

May 11, 2015

**VIA E-FILING**

Ms. Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 E. Capitol Avenue  
Pierre, SD 57501

**Re: In the Matter of the Application of Black Hills Power, Inc. for Authority to  
Increase its Electric Rates  
Docket No. EL 14-026**

Dear Ms. Van Gerpen:

Enclosed for filing in the above mentioned docket is Black Hills Industrial Intervenors' Amended Petition for Rehearing and Reconsideration.

Very truly yours,

Stoel Rives LLP

*/s/ Andrew P. Moratzka*

Andrew P. Moratzka

APM:kap  
Attachments

cc: Service List via email only

**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

Docket No. EL14-026

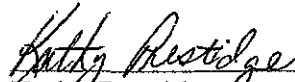
**AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA    )  
                                  ) ss.  
COUNTY OF HENNEPIN    )


I, Kathy Prestidge, hereby certify that I have this day served a true and correct copy of the following documents to all persons at the addresses indicated below or on the attached list by electronic filing, electronic mail, courier, interoffice mail or by depositing the same in an envelope with postage paid in the United States Mail at Minneapolis, Minnesota.

**BLACK HILLS INDUSTRIAL INTERVENORS' AMENDED PETITION  
FOR REHEARING AND RECONSIDERATION**

Further Your Affiant Sayeth Not.

  
Kathy Prestidge

Subscribed and sworn to before me  
this 11th day of May, 2015.

  
Notary Public



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

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In the Matter of the Application  
of Black Hills Power, Inc. for  
Authority to Increase its Electric  
Rates

Docket No. EL14-026

**BLACK HILLS INDUSTRIAL  
INTERVENORS' AMENDED  
PETITION FOR REHEARING AND  
RECONSIDERATION**

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**I. INTRODUCTION**

The Black Hills Industrial Intervenors ("BHII"),<sup>1</sup> by and through counsel, and pursuant to South Dakota Administrative Rules ("ARSD") § 20:10:01:30.01, hereby submit this Amended Petition for Rehearing and Reconsideration ("Amended Petition") of the decision of the South Dakota Public Utility Commission ("Commission") granting the Joint Motion for Approval of Amended Settlement Stipulation filed by Black Hills Power, Inc. ("BHP") and Commission Staff ("Commission Staff" or "Staff") on February 23, 2015 ("Amended Motion") and approving the terms and conditions set forth in the Amended Settlement Stipulation filed by BHP and Staff on February 10, 2015, and served on BHII on February 11, 2015 ("Amended Settlement"), which decision was voted on and approved by the Commission at the Commission's public meeting on March 2, 2015 and supported by the Final Decision and Order; Notice of Entry issued by the Commission on April 17, 2015 ("Final Decision"). ARSD 20:10:01:30.01 provides that any party to a proceeding may file a written petition for rehearing or reconsideration with the

<sup>1</sup> GCC Dacotah Inc., Pete Lien & Sons, Inc., Rushmore Forest Products, Inc., Spearfish Forest Products, Inc., Rapid City Regional Hospital, Inc., and Wharf Resources (U.S.A.), Inc.

Commission “within 30 days from the issuance of the [C]ommission decision or order.” On April 1, 2015, thirty days after the Commission’s public meeting on March 2, 2015 and prior to the Commission’s issuance of the Final Decision, BHII filed a Petition for Rehearing and Reconsideration (“Original Petition”) in this docket out of an abundance of caution, and on a protective basis, to ensure that BHII met the timeliness requirements of ARSD 20:10:01:30.01. In addition, BHII reserved the right to supplement or amend the Original Petition to clarify and provide additional specificity with respect to the requests set forth therein and based on the contents of the Commission’s Final Decision. BHII now submits this Amended Petition in response to the Final Decision.

## II. PROCEDURAL BACKGROUND

The following timeline and statement of events is relevant to the requests set forth herein:

- (1) On March 31, 2014, BHP filed an application for authority to increase electric rates (“Application”) with the Commission.
- (2) Between late October and early December 2014, BHII participated in settlement discussions with BHP, Commission Staff, and Dakota Rural Action (“DRA”).
- (3) On December 9, 2014, BHP and Commission Staff submitted a Joint Motion for Approval of Settlement Stipulation (“Initial Motion”) and corresponding Settlement Stipulation (“Initial Settlement”).
- (4) On December 30, 2014, BHII filed direct written testimony and on January 27-28, 2015, BHII provided live testimony at the Commission’s hearing, in each case opposing the Application and the Initial Settlement.
- (5) On February 10, 2015, two weeks after the hearing, Commission Staff and BHP submitted the Amended Settlement.

- (6) On February 23, 2015, Commission Staff and BHP submitted the Amended Motion.
- (7) At the Commission's public meeting on March 2, 2015, the Commission issued its decision granting the Amended Motion and approving the terms and conditions of the Amended Settlement, and counsel for BHII objected to the decision on the basis that the Amended Settlement was not properly before the Commission for decision.
- (8) On March 30, 2015, BHII's counsel talked to counsel for Commission Staff and confirmed that the Final Decision was forthcoming.
- (9) On March 30 and 31, 2015, BHII's counsel talked to counsel for Commission Staff and counsel for BHP about the timeframe for issuance of the Final Decision and the due date for any petition for rehearing or reconsideration. Although counsel for Commission Staff agreed that any petition for rehearing or reconsideration would be due 30 days after the date the Final Decision was issued, counsel for BHP would not so stipulate.
- (10) On April 1, 2015, BHII filed the Original Petition.
- (11) Simultaneously, on April 17, 2015, BHP filed its Answer to BHII's Original Petition and the Commission issued the Final Decision. In the Final Decision, the Commission noted that "[p]ursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days after the date of issuance of this Final Decision and Order; Notice of Entry."



- (12) On April 23, 2015, in response to a request from counsel to the Commission, BHII filed a proposed schedule for party filings and Commission consideration of the Original Petition, as supplemented and amended by this Amended Petition. All parties agreed with BHII's proposed schedule.
- (13) On April 30, 2015, the Commission issued a Procedural Order on Petition for Reconsideration, setting forth a filing schedule whereby BHII would submit this Amended Petition no later than May 11, 2015. BHII's Amended Petition is therefore timely.

### **III. PETITION FOR REHEARING OR RECONSIDERATION**

BHII submits this Amended Petition to supplement and amend the Original Petition. The Amended Petition is intended to amend and restate the Original Petition in its entirety based on the transcript from the Commission's March 2, 2015 public meeting and the Final Decision. BHII respectfully requests that the Commission grant rehearing or reconsideration of the erroneous Findings of Fact and Conclusions of Law in the Final Decision enumerated below based upon the grounds for error set forth herein.

**A. The Commission erred in finding that the Amended Settlement was "an agreed resolution of the case."**

As an initial matter, BHII points out that the Commission's Finding of Fact 59 mischaracterizes the nature of the Amended Settlement. Contrary to the Commission's finding that the Amended Settlement was "an agreed resolution of the case," the Amended Settlement is merely an agreement between two of the four parties to this docket to resolve the differences between them. The Amended Settlement was not subscribed by BHII or DRA. While BHII

agrees that the Amended Settlement “involves trade-offs between the parties to it,” the Amended Settlement does not include any trade-offs, agreements or concessions involving BHII or DRA.

BHII is also disappointed in the Commission’s characterization of BHII’s arguments in Finding of Fact 59 as “petty criticisms.” Failure to comply with the law is not a petty criticism. The “minute details” that BHII focuses on - including Commission Staff’s fundamental misinterpretation of ARSD 20:10:13:44 - impact all ratepayers (not just BHII) and would materially reduce BHP’s revenue requirement. The Commission is required by State law and the Commission’s own rules to review such details because they matter in making an accurate calculation of BHP’s actual revenue requirement - an issue squarely within the Commission’s jurisdiction to review and analyze. The Commission erred in ignoring State law and concluding that the Amended Settlement “is more appropriately judged on the basis of its overall resolution of the case,” because such an approach elevates the Commission’s interest in expediency above the requirements of South Dakota law.

**B. The Commission violated South Dakota Codified Laws (“SDCL”) § 15-6-6 and the principles of equity and due process by approving the Amended Settlement over BHII’s timeliness objection at the Commission’s public meeting on March 2, 2015.**

As a matter of law, the Commission was not authorized to approve the Amended Settlement at the March 2, 2015, public meeting because notice of the Amended Motion was not served in accordance with SDCL 15-6-6(d). BHII objected to the timeliness of the Amended Motion at the March 2, 2015, public meeting when it became clear that the Commission would violate the statute. BHP and Commission Staff submitted the Amended Settlement on February 10, 2015 (two weeks after the Commission’s evidentiary hearing in this docket), but did not submit their Amended Motion until February 23, 2015. BHII therefore petitions for rehearing on two grounds. First, the Commission’s approval of the Amended Settlement in the first ordering

paragraph of the Final Decision, which Amended Settlement was submitted to the parties after the evidentiary hearing, violates the principles of equity and due process. Second, and more fundamentally, the Commission's approval of the Amended Settlement, over BHII's timeliness objection, contravened SDCL 15-6-6(d). BHII therefore disputes the following Conclusions of Law:

11. BHII disputes that the Commission's excuse for failing to comply with State law is sufficient to warrant dismissal of BHII's objection. The Amended Settlement was approved as a "whole package" that BHP and Staff had separate justifications to support and neither BHII nor DRA had any input in developing. Moreover, the Amended Settlement was substantively different than the Initial Settlement, which was the only agreement before the Commission for decision and before the parties for analysis at the time of the evidentiary hearing. The Amended Settlement appears to be an attempt by BHP and Staff to paint over a mistake all parties acknowledged by proposing an eleventh-hour adjustment to BHP's cost of service after the evidentiary hearing and saying, for good measure, that there should be no impact on ratepayers. This sleight-of-hand is a violation of the principles of equity and due process in rate case proceedings that should not be tolerated by the Commission.

**C. BHP failed to meet its burden of proof under SDCL 49-34A-8.4 because, as the Commission acknowledges, BHP did not submit a cost of service analysis in connection with the Amended Settlement.**

Because BHP failed to submit a cost of service in connection with the Amended Settlement, the Commission erred in finding that the cost of service analysis included with the Amended Settlement (1) would recover no more than BHP's current revenue requirements and

(2) is supported by substantial evidence. BHII therefore disputes the following Conclusions of Law which are presented by the Commission as Findings of Fact:

61. BHII disputes that “the rates, terms and conditions in the Amended Stipulation demonstrate a thorough, penetrating, and credible analysis by Staff and its expert witnesses of the data and assumptions underlying the Application and the Amended Settlement Stipulation; balance fairly the interests of BHP and its customers; recover no more than BHP’s current revenue requirements, including a reasonable return to its stockholders commensurate with its cost of equity capital; are supported by substantial evidence; and meet the just and reasonable standard set forth in SDCL 49-34A-6, as more specifically delineated in SDCL 49-34A-8, the unreasonable preference or advantage and unreasonable prejudice or disadvantage prohibitory standards of SDCL 49-34A-3, the fair and reasonable return standard of SDCL 49-34A-8, and are prudent, efficient, and economical and are reasonable and necessary to provide service to the public utility’s customers as provided in SDCL 49-34A-8.4.”

Under SDCL 49-34A-6, every rate a utility demands or receives must be just and reasonable. The fact that rates (i.e., the charges on customers’ bills) must be just and reasonable implies that there is a range of rates that could be applied to a specific customer. However, under SDCL 49-34A-19, specific items govern the determination of a utility’s revenue requirement (i.e., the total amount of revenue that the utility has the opportunity to earn); and the calculation of the revenue requirement is based on a formula. Specifically, “[i]n determining the revenue requirement the [C]ommission shall consider revenue, expenses, cost of capital, and any other factors or evidence material and relevant thereto.” SDCL 49-34A-19. Put in the form of an equation:

$$\text{Revenue Requirement} = \text{Expenses} + (\text{Cost of Capital})(\text{Original Rate Base} - \text{Depreciation})$$

While the Commission may have discretion under South Dakota law to determine whether the rates proposed by BHP and Staff in the Amended Settlement are just and reasonable, the Commission does not have the same degree of latitude when determining whether the revenue requirement included in the Amended Settlement is just and reasonable. Rate cases are adjudicative proceedings, not quasi-legislative or rulemaking proceedings, where the result does not have immediate and particular effects on ratepayers. As such, the Commission is obligated to follow the long-standing revenue requirement formula for calculating BHP's revenue requirement.

Under SDCL 49-34A-8.4, BHP (not Staff) bears the burden of establishing that its cost of service (*i.e.*, each element of the variables in the above referenced equation) is "prudent, efficient, and economical and . . . reasonable and necessary to provide service." In other words, the utility bears the following two-part burden: (1) the underlying costs must be supported by evidence in the record and (2) such costs are reasonable and necessary in rendering service. In this case, the Commission was not afforded the opportunity to assess BHP's compliance with the first part of that burden because, as the Commission acknowledged in Finding of Fact 60, Staff never saw BHP's analysis of the cost of service included in the Amended Settlement. The Commission declared that "[t]here were a number of issues which the Staff and the company disagreed on. The Staff's resolution of those issues is stated in the staff Memorandum, but BHP had its own basis for settling certain issues which were either advantageous or adverse to the company. Staff does not see the company's analysis of that." Importantly, not only did Staff not get the opportunity to review BHP's cost of service analysis as it related to the Amended Settlement, neither did BHII, DRA, or any of BHP's other customers. Because the Commission

did not review a cost of service analysis prepared by BHP in connection with the Amended Settlement, the Commission's conclusions in Finding of Fact 61 are erroneous.

**D. BHP failed to meet its burden of proof under SDCL 49-34A-8.4 because BHP did not provide sufficient support for its adjustments to test-year book costs.**

Because BHP failed to provide sufficient support for adjustments to test-year book costs, the Commission erred in finding that the cost of service included with the Amended Settlement would recover no more than BHP's current revenue requirements. BHII therefore disputes the following Findings of Fact:

12. BHII disputes that "Staff and BHP reached a comprehensive agreement on BHP's overall revenue deficiency." While Staff and BHP settled on a number, the Amended Settlement is not a "comprehensive agreement" because Staff and BHP both admit that they came to the number using different calculation methods. *See* Findings of Fact 60. Ratepayers have no idea how BHP will spend its money.

Furthermore, BHII disputes the following Conclusions of Law which, unless otherwise specified, are presented by the Commission as Findings of Fact:

27. BHII disputes that "substantial and sufficient evidence was produced, introduced, and received in evidence in this proceeding to demonstrate that the rates agreed to in the Amended Settlement Agreement are just and reasonable and will adequately meet BHP's need for revenues sufficient to enable it to meet its current cost of furnishing adequate, efficient, economical, and reasonable service." In its Post-Hearing Brief, BHII brought to

the forefront the troubling lack of evidence to support the cost of service in either the Application or the Amended Settlement. Specifically, BHII noted the evidence that was lacking to support the inclusion of FutureTrack workforce costs, employee additions, performance plan and incentive restricted stock expenses, pension expenses, affiliate allocations, and steam and other production plant net salvage. *See, e.g.*, BHII Post-Hearing Brief at 31, 32, 38-39, 40, 44-46, 47-48.

Finding of Fact 40; Conclusion of Law 12. BHII disputes that “the incentive compensation plan included in the Amended Stipulation does not render the Amended Stipulation unjust and unreasonable.” Inclusion of the \$0.149 million in performance plan expenses and the \$0.739 million in incentive restricted stock expense makes the overall cost of service included in the Amended Settlement unjust and unreasonable. The sum-total of BHP’s evidence in support of incentive compensation is the table attached to BHII Exhibit 6, labeled 211-G, which was presented with no underlying work papers or references to other documents. Although, as Conclusion of Law 12 states, there is no statute or rule prohibiting inclusion of certain aspects of incentive compensation in a utility’s revenue requirement, the burden of proof remains on BHP to both establish an appropriate value for incentive compensation and demonstrate it is a reasonable and necessary cost to incur in providing service. The opinion of a BHP executive coupled with a table that is unsupported by *any* analysis is not sufficient evidence to support a legal conclusion that the adjustment is just and reasonable. While Commissioner Fiegen’s questioning at the Commission’s March 2, 2015 public meeting suggests that including the additional \$0.888 million is warranted because Staff witness Peterson had

“information that we weren’t all privy to,” Transcript at 9:9-14, BHII notes that all parties were privy to BHP’s complete performance plan. *See* BHII Exhibit 7. Only two logical conclusions can be drawn from this circumstance. Either (1) all parties, including the Commission, had the information upon which Staff made its recommendation (which BHII asserts is inadequate) or (2) Staff actually did have evidence that is not included in the record and the Commission and other parties have not reviewed - which cannot provide a basis for the Commission’s conclusion. Therefore, while BHII agrees with the Commission’s statement in Conclusion of Law 12 that “[t]he Commission’s decision whether to allow incentive compensation and, if so, subject to what limitations are judgment calls concerning what meets the just and reasonable standard,” the Commission’s discretion remains subject to BHP meeting its burden of proof under SDCL 49-34A-8.4, which it has not done.

**E. BHP failed to meet its burdens of proof under SDCL 49-34A-8.4 or 49-34A-11 because the Company failed to include expected changes in revenue in any of its proposed adjustments to test-year book costs.**

Because BHP failed to include expected changes in revenue in any of its proposed adjustments, the Commission erred in failing to reject BHP’s cost of service analysis under ARSD 20:10:13:44. When a utility takes advantage of the mechanism for proposing adjustments to book costs, ARSD 20:10:13:44 requires the utility to include any expected changes in revenue that would occur during the time the cost adjustment would be in effect. In other words, any time a utility wants to lift the hood of the 12-month historic test year to adjust costs, it must also adjust revenues. BHII therefore disputes the following Conclusions of Law which are presented by the Commission as Findings of Fact:



30. BHII disputes that “Staff and the Commission have previously interpreted [ARSD 20:10:13:44] to mean that for any post-test year change in expense or investment that has an incremental revenue component (i.e., expenses or investments made to increase sales and/or to serve new customers), a corresponding revenue adjustment must also be recognized.” BHII also disputes that “the Amended Settlement Stipulation is consistent with prior Commission policy in this regard and with the governing administrative rule.” BHII is unaware of any order issued by the Commission, and none of the Commission, Staff, or BHP has cited such an order, where the Commission was asked to interpret ARSD 20:10:13:44 and subsequently adopted the interpretation that Staff has proffered in this docket. The Commission has cited no legal precedent that disputes BHII’s reasoned analysis of the plain language of the rule.

31. BHII agrees with the Commission’s statement that “the only logical conclusion [that can be reached regarding the requirement in ARSD 20:10:13:44 that a utility must include expected changes in revenue in any adjustment to test-year book costs] is that the revenue effect of specific post-test year changes has to be acknowledged or recognized in an adjustment before the adjustment itself can be reflected in the revenue requirement.” However, BHII disputes the Commission’s interpretation of ARSD 20:10:13:44, set forth in Conclusion of Law 9., which the Commission relies on in adopting Staff’s position that “if ARSD 20:10:13:44 intended that all revenues, not just those associated with plant additions, are intended or are supposed to be recognized within the 24-month post-test year period, the rule would require a forecast test year.” The Commission wrongly concluded that adjustments to test-year book costs may be accepted if they become

known and measurable after a utility submits its application. By doing so, the Commission is allowing changes to the historical test year on a rolling basis. BHII agrees with the “logical conclusion” set forth in this paragraph because it is true so long as a utility is not permitted to include adjustments that were not known and measurable at the time the utility filed its application. If, as here, the Commission allows adjustments for costs that were not known and measurable at the time BHP filed the Application and have not yet been incurred (e.g., LIDAR costs discussed on pp. 48-50 of BHII’s Post-Hearing Brief), but fails to require BHP to include adjustments to revenues for the same period, the Commission erred in finding that BHP’s cost of service and proposed rates are just and reasonable.

43. BHII disputes that “Mr. Kollen’s recommended adjustment [to pension expenses] is internally inconsistent with BHII’s position regarding post-test year adjustments in that BHII’s witness did not include a revenue adjustment to correspond to its proposed expense adjustment.” BHII does not bear the burden of showing revenues that correspond with proposed cost adjustments. State law clearly places that burden on BHP.

**F. The Commission also violated ARSD 20:10:13:44 by failing to reject adjustments to the cost of service submitted by BHP in the Application that were not known with reasonable certainty and measurable with reasonable accuracy at the time BHP submitted the Application.**

As a threshold matter, the Commission is required to analyze the completeness and accuracy of a utility’s filed cost of service in accordance with ARSD 20:10:13:44. The Commission can only find that a utility has met its burden of proof under SDCL 49-34A-8.4 if the utility’s cost of service satisfies the provisions of ARSD 20:10:13:44. In the Commission’s

public meeting on March 2, 2015, Chairman Nelson asked what in ARSD 20:10:13:44 requires the Commission “to analyze the completeness and accuracy of a utility’s filed cost of service pursuant to ARSD 20:10:13:44”? The language of the rule is clear: “**[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 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.” The phrase “[N]o adjustments shall be permitted unless . . .” obligates the Commission to evaluate each and every adjustment to the cost of service filed by the utility in the utility’s application and reject any that do not meet the criteria set out in the rule.<sup>2</sup> No other body has jurisdiction to evaluate adjustments to utilities’ revenue requirements and failure to analyze each is an abdication of one of the Commission’s core responsibilities in rate cases. To the extent the Commission believes it evaluated and approved each adjustment submitted since BHP filed the Application (including the adjustment to update production O&M costs at the Wyodak power plant included in the Amended Settlement discussed in Findings of Fact 15 and 17), the Commission erroneously interpreted the plain meaning of ARSD 20:10:13:44. Insofar as the Commission did not evaluate and approve each adjustment, the Commission violated the rule.

Furthermore, and as explained in detail in BHII’s Post-Hearing Brief, ARSD 20:10:13:44 does not permit a utility to propose adjustments to its filed cost of service that were not known and measurable at the time the utility filed its application. In other words, a utility cannot adjust

<sup>2</sup> As counsel for BHII commented during the March 2 hearing “if the Commission is not required to analyze that Cost of Service Analysis, then the rhetorical return question could be why would [the utility] have filed it.”

a cost that appears in its filed cost of service unless the utility can demonstrate that the adjustment was known with reasonable certainty and measurable with reasonable accuracy at the time the utility filed its application. Additionally, ARSD 20:10:13:44 does not allow a utility to continually add costs to its overall cost of service that were not known with reasonable certainty and measurable with reasonable accuracy at the time the utility filed its application. Stated differently, a utility cannot use the mechanism for proposing adjustments to retroactively add any new costs to its filed cost of service unless the utility can demonstrate that the new cost was known and measurable at the time the utility filed its application. BHII therefore disputes the following Findings of Fact:

11. For the reasons noted above, BHII disputes that Staff “adjusted the September 30, 2013, test year results for appropriate post-test year changes.”

15. BHII disputes the inference that because an expense, which was neither known nor measurable at the time of the rate case filing, becomes known and measurable during the rate case proceeding, that expense is allowable and can be considered in the utility’s revenue requirement calculation.

Furthermore, BHII also disputes the following Conclusions of Law which, unless otherwise specified, are presented by the Commission as Findings of Fact.

19. BHII disputes that “the agreements, adjustments, and rates proposed in the Amended Stipulation . . . are just and reasonable.”

Findings of Fact 23, 32; Conclusion of Law 2. BHII disputes that ARSD 20:10:13:44 sets forth a “twenty-four month cost of service adjustment period” (Finding of Fact 32 similarly states that “the appropriate test year adjustment period is 24 months” and Conclusion of Law 2 likewise refers to “the twenty four month cost of service adjustment period set forth in ARSD 20:10:13:44.”). The twenty-four month period described in ARSD 20:10:13:44 is not a period during which cost adjustments can be made. Rather, it is the twenty-four month period in which adjustments that were known and measurable at the time the utility filed its application must “become effective.” If the adjustments are not known and measurable at the time the utility filed its application and do not become effective within 24 months after filing, then the Commission must reject them. Conclusion of Law 9 underscores the fundamental misunderstanding of this concept. There, the Commission concludes that SDCL 49-34A-19 permits it to consider any adjustment that becomes known and measurable within 24 months of the date of the application. Taken to its logical conclusion, this would mean that the Commission could consider adjustments that become known and measurable in December 2015, after the date of the Commission’s order in this case, which would be entirely outside the bounds of reason. Alternatively, if the Commission’s reading of SDCL 49-34A-19 implies that adjustments are permissible up until the date of the Commission’s order, then the 24-month time-frame is meaningless because cases are generally decided within 1 year of filing to preserve the right for a refund of interim rates. SDCL 49-34A-17. The only logical reading of SDCL 49-34A-19 and ARSD 20:10:13:44 is that (1) the adjustment must be known and measurable at the time of the filing of the rate case application and

(2) that adjustment must “become effective” within 24 months after the rate case application is filed.

23. Except in the unlikely event described in Footnote 29 to BHII’s Post-Hearing Brief, BHII disputes that ARSD 20:10:13:44 permits any adjustments to a utility’s cost of service “which become known and measurable during the pendency and processing of the case.” Unless the adjustment was known and measurable at the time the utility filed its application, ARSD 20:10:13:44 mandates that the Commission to reject it.

26. The Commission states that Staff has interpreted ARSD 20:10:13:44 and SDCL 49-34A-19 “to mean that the adjustments have to be sufficiently known and measurable at the time of its review of the hundreds of responses to discovery requests and filings in this case.” BHII disputes the alleged legal basis for the Commission’s position that “the Commission has approved numerous rate case settlements based on that standard.” In point of fact, the Commission has never been asked to interpret the meanings of ARSD 20:10:13:44 and SDCL 49-34A-19 together. The fact that the Commission has approved settlements that incorporate Staff’s newly-articulated position does not provide any legal support for the errant underlying analysis that the Commission is adopting. *See* BHII Post-Hearing Brief at 5-6.

27. BHII disputes that “the adjustments in the Amended Settlement Stipulation are within the allowable adjustment periods set forth in SDCL 49-34A-19 and ARSD 20:10:13:44” based on the analysis set forth above and in BHII’s Post-Hearing Brief.

33. BHII disputes that “BHII’s objection [to allowing recovery for Future Track hirings because they were not known and measurable at the time the Application was filed] is not warranted.” BHII reiterates its objection to the Commission’s interpretation of ARSD 20:10:13:44. The adjustments for FutureTrack hiring should have been rejected by the Commission because they were not known and measurable at the time BHP filed the Application.

34. BHII disputes that “BHII’s objection [to allowing recovery for employee additions that were not known and measurable at the time the Application was filed] is not warranted.” BHII restates its objection to the Commission’s interpretation of ARSD 20:10:13:44. The adjustments for employee additions that were not known and measurable at the time BHP filed the Application should have been rejected by the Commission.

43. BHII disputes that “the facts and circumstances surrounding the pension expense make it appropriate to apply normalization treatment.” For the Commission to approve normalization treatment without simultaneously ordering BHP to defer the difference between the pension expense reflected in its rates and the actual pension expense this year (in order to share the savings with its customers) creates a windfall for BHP that is unjust and unreasonable on its face. The idea that BHP’s customers should receive the benefit of low 2014 pension expenses when they shouldered the burden of high pension expenses in previous years is not “particularly egregious.” On the other hand, to deny

ratepayers such a benefit would be. Finally, for the Commission to paint over the \$0.286 million error in the Original Settlement by including Wyodak O&M expenses allocated from Black Hills Utility Holdings (“BHUH”) that were not known and measurable until after the Original Settlement was filed while, at the same time, ignoring BHP’s known and measurable 2015 pension expenses in the normalization calculation is arbitrary and capricious.

47, 49. While BHII agrees that “the Settlement Stipulation reflects known costs experienced by BHP [from its affiliates],” BHII disputes that those costs were incurred “well within the twenty-four month post-test year period provided for in ARSD 20:10:13:44,” and are “just and reasonable for inclusion in BHP’s revenue requirement.” As mentioned above in connection with Findings of Fact 23 and 32, the twenty-four month period is not a period during which cost adjustments can be made. Instead, it is the twenty-four month period in which adjustments that were known and measurable at the time the utility filed its application must become effective. The Initial Settlement and the Amended Settlement include increases to both the BHUH and Black Hills Service Company affiliate allocation amounts included in the Application. (With respect to BHSC, the Company did not propose any allocation in the Allocation and it provided no evidence that the amount was known and measurable at the time the Application was filed.) These increases, including the Wyodak O&M expenses allocated from BHUH that were added to the Amended Settlement, were not known and measurable at the time BHP filed its Application and should be excluded from the cost of service. Beyond this, the Initial Settlement included an error in the BHUH allocation that artificially increased



· BHP's revenue requirement by \$0.286 million - an error that was acknowledged by both BHP and Staff. That error should have been fixed and the revenue requirement included in the Initial Settlement reduced accordingly. Because the Wyodak O&M expenses allocated from BHUH were not known and measurable at the time BHP filed the Application, the Commission's failure to reduce BHP's revenue requirement by \$0.286 million is clearly erroneous and constitutes an arbitrary and capricious decision that harms ratepayers.

53. BHII notes that the Commission did not address BHII's request to exclude LIDAR costs completely from BHP's cost of service. BHII makes that request again here, observing that the LIDAR costs included in the Amended Settlement were not known and measurable at the time BHP filed the Application and the Commission should therefore reject the adjustment to include LIDAR costs in BHP's cost of service.

**G. The Commission erred in concluding that the matching principle of ratemaking is satisfied if a utility does not show expected changes in revenue for the same period implicated by a cost adjustment so long as the cost adjustment itself does not have a revenue component.**

A fundamental tenet underlying BHII's interpretation of ARSD 20:10:13:44 is that the Commission and ratepayers will only be able to avoid a mismatch of expenses and revenues if BHP is required to include expected changes in revenue each time it submits a proposed adjustment to costs. While the 12-month historical test year presents an accurate picture of expenses and revenues for that period, any change to one side of the ledger (e.g., expenses) would pervert the other side of the ledger (e.g., revenues) unless corresponding changes to the latter were made. If, as the Commission concludes in Conclusion of Law 10, BHP is allowed to

adjust costs using post-test year data without making corresponding changes to revenue, then the information regarding the 12-month historical test period in the Application becomes skewed. The Commission's conclusion promotes a gross inequity between BHP and ratepayers where BHP is permitted to cherry-pick adjustments to its filed cost of service, as it has done, based on whether each cost has an incremental revenue requirement. This inequity causes ratepayers to be stuck with the revenues set forth in the 12-month historical test year, while BHP is free to run up the bill on costs. BHII therefore disputes Conclusion of Law 10.

#### **IV. CONCLUSION**

Based upon the grounds for error set forth herein, BHII respectfully requests that the Commission grant rehearing or reconsideration of the erroneous Findings of Fact and Conclusions of Law in the Final Decision referred to and discussed.

Dated: May 11, 2015

Respectfully submitted,

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**Date:** Monday, May 11, 2015 2:33:03 PM  
**Attachments:** Service Letter, Affidavit and Service List re Docket No. 14-026.pdf  
BHII - Amended Petition.pdf

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The South Dakota PUC has received your filing on **5/11/15**. There are two attachments. These attachments **do not contain confidential information** and has 27 total pages.

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Comments: For Filing - Service Letter, Affidavit of Service, Service List and Amended Petition for Rehearing and Reconsideration on behalf of Black Hills Industrial Intervenors