expenses that were also first offered in Thurber's rebuttal testimony.

Although it conflates the two tests in Part A of its brief, the Commission conveniently relies on the second test alone to argue that the 2015 pension data should be excluded. *SDPUC Br.* at 20-21. Specifically, the Commission argues that the 2015 data should be excluded because it "goes beyond the 24 months" referenced in ARSD 20:10:13:44. *Id.* at 21. In other words, the Commission believes the 2015 data should be excluded because a portion of it did not become effective within 24 months of the end of the test year. This argument must fail. BHP's proposed adjustment is the normalization of pension expenses based on the most recent five year average of actual costs. All evidence in Mr. Thurber's testimony points to the fact that the 2015 pension expenses are known and measurable and have been incurred by BHP. *See Thurber Rebuttal* at 23-24, BHII App. A-389-390 ("actual total company 2015 pension expense *is* $2,056,581" and "the 2015 expenses *was* approximately 111% greater than the 2014 expense"). BHP presented

no evidence that these costs have not been incurred—*i.e.*, that they have not "become effective" within the meaning of ARSD 20:10:13:44.

**3. BHP's argument regarding ARSD 20:10:13:44 as applied to pension expense is "nonsensical."**

BHP asserts that BHII's argument regarding ARSD 20:10:13:44 and its application to pension expense is "nonsensical." *BHP Br.* at 24. BHP goes onto state that the utility, and only the utility, is in control of if and when adjustments are proposed to the test period. *Id.* This interpretation is directly contrary to the position advanced Appellees. *See, e.g. SDPUC Br.* at 32 ("the intent of SDCL 49-34A-19 is to *permit the consideration of cost of service evidence* that becomes known and measurable during thee twenty-four month period following the end of the test year"). BHP presented evidence that 2015 data was known and measurable during the pendency of the case. Under the Commission's own order, it must be considered. To accept the interpretation of 20:10:13:44 proffered by BHP and the Commission, but reject consideration of the 2015 pension expense is beyond the pale and nonsensical.

**F. <u>Appellees' Rationale for Including Excessive Incentive Compensation is Meritless.</u>**

BHII's argument with respect the adjustment for performance plan and incentive restricted stock expenses is simply that BHP did not provide sufficient evidence to support its inclusion; hence, the Commission should have rejected it. *BHII Br.* at 27-31.

**1. BHII does not dispute BHP's need to provide incentive compensation.**

Appellees expend considerable energy countering an argument that BHII did not make. BHII does not argue that BHP cannot recover any of its incentive compensation expenses from ratepayers. Even if the Commission had removed from BHP's cost of service the $0.888 million that BHII has shown was not fully supported in the record, the company would still be permitted to recover $2.2 million. BHII App. A-431.

The question before the Court is whether BHP's $0.888 million adjustment for performance plan and incentive restricted stock expenses was "fully supported." As BHII has already shown, every adjustment to a utility's test-year cost of service must be "fully supported." ARSD 20:10:13:44. BHP witnesses Patterson and White say nothing to support the $0.888 million adjustment and Appellees' analyses of their general testimony regarding incentive compensation is irrelevant. *Contra SDPUC Br.* at 27-28, *BHP Br.* at 26-28. The only relevant evidence proffered by BHP was (1) Mr. White's dismissive statement at the evidentiary hearing and (2) Attachment 211-G, which was presented with no underlying work papers or other references to other documents. *See BHII Br.* at 27-31, *Evid. Hrg. Tr.* at 59:11-18, BHII App. A-424.[3] That evidence is not sufficient to demonstrate that the adjustment is "prudent, efficient, and economical, and . . . reasonable and necessary to provide service," under SDCL 49-34A-8.4. Appellees' citations to unrelated testimony do not change that fact.

**2. BHII's argument on incentive compensation is supported by SDCL 49-34A-8.4 and ARSD 20:10:13:44.**

BHP's argument that "BHII has offered no legal basis to challenge the inclusion of incentive compensation," *BHP Br.* at 30, is baseless. BHII clearly articulated its argument that the evidence proffered by BHP to support its performance plan and incentive restricted stock adjustments was insufficient to meet its burdens of proof under SDCL 49-34A-8.4 and -11 and ARSD 20:10:13:44. Also, and contrary to BHP's allegations, *BHP Br.* at 31, BHII presented evidence that the performance plan and incentive restricted stock expense were tied to

---

[3] This failure is especially concerning given the fact that that total incentive compensation proposed during the test year increased from 2013 actual payouts while the amount related to financial goals (*i.e.*, the amount BHP proposed to exclude from rate recovery) decreased. In other words, BHP proposed, and the Commission approved, an increase (an adjustment) in incentive compensation over the 2013 payout with absolutely no explanation.

performance. *See, e.g., BHII Post-Hrg. Br.* at 38; BHII App. A-110. For BHP to state otherwise is disingenuous.

BHP's argument that "[t]here is . . . no legal authority that the Commission cannot approve a settlement which includes some incentive compensation," *BHP Br.* at 31, is also out of place. BHII does not argue that such authority exists, nor (as stated earlier herein) does BHII argue that BHP should be denied all recovery for incentive compensation expenses. BHII argues that the additional $0.888 million approved by the Commission is fundamentally no different than the $0.666 million it rejected. *See BHII Br.* at 27-28. Without "full support," the additional $0.888 million should also have been rejected.

## III. CONCLUSION

Based on the simple, reasoned analysis set forth herein and in BHII's opening brief, the Court should reject Appellees arguments and grant the relief requested in that brief. BHII renews its request for oral arguments and respectfully requests that the Court fix a date and time for the making of them as soon as practicable.

Dated: October 2, 2015

Respectfully submitted,

Mark A. Moreno
MORENO, LEE & BACHAND, P.C.
206 W. Missouri Ave.
P.O. Box 1174
Pierre, SD 57501-1174
Tele: 605-224-0461
Fax: 605-224-1607
mmoreno@pirlaw.com

and

Andrew P. Moratzka
STOEL RIVES LLP
33 South Sixth Street, Suite 4200
Minneapolis, MN 55402
Tele: 612-373-8822
Fax: 612-373-8881
andrew.moratzka@stoel.com

and

Chad T. Marriott
STOEL RIVES LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Tele: 503-294-9339
Fax: 503-220-2480
chad.marriott@stoel.com

Attorneys for Appellants, Black Hills Industrial Intervenors

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of October, 2015, a true and correct copy of Appellant's Reply Brief in the above-captioned case was electronically mailed and/or electronically served, as the case may be, to the following persons:

Karen E. Cremer
S.D. Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us

Todd L. Brink
Black Hills Power, Inc.
PO Box 1400
Rapid City, SD 57709
todd.brink@blackhillscorp.com

Lee A. Magnuson
Lindquist & Vennum, LLP
101 S. Reid St. Ste. 302
Sioux Falls, SD 57103
lmagnuson@lindquist.com

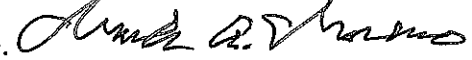
Amy Koenig
Black Hills Corporation
PO Box 1400
Rapid City, SD 57709
amy.koenig@blackhillscorp.com

Caitlin F. Collier
Collier Law Office
PO Box 435
Vermillion, SD 57069
collierlawoffice@gmail.com

The Appellant's Reply Brief was also electronically filed this date with the Hughes County Clerk of Courts, 104 East Capitol Avenue, Pierre, South Dakota 57501.

Dated this 2nd day of October, 2015.

MORENO, LEE & BACHAND, P.C.

BY: 

MARK A. MORENO
P.O. Box 1174
Pierre, SD 57501-1174
(605) 224-0461
mmoreno@pirlaw.com
Attorneys for Appellants/Black Hills Industrial Intervenors

and

STOEL RIVES LLP

Andrew P. Moratzka
33 South Sixth Street, Suite 4200
Minneapolis, MN 55402
Tele: (612) 373-8822
Fax: (612) 373-8881
andrew.moratzka@stoel.com

Chad T. Marriott
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Tele: (503) 294-9339
Fax: (503) 294-2480
chad.marriott@stoel.com

Attorneys for Appellants/Black Hills Industrial Intervenors

# IV. APPENDIX

**TABLE OF CONTENTS** **Page**



79909818.8 0064944-00002