

BEFORE THE  
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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Docket No. EL09-18

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

**BRIEF IN OPPOSITION TO  
JOINT MOTION FOR APPROVAL  
OF SETTLEMENT STIPULATION**

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COMES NOW the Residential Consumers Coalition, by and through counsel, and hereby submit its Brief in Opposition to Joint Motion for Approval of Settlement Stipulation.

**I. INTRODUCTION**

On September 30, 2009, Black Hills Power, Inc. (hereinafter “Utility”), applied to the Commission for a revenue increase of 26.6%. On December 3, 2009, the Commission granted the Black Hills Industrial Intervenors (hereinafter “BHII”) and the Residential Consumers Coalition (hereinafter “RCC”) permission to intervene as parties to this case. PUC Staff reached a settlement with the Utility, and has filed a joint motion requesting approval of those parties’ settlement. For the reasons stated below, the RCC respectfully requests that the Commission deny the motion and proceed to a full hearing on the merits.

**II. ARGUMENT AND AUTHORITIES**

**1. The RCC should not lose its party status as a result of the settlement.**

As part of their motion, PUC Staff and the Utility have requested that the RCC “be allowed the opportunity to comment on the Settlement Stipulation, consistent with SDCL § 49-34A-13.1 . . . .” Joint Motion, p. 1. That statute provides that any person may appear at a rate change hearing as an intervenor to express comments on the pending rate change request. SDCL

§ 49-34A-13.1. However, those appearing pursuant to Section 13.1 “may not be afforded the status of a party to the proceedings.” *Id.* By invoking that statute, the moving parties are simply attempting to strip the RCC of its party status, and circumvent a full hearing on the record.

South Dakota’s Administrative Procedure Act provides for intervention as a party where upon timely application of one “who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency’s order made upon the hearing.” SDCL § 1-26-17.1. An intervenor who has been granted party status has the same right to, *inter alia*, “respond and present evidence on issues of fact and argument on issues of law or policy.” SDCL § 1-26-18.

The administrative regulations governing these proceedings further vest an intervening party with full party status.

A person granted leave to intervene in whole or in part is an intervenor and is a party to the proceeding. As a party, an intervenor is entitled to notice of hearing, to appear at the hearing, to examine and cross-examine witnesses, to present evidence in support of the person's interest, to compel attendance of witnesses and production of evidence, to submit briefs, to make and argue motions and objections, and to all other rights granted to parties by statute or this chapter.

ARSD 20:10:01:15.05. This distinction is further clarified by the fact that the section that immediately follows reiterates the substance and form of SDCL § 49-31A-13.1. Because the RCC has intervened as a party, it has been vested with the rights of any other party to these proceedings. The moving parties have not cited any authority that would permit them to undermine the hearing process and the authority of the Commission by denying the RCC its right to cross-examine witnesses and present testimony at a full hearing.

**2. Staff and the Utility cannot compromise the interests of residential consumers over RCC's objection.**

Generally, “parties to any proceeding or investigation before the commission may, by stipulation in writing filed with the commission or entered on the record, agree upon the facts or any portion thereof involved in the controversy. Such stipulation shall be regarded and used as evidence at the hearing.” ARSD 20:10:01:19. Parties to a proceeding may settle their individual claims, but “parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.” *Local Number 93, Int’l Assoc. of Firefighters v. City of Cleveland, et al.*, 478 U.S. 501, 529 (1986). “[I]f properly raised, these claims remain and may be litigated by the intervenor.” *Id.* The moving parties expressly state that “the Commission Staff enters into this Stipulation for the benefit of all of BHP’s South Dakota customers affected by this docket.” Settlement Stipulation, ¶ 5.

Further, the proposed settlement increases the rates for residential consumers. The RCC has intervened in order to represent the interests of residential consumers. *See Residential Consumers’ Petition to Intervene as Parties*. The RCC has not stipulated to the requested rate increase, or indeed to any other rate increase for BHP’s residential customers. It has been the RCC’s contention throughout this process that it is neither just nor reasonable to include Wygen III in the Utility’s rate base. Such a fundamental issue cannot be resolved without the consent of those deemed by the law and by the Commission to have an interest in the outcome of this litigation.

In *Steiner v. County of Marshall*, the South Dakota Supreme Court cited *Local Number 93* in holding that the lower court had properly approved a consent decree over an intervenor’s

objection. 1997 SD 109. Though the intervenor was precluded from blocking settlement between the County and a group of landowners in that case, *Steiner* is distinguishable. The consent decree in *Steiner* was entered into “only for the benefit of [Landowners]. This Consent Judgment does not create rights for the benefit of any individuals or entities other than [Landowners]; nor does this Consent Judgment create any obligation to any individuals or entities other than [Landowners].” *Id.* at ¶ 9. Here, the settlement agreement expressly references the interest of all of BHP’s consumers. Further, it imposes an obligation on those persons represented by the RCC to pay more for their electricity in the future. Because the vast majority of the settlement provisions cannot be resolved without the consent of the Residential Consumers, this matter must proceed to hearing.

### **III. CONCLUSION**

For all of the foregoing reasons, the Residential Consumers Coalition prays that the Commission deny the Joint Motion for Approval of Settlement Stipulation.

Respectfully submitted this 19<sup>th</sup> day of May, 2010.

*/s/ Sam E. Khoroosi*

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