IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27751

IN THE MATTER OF THE APPLICATION OF BLACK HILLS POWER, INC. FOR AUTHORITY TO INCREASE ITS ELECTRIC RATES

PRELIMINARY STATEMENT

Throughout this brief, Appellant 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., are referred to collectively as "BHII." Appellant's brief is cited as "BHII Br __." The Appellee, the South Dakota Public Utilities Commission, is referred to as the "Commission." The Appellee, Black Hills Power, Inc., is referred to as "BHP." Citations to the Administrative Record are denoted "AR __." The Commission's Final Decision is referred to as "Final Decision," Findings of Fact are denoted "FOF" and Conclusions of Law are denoted "COL." Materials included in the Appendix are denoted as "App ____." The Circuit Court's Order and Memorandum Decision is designated as "Order."

JURISDICTIONAL STATEMENT

The Commission accepts BHII's jurisdictional statement.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the Commission correctly interpreted its ratemaking statutes and rules when approving post-test year cost adjustments that are known with reasonable certainty and measurable with reasonable accuracy.

The Circuit Court affirmed the Commission's interpretation and held in the affirmative.

SDCL 49-34A-8

SDCL 49-34A-8.4

SDCL 49-34A-19

ARSD 20:10:13:44

Application of NorthWestern Public Service Co., 297 N.W.2d 462 (SD 1980)

Farmland Ins. Companies of Des Moines, Iowa v. Heitmann, 498 N.W.2d 620 (S.D. 1993)

In re Otter Tail Power Co. ex rel. Big Stone II, 2008 SD 5, 744 N.W.2d 594

Krsnak v. SDDENR, 2012 SD 89, 824 N.W.2d 429

II. Whether the Commission erred in approving normalization of the five-year average pension cost.

The Circuit Court affirmed the Commission and found that the normalization of the five-year average pension expense was not clear error.

SDCL 49-34A-8

SDCL 49-34A-11

SDCL 49-34A-19

ARSD 20:10:13:44

Behrens v. Wedmore, 2005 S.D. 79, ¶55, 698 N.W.2d 555

In re Otter Tail Power Co. ex rel. Big Stone II, 2008 SD 5, 744 N.W.2d 594

NorthWestern Public Service v. Cities of Chamberlain, etc., 265 N.W.2d 867 (SD 1978)

Tucek v. Department of Social Services, 2007 SD 106, 700 N.W.2d 867

III. Whether the Commission erred when it determined final electric rates that included an incentive compensation expense in the utility's cost of service.

The Circuit Court affirmed the Commission and found that the inclusion of an incentive compensation expense in BHP's cost of service was not clear error.

SDCL 49-34A-6

SDCL 49-34A-8

SDCL 49-34A-8.4

SDCL 49-34A-11

Behrens v. Wedmore, 2005 S.D. 79, ¶55, 698 N.W.2d 555

In re Otter Tail Power Co. ex rel. Big Stone II, 2008 SD 5, 744 N.W.2d 594

Irvine v. City of Sioux Falls, 2006 SD 20, 711 N.W.2d 607

STATEMENT OF THE CASE AND FACTS

On March 31, 2014, BHP filed an Application for Authority to Increase Electric Rates (Application) and supporting exhibits requesting approval to increase rates for electric service by approximately $14.6 million annually or approximately 9.27% based on BHP's test year ending September 30, 2013. App. 114. The Commission granted intervention to BHII and Dakota Rural Action, Inc. (DRA) on June 26, 2014. App. 114.

Following settlement discussion with all parties, on December 9, 2014, BHP and Commission Staff (Staff) filed a Joint Motion for Approval of Settlement Stipulation, Settlement Stipulation, and Exhibits (Original Stipulation). App. 115. BHII and DRA were not signatories to the Original Stipulation. App. 115. Pursuant to the Hearing Notice, a hearing was held on January 27-28, 2015. To be determined was whether the Commission should approve the Original Stipulation and, if not, to determine what rates, terms, and conditions should be approved as just and reasonable.

At the close of the hearing, the Commission took the matter under advisement. Following further settlement discussions between Staff and BHP, (BHII and DRA did not participate as they were not signatories to the Original Stipulation), on February 10, 2015,

BHP and Staff filed an Amended Settlement Stipulation (Amended Stipulation) and Staff filed its memorandum supporting the Amended Stipulation. App. 69-81. The Amended Stipulation reflected two changes to the factual bases supporting the agreed upon revenue requirement due to new information contained in pre-filed testimony that was filed after the Original Stipulation was filed. The Amended Stipulation did not change the overall revenue requirement agreed to in the Original Stipulation. App. 119. On March 2, 2015, the Commission voted unanimously to grant the Joint Motion for Approval of Amended Settlement Stipulation between BHP and Staff and approve the terms and conditions stipulated therein as the decision of the Commission on the rate increase requested by BHP with an effective date of April 1, 2015. On April 17, 2015, the Commission issued its Final Decision[1]. App. 114. On May 29, 2015, the Commission denied BHII's Amended Petition for Rehearing and Reconsideration. AR 7796-7815. BHII filed a Notice of Appeal with the Sixth Circuit Court on June 26, 2015. Dakota Rural Action did not file a notice of appeal. On January 8, 2016, the Honorable Mark W. Barnett, Circuit Court Judge, entered a Memorandum Decision and Order affirming the Commission's Final Decision to approve the Amended Settlement Stipulation. App. 135-157.

ARGUMENTS

ISSUE I

A. Overview of Regulatory Theory

As part of its regulatory obligations under SDCL Ch. 49-34A, the Commission is tasked with the responsibility of regulating the rates for the six investor-owned public

[1] In FOF 23, the phrases "application is filed" and "filing of the application" following the phrase "twenty-four month period after the" should be replaced with "last month of the test period."

utility companies that provide electric service to specific geographic areas in South Dakota. The rates paid by ratepayers must be just and reasonable for the service rendered.[2]

The Commission's statutory mandate for setting utility rates that are just and reasonable is more specifically delineated in SDCL 49-34A-8:

> The commission, in the exercise of its power under this chapter to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, economical, and reasonable service and to the need of the public utility for revenues sufficient to enable it to meet its total current cost of furnishing such service, including taxes and interest, and including adequate provision for depreciation of its utility property used and necessary in rendering service to the public, and to earn a fair and reasonable return upon the value of its property.

The process of setting rates begins when the utility files an application for a rate increase. *See generally* SDCL Ch. 49-34A and ARSD Ch. 20:10:13 titled, *Public Utilities Rate Filing Rules*. This rules chapter sets forth a utility's filing obligations regarding tariffs and applications for rate increases. As required by ARSD 20:10:13:40 and 20:10:13:104, BHP filed its rate application, testimony, and exhibits.

The Commission has adopted the "cost of service" method of ratemaking as noted in *Application of Northwestern Public Service Co.*, 297 N.W.2d 462, 464 (S.D. 1980).

> The PUC has adopted the "cost of service" method of rate making. This method entails four steps as follows: (1) Properly determine company's rate base, i.e., investment devoted to public service; (2) determine a fair and reasonable rate of return; (3) multiply the base [(1) above] by the rate [(2) above]; and (4) add to

[2] SDCL 49-34A-6. Rates to be reasonable and just--Regulation by commission. Every rate made, demanded or received by any public utility shall be just and reasonable. Every unjust or unreasonable rate shall be prohibited. The Public Utilities Commission is hereby authorized, empowered and directed to regulate all rates, fees and charges for the public utility service of all public utilities, including penalty for late payments, to the end that the public shall pay only just and reasonable rates for service rendered.

company's cost of operations referred to above (including taxes and depreciation). To assist in the computation of the steps above, a historical test year is adopted. The data from this year must be adjusted as to the cost of operations and the rate base to reflect changes which will be in effect subsequent to the historical test year.
(emphasis added.)

The Commission uses a historical test year as the starting point for establishing just and reasonable rates. A historical test year is employed to establish representative levels of revenues, expenses, rate base, and capital structure for use in the rate-setting formula.[3] The historical test year is used to ensure a matching of revenue and costs; that is, the use of a historical test year is primarily for the purpose of setting rates based on the costs to be incurred when the rates come into effect. If revenues and costs are mismatched in the revenue requirement, the resulting rates will either over or under recover costs, causing rates to not be just and reasonable.

An assumption in using a historical test year is that recent costs are a fair predictor of future costs. In *NorthWestern Public Service v. Cities of Chamberlain, etc.*,

[3] SDCL 49-34A-19. Costs and revenue considered in determining rates--Acquisition cost of property as alternative--Projected income and expenses. In determining the rate base upon which the utility is to be allowed to earn a fair rate of return, the Public Utilities Commission shall use the depreciated original cost of the property. However, the commission may alternatively use the full acquisition cost of any property acquired by the utility after the property was first devoted to public use. Full acquisition cost of such property shall be used if:
(1) The utility makes application prior to acquisition;
(2) The commission holds a hearing;
(3) The commission finds that the cost of acquisition is prudently incurred; and
(4) The commission finds that the acquisition will provide benefits to the utility's customers. (cont.)

(cont.) In determining the revenue requirement the commission shall consider revenue, expenses, cost of capital and any 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.

265 N.W.2d 867, 879 (S.D. 1978), the Court stated, "The purpose of using a test year is to establish with a reasonable degree of accuracy the revenue and expenses that a utility will experience during the period when the new rates will be in effect."

The use of a historical test year for the purposes of establishing rates represents a snapshot in time that may or may not precisely reflect the rate base, revenues, and cost of service in place at the time that revised rates will take effect. Therefore, to account for this inherent imprecision, ARSD 20:10:13:44 and SDCL 49-34A-19 allows post-test year adjustments which are known with reasonable certainty and measurable with reasonable accuracy (known and measurable) at the time of filing the adjustment and that will become effective within 24 months after the last month of the test year.

In *South Dakota Public Utilities Commission v. Otter Tail*, 291 N.W.2d 291, 294 (S.D. 1980), the Court stated: "[T]he PUC need not follow any single formula in arriving at the rates fixed so long as the method used, when applied to the facts and viewed as a whole, does not produce an arbitrary result." *See also, Application of Montana-Dakota Utilities Co., Etc.*, 278 N.W.2d 189, 191 (S.D. 1979).

While ARSD 20:10:13:104 permits the filing of a forecast test year, the Commission has not used a forecast test year to determine a just and reasonable rate. App. 121. To determine just and reasonable rates, the use of a historic test year adjusted for known and measurable changes is more accurate than using a speculative future test year. *In re Minnesota Gas Co.*, 32 P.U.R.4th 1, 2, (S.D.P.U.C. 1979), 1979 WL 461903, App. 3. (finding that "a projected test year based on estimates is in total contravention of the rational and sound rate-making principle of utilizing a test year adjusted for known and measurable changes.")

The Commission's long standing interpretation and application of ARSD 20:10:13:44 allows post-test year adjustments which are known and measurable at the time of filing the adjustment and that will become effective within 24 months after the last month of the test year. Its interpretation does not violate due process. Based on the volatility of BHP's pension costs, the Commission's approval of the pension normalization adjustment was not clear error. Finally, the Commission's inclusion of incentive compensation costs was not clear error as BHP met its burden to prove that such costs were necessary and the resulting rates were just and reasonable.

B. The Standard of Review.

The standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company,* 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. "[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the 'same review of the administrative tribunal's action as did the circuit court.' " [citations omitted] "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. "A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency's decision only if it is 'clearly erroneous in light of the entire evidence in the record.'" *In Re Pooled Advocate Trust,* 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep't of Soc. Serv.,* 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, "[a]n 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." Krsnak v. S. Dakota Dep't of Env't & Natural Res.,* 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916. (emphasis added).

"A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labo*r, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or decision is inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion,* 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

C. The Commission's interpretation of ARSD 20:10:13:44 permits post-test year adjustments to establish just and reasonable rates.

The primary issue raised by BHII concerns the Commission's interpretation of ARSD 20:10:13:44. The question to be answered is this: is the Commission's interpretation of what may be presented by an applicant for a rate increase within the 24 month cost of service adjustment period set forth in ARSD 20:10:13:44, which allows post-test year adjustments to the revenue requirement when the adjustment is known with reasonable certainty and measurable with reasonable accuracy at the time the adjustment

is filed, correct? The Circuit Court affirmed the Commission's interpretation and application of ARSD 20:10:13:44.

When determining just and reasonable rates, SDCL 49-34A-8 requires the Commission to give due consideration to the need of the public utility *to meet its total current cost of furnishing service.* Utilizing updated data based upon actual costs rather than estimates allows the Commission to set rates based upon data that will most closely match the time period during which rates will take effect. The rates charged to customers should reflect the costs incurred by the utility on a prospective basis so that the rates, when they go into effect, provide sufficient revenue to cover the actual prudent costs incurred to supply safe, reliable electric service to ratepayers. If this Court were to accept the argument put forth by BHII, the Commission would be in violation of SDCL 49-34A-8.

1. The Commission correctly interpreted and applied its ratemaking statutes and rules in approving post-test year adjustments.

The Commission's plain reading and long standing interpretation of ARSD 20:10:13:44 read together with SDCL 49-34A-19, permits the consideration of cost of service evidence that becomes known and measurable during the 24 month period following the last month of the test year. The Commission has interpreted the rule to allow cost of service adjustments to reflect any changes that occurred during the test year and adjustments to reflect any changes that occurred after the test year that become known and measurable within the 24 month period following the end of the test year.

The Commission concluded that such an interpretation of ARSD 20:10:13:44 and SDCL 49-34A-19 is not inconsistent with the phrase "at the time of the filing" due to the voluminous filings in a rate case. The Commission concluded that because cost of service

data is used to set rates of a future period, its interpretation results in the most accurate real-time basis for the utility rates, thus minimizing the need for an immediate or near term filing by BHP of a follow-on rate case to recover its costs. App. 131.

A plain reading of the rule and the long standing interpretation associated with it led the Commission to conclude that the adjustments in the Amended Stipulation are within the allowable adjustment periods set forth in ARSD 20:10:13:44 and SDCL 49-34A-19. The Commission found 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 Stipulation 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. App. 121.

The Circuit Court affirmed the Commission's plain language interpretation of ARSD 20:10:13:44; it further stated that if statutory construction was needed, it would give the Commission a reasonable range of informed discretion when interpreting and applying the rule because the Commission's interpretation is one of long standing. App. 140.

BHII argues that ARSD 20:10:13:44 only allows the consideration of post-year adjustments which were known and measurable at the time the Application was filed; that certain pre-filing adjustments were not "fully supported;" and certain post-filing adjustments were not known and measurable at the time BHP filed its Application. BHII's argument should be rejected. Substantial and sufficient evidence was offered at the hearing and the Commission's interpretation of its statutes and rules are well grounded allowing it to determine new rates that are just and reasonable.

a. The Commission employed a plain reading of the rule to determine its interpretation.

A rule is only "ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *State v. Mundy-Geidd,* 2014 S.D. 96, ¶ 7, 857 N.W. 2d 880, 884.

"The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained *primarily* from the language expressed in the statute. We must give a statute's language 'a reasonable, natural, and practical meaning' to effect its purpose. Essentially the same tenets apply to our construction of administrative rules." *First Gold, Inc. v. South Dakota Dept. of Rev. and Reg.,* 2014 S.D. 91, ¶ 6, 857 N.W.2d 601, 604. (emphasis in original). "As with statutes, when the meaning of a regulation is clear and unambiguous, we only declare its meaning 'as clearly expressed.' " *Id*. at ¶ 9. The first step is to analyze the plain language and effect of the rule to determine if there is an ambiguity.

In its analysis, the Commission found that the plain language of ARSD 20:10:13:44 was not ambiguous and the analysis and substance of a proposed change in utility rates should include both known expenses during the test year and also adjustments to reflect any changes that occurred after the test year that become known and measurable within the 24-month period provided for in ARSD 20:10:13:44 and SDCL 49-34A-19. *Final Decision,* FOF 26. App. 121.

Similarly, the Circuit Court in its *Order,* App. 142-143, stated: the first portion of the rule provides the requirements of the cost of service analysis; the second portion provides conditions for submitting adjustments to the test year data. The initial application is not the subject of this passage nor does the rule refer to the "application;

the subject of each sentence in this adjustment passage is "adjustments" and all modifiers refer to "adjustments."

> **Analysis of system costs for a 12-month historical test year.** The statement of the cost of service shall contain an analysis of system costs as reflected on the filing utility's books for a test period consisting of 12 months of actual experience ending no earlier than 6 months before the date of filing of the data required by §§ 20:10:13:40 and 20:10:13:43 unless good cause for extension is shown. The analysis shall include the return, taxes, depreciation, and operating expenses and an allocation of such costs to the services rendered. The information submitted with the statement shall show the data itemized in this section for the test period, as reflected on the books of the filing public utility.
>
> Proposed adjustments to book costs shall be shown separately and shall be fully supported, including schedules showing their derivation, where appropriate. However, no adjustments shall be permitted unless they are based on changes in facilities, operations, or costs which are known with reasonable certainty and measurable with reasonable accuracy at the time of the filing and which will become effective within 24 months of the last month of the test period used for this section and unless expected changes in revenue are also shown for the same period.
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> ARSD 20:10:13:44 (emphasis added.)

"It is a general rule of statutory construction that modifying phrases or clauses should be referred to the word, phrase, or clause with which they are grammatically connected." *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann,* 498 N.W.2d 620, 624 (S.D. 1993). The Circuit Court concluded that the only reasonable interpretation based on sentence structure is that adjustments are permitted after the initial application is filed. App. 143.

BHII argues that the adjustments must be known and measurable at the time the utility files its initial application rather than at the time the adjustment is filed. BHII Br. 6.

ARSD 20:10:13:44 does not contain the words "of the initial application" or even the word "application." Contrary to BHII's argument, the term "filing" is not restricted in time to the date the initial application is filed with the Commission.

"[The court] may not, under the guise of judicial construction, add modifying words to the statute or change it terms." *State v. Moss*, 2008 S.D. 64, ¶ 15, 754 N.W.2d 626, 631. BHII's interpretation of the rule is asking the Court to do just that. Further, had the Legislature intended that adjustments be limited to the initial application, it could have done so. Had that been the intent of the rule, there would have been no need for the second passage referring to adjustments.

b. The Commission relied upon its consistent and long standing interpretation of the rule to interpret ARSD 20:10:13:44.

The Commission as an expert in the field of electric utilities is permitted a reasonable range of informed discretion in the interpretation and application of its rules and statutes. The Court has recognized the Commission is an administrative agency with expertise and gives "deference to PUC's expertise and special knowledge in the field of electric utilities." *Pesall v. Montana Dakota Utilities, Co.,* 2015 S.D. 81, ¶ 8. The Commission is also given a reasonable range of informed discretion in interpreting its rules "*when the agency interpretation is one of long standing." Krsnak v. S. Dakota Dep't of Env't & Natural Res.,* 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (citation omitted.) (emphasis added).

While the Commission based its interpretation in part on a plain reading of the rule, it also relied on its long standing, consistent interpretation of ARSD 20:10:13:44, read together with SDCL 49-34A-19, to reach its conclusion. App. 121, FOF 26.

Staff's expert witness David Peterson testified that during the four plus decades that he has worked with Staff on rate cases, the consistent interpretation of ARSD 20:10:13:44, read together with SDCL 49-34A-19, has been that because a historic test year is used to set rates for a future period, the analysis and substance of a proposed change in utility rates should include both known expenses during the test year and also adjustments to reflect any changes that occurred after the test year that become known and measurable within the 24-month period provided for in ARSD 20:10:13:44 and SDCL 49-34A-19. Peterson testified Staff has interpreted these provisions 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 the case. App. 121. This has been a consistent policy and is reflected in the Settlement Stipulation. Peterson testified it is also Staff's responsibility to closely examine the evidence that such changes are known and measurable expenses. This is the standard that Staff has relied on for years, and the Commission has approved numerous rate case settlements based on that standard. App. 121. Many other states have a similar rule, with varying timeframes, and interpret it similarly. AR 007089-007090.

The Commission's consistent and long standing interpretation of ARSD 20:10:13:44 follows the plain language of the rule and its Final Decision should be affirmed.

c. The commission's interpretation gives effect to all parts of its ratemaking rules and statutes.

ARSD 20:10:13:44 does not stand alone. The ratemaking statutes and rules "must be construed together, giving effect as far as possible to all parts thereof, so as to harmonize

them and effectuate the legislative intention as therein expressed. *Anderson v. City of Sioux Falls*, 384 N.W.2d 666, 669 (S.D. 1986).

The Commission must determine just and reasonable rates applying its applicable rules and statutes. By interpreting the rule to allow post-test year adjustments, the Commission has harmonized the various rules and statutes, giving effect as far as possible to all parts to effectuate the legislative intentions and avoid an absurd or unreasonable result. The Commission's determination of a rate based on the most current actual costs that accounts for both increases and decreases to the revenue requirement supports the principle of determining a just and reasonable rate by allowing consideration of more than just test year data. *Order*, pg. 11. BHII's interpretation would not permit adjustments to increase or decrease the revenue requirement. Such an interpretation would not lead to just and reasonable rates.

d. The Commission's interpretation of ARSD 20:10:13:44 does not violate due process and rulemaking requirements.

The Circuit Court found no due process violation because notice and opportunity to participate were provided. App. 151. BHII alleges that the Commission's interpretation of ARSD 20:10:13:44 violates due process and rulemaking requirements but fails to cite to any authority detailing what its property interest is or the due process attached to that interest. BHII bears the burden to prove a due process violation. *Daily v. City of Sioux Falls*, 2011 S.D. 48 ¶ 14, 802 N.W. 2D 905, 911. For that reason, BHII's argument must fail on this point. "Failure to cite to any authority is waiver of an argument." *Behrens v. Wedmore*, 2005 S.D. 79, ¶55, 698 N.W.2d 555, 577.

BHII does cite to *Hollander v. Douglas County*, 2000 S.D. 159, ¶ 17, 620 N.W.2d 181, 186, noting that due process does not merely require an opportunity to participate, but rather an "opportunity to be heard." BHII Br. 16.

Pursuant to ARSD 20:10:13:17, BHP ratepayers (including BHII) were given notice of the proposed rate increase by an individually mailed notice of the rate increase and a Notice of Rate Increase which was posted in the local BHP offices. AR 000038. The Commission also issued a Notice of Hearing in accordance with SDCL 1-26-16 and 1-26-17. BHII participated in the contested case hearing process and initiated the appellate process; it is unclear how, and when, BHII did not have an opportunity to participate and be heard. Final Decision FOF 1, App. 116. BHII's due process rights were not violated.

e. The issue of "secret cut-off dates" was not preserved for appeal and the dates were publically known.

BHII claims to be unaware of the administrative practice of using cut-off dates when rate cases settle in order to allow the parties an opportunity to prepare the documents for approval. Contrary to BHII's assertion, these cut-off dates were not a secret. Dates for the post-test year adjustments were publically available and shared with BHII prior to the contested case hearing.[4] App. 53-68. BHII had this information. Further,

[4]**Staff Memo references:**

Page 3, CPGS Plant Additions: "reflect actual costs as of October 31, 2014, and reasonably known and measurable changes after October 31, 2014." App. 55.
Page 3, Post-Test Year Plant Additions: "reflect actual costs for completed projects in-service as of November 6, 2014." App. 55.
Page 4 & 8, Rate Case Expense: "actual costs as of November 6, 2014." App. 56 & 60.
Page 5 & 11, Storm Atlas Regulatory Asset: "reflects actual, final Atlas-related costs (excluding employee bonuses) and actual system inspection costs through September 30, 2014." App. 57 & 63. (cont.)

having been a party to prior BHP rate case settlements, it is surprising that BHII was unaware that such a procedure was standard in settlement matters.

BHII misunderstands the facts surrounding practical and administrative use of cut-off dates. Once an application is filed, the Commission has one year in which to issue its decision so that if any refunds are due to ratepayers, those refund amounts can be ordered. SDCL 49-34A-17. Settlement agreements are generally presented to the Commission at least six weeks prior to the hearing date so that if the agreement is rejected, there is still time to prepare for a hearing. Because so much work has to be completed prior to the filing of the settlement agreement, once a post-test year adjustment is known and measurable, a cut-off date for that adjustment is determined to avoid *de minimis* updating of costs. If a settlement is ultimately reached, those dates and adjustments are used as part of the agreement.

In order to arrive at a revenue requirement and prepare all the documents that are needed to seek approval of a settlement agreement, cut-off dates are established. Some of

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(cont.) Page 7, BHC/BHUH Intercompany Charges: "actual costs for the twelve months ended August 31, 2014." App. 59.
Page 8, Generation Dispatch & Scheduling: "actual year-end Aug. 2014 costs." App. 60.
Page 9, Neil Simpson Complex Common Steam Allocation: "actual year end August 2014 costs." App. 61.
Page 12, BHC/BHSC Intercompany Charges: "actual costs for the twelve months ended August 31, 2014." App. 64.

Order references:

Findings of Fact 33: "limit the inclusion of such costs to positions actually hired at the time of settlement negotiations." App. 122.
Findings of Fact 34: "limits recovery for employee additions to those actually hired and in service as of the date of the Settlement Stipulation." App. 122.
Findings of Fact 47: "actual billings by BHP's affiliates…to the Company for the twelve months ended August 31, 2014." App. 125.

the work required before a complete settlement agreement can be presented include: a final rate is calculated rolling all the post-test year adjustments into a revenue requirement, the class cost of service (what each class of service will pay for a rate increase) has to be calculated, rate design must be completed, tariffs need to be revised, staff's memorandum has to be written, and the settlement agreement has to be written and executed. All of this is presented to the Commission so it can conduct its own review and make a determination as to whether what is presented in the settlement agreement is a just and reasonable rate. This process is no different than any other litigation where settlement is reached and documents drawn up. The Commission's interpretation of ARSD 20:10:13:44 has no bearing on Staff's use of a cut-off date so that its work can be completed in a timely manner.

Regardless, BHII did not preserve this matter for appeal as it never objected to the dates either before the Commission or the Circuit Court; therefore, it is proper for the Court to decline to address it for the first time on appeal. See *Alvine Family Ltd. P'ship v. Hagemann, 2010* S.D. 28, ¶ 21, 780 N.W.2d 507, 514 ("We have consistently held that this Court may not review theories argued for the first time on appeal."). As the matter of cut-off dates was not objected to or preserved for appeal, it was waived.

f. The procedure used was for administrative and practical reasons and was not a rule.

The use of cut-off dates for administrative purposes is an administrative practice, not a rule. The use of cut-off dates allows Staff to complete its work in a timely fashion so that the Commission can complete its work within the one-year deadline in which it can order full refunds to ratepayers.

SDCL 1-26-1(8)(a) specifically excludes agency practices concerning the internal management of an agency from the definition of what constitutes a "Rule." The Commission is not required to initiate a rulemaking for its staff's use of an administrative cut-off date.

2. The Commission's approval of adjustments was not clearly erroneous.

BHII argues the Amended Stipulation approved by the Commission contains adjustments (LIDAR costs, affiliate allocations, and wages and salaries for newly hired employees) based on information that was not known and measurable at the time BHP filed its Application. This argument ignores the plain language of ARSD 20:10:13:44 which permits adjustments that are known and measurable and which become effective within 24 months of the last month of the test period.

BHII argues that because the three adjustments were budgeted amounts in the Application but later adjusted once the actual values became known and measurable—as being unsupported budget values that should have been rejected by the Commission. However, the Amended Stipulation does not contain <u>any allowances or adjustments</u> that were based on non-fixed priced budgeted amounts.

BHP has the burden to prove by a preponderance of the evidence that its underlying costs for its rates are reasonable and necessary in order for the Commission to determine that the rates are just and reasonable. SDCL 49-34A-11; SDCL 49-34A-8.4; *Irvine v. City of Sioux Falls*, 2006 SD 20, ¶10, 711 N.W.2d 607, 610. The Commission's findings are reviewed for clear error. *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14.

The Commission's approval of BHP's three adjustments (LIDAR costs, affiliate allocations, and wages and salaries for newly hired employees) in the Amended

Stipulation is based on its interpretation of its rules and the substantial and sufficient evidence produced, introduced, and received in evidence. FOF 27, 53, 61; COL 9; App. 121, 126, 129, 131.

BHP's LIDAR surveying costs as submitted in the Application were based on a budget. For that reason Staff did not accept the adjustment. When actual costs became known and measurable, Staff accepted an amended adjustment reflecting known changes through October 15, 2014. App. 58, 61; AR 005728-005730. Regarding the affiliate allocations from Black Hills Utility Holdings (BHUH), Staff initially rejected this adjustment, as it was an estimate of future costs. Once actual costs became known and measurable, Staff accepted an amended adjustment reflecting known changes through August 31, 2014. App. 59. The adjustment for payroll and expenses related to 17 open positions. This cost was initially rejected by Staff until such time as the number of actual employees hired and actual wage increases became known and measurable. The adjustment was amended to reflect actual positions filled through October 2014 and known wage increases through April 1, 2015. App. 122. BHII cites to an adjustment in affiliate allocations from BHP's affiliate, Black Hills Service Company, as a new cost. None of the rules or statutes differentiates between adjustments of costs incurred during the test year and adjustments of costs that were not incurred until after the test year. ARSD 20:10:13:44 allows their adjustment when the result is a just and reasonable rate. App. 149-150, *Order*.

The Commission is mandated to regulate all rates so that the public shall pay only just and reasonable rates. To determine such a rate the Commission is required to give due consideration to the public need for adequate, efficient, economical, and reasonable

service and to the need of the public utility for revenues sufficient to enable it to meet its total current cost of furnishing such service. SDCL 49-34A-6; SDCL 49-34A-8. To accomplish this task the Commission adopted the "cost of service" method of ratemaking. *Application of Northwestern Public Service Co.*, 297 N.W.2d 462, 464 (S.D. 1980).

Utilizing updated data based upon actual costs allows the Commission to set rates based on data that will most closely match the time period during which rates will take effect. The goal is to reach just and reasonable rates. Using updated data will best satisfy this purpose. The rates charged to customers should reflect the costs incurred by the utility on a prospective basis so that the rates, when they go into effect, provide sufficient revenue to cover the actual prudent costs incurred to supply safe, reliable electric service to ratepayers.

Known and measurable changes are required in order to meet the statutory mandate of providing a utility its total current costs. Ratemaking proceedings generally take one year to complete. During this time, costs continue to change and investment occurs. This regulatory lag can cause gaps in the ability of utilities to recover prudently incurred costs or, depending on the circumstances, may cause costs in the test year to be overstated. For this reason, ARSD 20:10:13:44 allows utilities to adjust test year costs for those costs that are certain to be expended within or for up to 6[5] months after the pendency of the rate case that would otherwise not be captured by the test year calculation. This avoids unfairly penalizing the utility for on-going investment and avoids potentially forcing the utility to immediately file a new rate case. It is well-settled,

[5] This is assuming the rate case takes 12 month to process.

however, that when reliable evidence of actual experience is available, it should supplant evidence of a purely theoretical and predictive nature. See *Application of NorthWestern Public Service Co.*, 297 N.W.2d 462, 469 (S.D. 1980).

Affirmance of the Commission's interpretation of ARSD 20:10:13:44 does not violate ratemaking rules and statutes. It is fair to both ratepayers and utilities. On the other hand, acceptance of BHII's interpretation would mean no post-test year adjustments that were not known and measurable at the time the application was filed could be proposed, including those that decrease the revenue requirement.

The Court should reject BHII's arguments and affirm the Commission's Final Decision.

ISSUE II

A. The Commission's approval of a five-year pension normalization adjustment was not clearly erroneous.

In its March 31, 2014 Application, due to fluctuating employee benefits expenses, BHP proposed an adjustment to test year employee benefits expenses. BHP normalized its test year pension expense by averaging the annual expense using the most recent five years 2010-2014. At the January 2015 hearing, testimony was presented regarding pension expense for the years 2010-2015: Test year pension expense was $2,844,759; 2010 pension expense was $2,925,853; 2011 pension expense was $1,819,156; 2012 pension expense was $3,251,072; 2013 pension expense was $2,709,322; 2014 pension expense was $976,122; five-year average pension expense for 2010-2014 was $2,336,305; 2015 pension expense was $2,056,581. AR 005737-005738.

The five-year average expense used for rate setting purposes was $2,336,305. This adjustment was included in the Original Stipulation filed on December 9, 2014. The

five-year average adjustment represented over a $500,000 reduction in test year expense. BHP's 2015 pension expense was not known at the time the Original Stipulation was filed. Mr. Thurber testified that the purpose in introducing the 2015 pension expense at the hearing was to confirm the reasonableness of the five-year average adjustment in the revenue requirement as the difference between 2014 and 2015 continued to show the pension expense was fluctuating. AR 005737-005738.

The clearly erroneous standard of review is applicable to the Commission's findings of fact pertaining to the normalization of the five-year pension expense. "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14. "A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26.

Should the de novo standard apply, the Court has stated "[a]n 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." *Krsnak v. S. Dakota Dep't of Env't & Natural Res.*, 2012 S.D. 89, ¶ 16. BHII's reliance on *Tucek v. Department of Social Services*, 2007 SD 106, ¶ 13, 700 N.W.2d 867, 871, for a de novo review is misplaced as the Commission's findings were based on both live and documentary evidence. App. 124. The Court held that the standard of review for agency decisions varies depending on the type of evidence presented: "When findings of fact are made based on live testimony, the clearly erroneous standard applies. Deference and great weight are given to the hearing examiner on fact questions."

1. The Commission's use of 2010-2014 pension expenses to normalize the volatility of pension expenses for rate setting purposes was not clearly erroneous.

The Commission's interpretation of ARSD 20:10:13:44 did not change when it permitted the normalization of pension expense for the years 2010-2014 in its Final Decision. As set forth in the previous analysis in Issue I, ARSD 20:10:13:44 permits adjustments that are known and measurable at the time a utility provides the information that supports the adjustment for 24 months beyond the end of the test year. The use of post-test year adjustments allows the Commission to determine a just and reasonable rate.

Pension expense for 2015 was not known and measurable when BHP and Staff agreed to a normalization adjustment based on the most recent five-year average of actual costs. Pension expense for 2015 was still unknown at the time the Original Stipulation was filed on December 9, 2014, in preparation for the January 2015 contested case hearing. The 2015 pension expense was submitted into the record by BHP in order to support the reasonableness of the 2010-2014 average included in the Amended Stipulation. AR 005738.

BHII advocates using 2011-2015 data to determine a five-year average and argues that the Commission ignored the 2015 pension expense when it determined a five-year average normalization adjustment. BHII Br. 25.

The Commission is responsible to ensure "that the public shall pay only just and reasonable rates for service rendered." SDCL 49-34A-6. Coupled with that statute is SDCL 49-34A-8 which dictates the criterion the Commission shall consider when balancing the public's need for adequate, efficient, economical, and reasonable service

with the need of the utility for revenues sufficient to enable it to meet its total current cost of furnishing such service.

Balancing these two interests requires the Commission to use its expertise to predict revenues and expenses in the reasonably near future when calculating a rate. "[T]he regulatory body undertakes a reasoned exercise of its discretion in altering the test-year data to reflect changes of known magnitude occurring subsequent to the test year." *NorthWestern Public Service v. Cities of Chamberlain, etc*. 265 N.W. 867, 878 (S.D. 1978) (citing *Northwest Bell Telephone Co. v. State of Minn.,* 253 N.W.2d 815, 822 (Minn. 1977).

As set forth in Finding of Fact #43, the Commission used its expertise to balance the needs of the ratepayer and the utility. The Commission found that the normalization treatment of a widely varying expense is consistent with sound regulatory principles; it found the Commission has routinely relied on the normalization treatment in prior cases before it, e.g. storm damage expense and uncollectible expenses; it found the facts and circumstances in this matter made it appropriate to apply normalization treatment to the pension expense; and it found the 2015 pension expense estimate to be similar to the five-year average reflected in the Original Stipulation thus confirming that the years 2010-2014 used as the five-year average for determining the normalized pension expense adjustment produced just and reasonable rates.

> 43. The Commission finds that it is BHII's position, not that of BHP and the Staff, which is opportunistic in this instance with respect to the pension expense. BHII's recommendation would set rates based on the lowest pension expense experienced in the last five years. BHII's recommendation is particularly egregious in this instance given that BHP's witness Thurber testified that the Company's most recent estimate of its 2015 pension expense is $2,056,581 – which is considerably higher than its 2014 expense that Mr. Kollen recommends and similar to the five-year average reflected in the Settlement

> Agreement. Ex BHP 70, pp. 22-23. The Commission also finds that the normalization treatment of a widely varying expense is consistent with sound regulatory principles and that the Commission has routinely relied on the normalization treatment in prior cases before the Commission, e.g. storm damage expense and uncollectible expenses. The facts and circumstances surrounding the pension expense make it appropriate to apply normalization treatment in this instance. Finally, the Commission further finds that Mr. Kollen's recommended adjustment 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 even though BHII incorrectly contends that a revenue adjustment is required for each post-test year adjustment.

The Commission's interpretation of ARSD 20:10:13:44 does not require it to use every current cost that is available. The reason for this is obvious—it is possible that some current cost would make the rate unjust and unreasonable if the cost were some type of outlier. BHII cannot point to any evidence that using 2015 in the five-year average would produce rates that are more just and reasonable. BHII offers no authority for its argument that the Commission was required to use the 2015 data in its calculation of a just and reasonable rate. Failure to cite to authority is waiver of an argument and therefore BHII's argument on this issue should fail. *Behrens v. Wedmore*, 2005 S.D. 79 ¶ 55, 698 N.W.2d 555, 577.

2. The Commission's findings on affiliate allocations were not clearly erroneous.

BHII argues that the Commission's exclusion of the 2015 pension expense combined with the inclusion of the Wyodak O&M expense is a clearly unwarranted exercise of discretion as there is no rational explanation for the Commission's action. BHII Br. 26. The exclusion of the 2015 pension expense was explained above. As for the inclusion of the Wyodak O&M adjustment and the BHUH allocation adjustment, it is the Commission's long-standing interpretation of ARSD 20:10:13:44 that permits these

adjustments, (see Issue I, C), and therefore the Commission's findings are not clear error or an unwarranted exercise of discretion.

In its March 31, 2014 Application, BHP proposed an adjustment to its test year BHUH expenses based on its post-test year operating budget. Staff objected to this adjustment because it did not reflect a known and measurable change in BHP's costs. App. 59. Consistent with the treatment of other operating expenses, BHP and Staff agreed to recognize actual annual amounts in billed costs by BHUH through August 31, 2014. App. 59.

At the January 2015 hearing, Mr. Thurber testified to the updated production operating and maintenance costs at the Wyodak power plant. These costs were incurred from October 2013 through September 2014. AR 005734-005736. Following the January 2015 hearing, an Amended Stipulation was filed which corrected the $286,041 BHUH allocation error in the Original Stipulation and updated the $412,988 Wyodak O&M expense in the Original Stipulation. Both of these adjustments were known and measurable before September 30, 2014. App. 80. The Commission's long-standing interpretation of ARSD 20:10:13:44 read together with SDCL 49-34A-19, permits the consideration of cost of service evidence that becomes known and measurable during the twenty-four month period following the end of the test year.

The Commission's actions were not a clearly unwarranted exercise of discretion. In fact, it is just the opposite. The approval of the Amended Stipulation retains the $6,890,746 revenue deficiency agreed to in the Original Stipulation even though the Amended Settlement SD Electric Revenue Requirement cost of service calculation showed a higher revenue deficiency of $7,010,894. App. 81.

The Commission's Final Decision which approved the calculation of a five-year average pension expense based on data from 2010-2014, was based on substantial and sufficient evidence that resulted in just and reasonable rates. App. 118-119.

ISSUE III

A. The Commission's approval of BHP's incentive compensation costs as a part of the Amended Stipulation is not clearly erroneous as the final rates are just and reasonable.

BHII appears to argue that the Commission's findings on this issue should be reviewed de novo.

The Commission's approval of BHP's incentive compensation cost is a factual finding based on the presentation of both live and documentary evidence and, therefore, is reviewed by the Court using the clearly erroneous standard. The Court has held that the standard of review for agency decisions varies depending on the type of evidence presented: "When findings of fact are made based on live testimony, the clearly erroneous standard applies. Deference and great weight are given to the hearing examiner on fact questions." *Tucek v. Department of Social Services*, 2007 SD 106, ¶ 13.

"A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact." *In Re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 49. "We will reverse an agency's decision only if it is "clearly erroneous in light of the entire evidence in the record.'" *Id.* "A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26.

Based on the substantial evidentiary record produced at the hearing and the absence of a statute or rule precluding the inclusion of incentive compensation costs, the Commission did not make a mistake by including incentive compensation costs in the final electric rates. The Commission concluded that the resulting rates as reflected in the Amended Stipulation were just and reasonable.

BHII acknowledged that BHP can include incentive compensation costs in its electric rates as a matter of law; however, it argues that BHP failed to carry its burden proving any incentive compensation costs were reasonable and necessary to provide electric service. BHII Br 31. The burden of proof for administrative hearings is preponderance of the evidence. *Irvine v. Sioux Falls*, 2006 SD 20, ¶10.

BHP has the burden to prove by a preponderance of the evidence that its underlying costs for its rates are reasonable and necessary in order for the Commission to determine that the rates are just and reasonable. SDCL 49-34A-11; SDCL 49-34A-8.4.

In its Application, BHP's proposed revenue requirement included approximately $3.8 million for incentive compensation, including amounts billed from BHP's affiliates BHUH and Black Hills Service Company. For settlement purposes, BHP and Staff agreed that incentive compensation paid for achieving financial performance goals would be excluded from the revenue requirement thus reducing operating expenses by $660,000. This is the amount that BHP identified as being tied to its financial results. BHP and Staff agreed to exclude the $666,000 recognizing that the incentive compensation exclusion embodied in the Amended Stipulation was essentially the same type of exclusion the Commission approved for BHP and other South Dakota utilities in prior base rate case settlements. FOF 40. App. 123

At the evidentiary hearing, BHP presented direct evidence in its case-in-chief supporting the inclusion of employee incentive compensation in its cost of service through the prefiled testimony of Kyle White, Vice President of Regulatory Affairs., and Laura Patterson, Director of Compensation, Benefits and Human Resources Information Systems.

Ms. Patterson's testimony stated that she is responsible for partnering with business leaders to design and execute compensation and benefits strategies and plans. Her prefiled testimony describes and supports the general compensation program for Black Hills Corporation (BHC) employees, and particularly the employees of BHP, including the variable compensation program and the equity compensation program. Ms. Patterson explained why these programs and their associated costs are reasonable and necessary to attract, motivate and retain well qualified and competent employees to support utility operations. She stated that employee incentive compensation plans are widely employed by utilities throughout the country and that it is necessary for BHP to provide employee incentive opportunities that are competitive with other companies in the industry in order to attract, motivate, and retain well qualified and competent employees to support utility operations. Another goal of the program is to focus employees on important objectives to improve the performance of utility operations by focusing on improvements to operational excellence, safety, reliability, and customer satisfaction. AR 004915-17; 004920; 004922-23.

Mr. White adopted Ms. Patterson's written testimony as his own and answered all questions regarding this subject matter at the evidentiary hearing. BHII extensively cross-examined Mr. White regarding the matter of the inclusion of employee incentive

compensation in the utility's cost of service. Mr. White testified that incentive compensation relating to the goals of shareholders in the amount of approximately $666,000 was removed from the revenue requirement for settlement purposes. App. 100.

As a part of Staff's review of the Application, BHP was asked hundreds of discovery questions. BHP responded to each request. A number of the discovery questions dealt with the inclusion of employee incentive compensation in the utility's cost of service and revenue requirement. FOF 10. App. 117.

David Peterson, Staff's consultant, filed prefiled testimony to address among other matters, the inclusion of the employee incentive compensation plan in the utility's cost of service. App. 82-113. Mr. Peterson supported the exclusion that is contained in the Amended Stipulation and recommended that the Commission reject BHII's recommendation to expand the exclusion at this time. App. 101.

BHII argues that the Commission misapplied the legal standard a utility is obligated to meet when satisfying its burden of proof under SDCL 49-34A-8.4, 49-34A-11, and ARSD 20:10:13:44. According to BHII, the testimony given by Mr. White was conclusory and therefore insufficient to justify the inclusion of the incentive compensation costs in the overall rates. BHII argues that the Commission's reliance on conclusory statements to approve of the Amended Settlement Stipulation was a clear error of judgment.

BHII's argument belies what is in the evidentiary record. The record is replete with substantial and sufficient evidence presented through the testimony of Mr. White, Ms. Patterson, and Mr. Peterson.

BHP testified that the cost of the employee incentive plan was reasonable and necessary to provide service to the public. As shown in the testimony, the employee incentive compensation plan is necessary for BHP to provide employee incentive opportunities that are competitive with other companies in the industry as well as to attract, retain, and motivate employees. Another goal of the program is to focus employees on important objectives to improve the performance of utility operations by focusing on improvements to operational excellence, safety, reliability, and customer satisfaction. Amounts identified as being tied to BHP's financial results were excluded. The treatment of the employee incentive plan cost is essentially the same as the Commission has approved for BHP in the past as well as for other public utilities.

The Commission found the evidence to be credible and therefore demonstrated that the resulting rates in the Amended Settlement Stipulation were just and reasonable. FOF 37-40, COL 12. App. 123 & 132.

The Commission's duty under the 49-34A-6, -8, and -8.4 is to determine an appropriate balance between the needs of the public to have safe and reliable electric service at reasonable rates and the financial ability of the utility to provide such services on an ongoing basis. As determined by the Commission in its findings of fact and conclusions of law, BHP's costs for its incentive compensation plan met these elements. As no statute or rule precludes the inclusion of employee incentive compensation in the utility's cost of service and revenue requirement, the Commission has the discretion to include incentive compensation in the cost of service. The Court should reject BHII's arguments and affirm the Commission's Final Decision.

VII. CONCLUSION

The Commission respectfully requests that its Final Decision and Order be affirmed in all respects.

VIII. REQUEST FOR ORAL ARGUMENT

The Commission requests oral argument on all issues and matters raised in this appeal.

Dated this 23rd day of May, 2016.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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