

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

Docket No. EL09-018

IN THE MATTER OF THE)	
APPLICATION OF BLACK HILLS)	BLACK HILLS POWER’S BRIEF IN
POWER, INC., FOR AUTHORITY TO)	REPLY TO OPPOSITION TO JOINT
INCREASE ITS ELECTRIC RATES)	MOTION FOR APPROVAL OF
)	SETTLEMENT STIPULATION
)	

Black Hills Power, Inc. (“Black Hills Power”) through undersigned counsel, respectfully submits this Brief in Reply to Opposition to Joint Motion for Approval of Settlement Stipulation, filed on behalf of the three residential intervenors in this docket and the South Dakota Peace and Justice Center.

Introduction and Summary

In its brief, the three residential intervenors and the South Dakota Peace and Justice Center assert that Black Hills Power is attempting to “strip” them of their party status, and “undermine the hearing process and authority of the Commission,” by denying them the ability to cross examine witnesses and present evidence. *Opposition Brief* at 2. This assertion is simply false. In addition, this assertion is inconsistent with Black Hills Power’s communication with the group related to procedure going forward in light of the settlement. There is no dispute that non-settling intervenors have the right to present evidence in opposition to the settlement, and cross-examine witnesses offered in support of the settlement. In addition, if the Commission finds that the settlement results in just and reasonable rates and is supported by substantial evidence after all parties have had the

opportunity to present evidence and cross-examine witnesses, the settlement should be accepted as a resolution of the case.

Issues and Analysis

Although not specifically stated in the Opposition Brief, there are essentially two issues raised by the non-unanimous settlement:

1. The standard to be applied by the Commission in determining whether to accept the terms of the settlement as a resolution of the case; and
2. The procedural rights of the non-settling party to oppose the settlement.

There is a significant body of case law to guide the Commission in resolving these procedural and substantive matters. *See, e.g. Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283 (1974); *See also, Placid Oil Company v. Federal Power Commission*, 483 F.2d 880, 893 (4th Cir. 1973); *Bryant v. Arkansas P.S.C.*, 877 S.W.2d 594, 598-602(Ark. App. 1994); *A.G. of the State of New Mexico v. New Mexico P.S.C.*, 808 P.2d 606, 608-11 (N.M. 1991); *U.S. v. Public Service Commission of the District of Columbia*, 465 A.2d 829, 832 (D.C. Ct. App. 1982)(“The central issues presented on appeal are whether the Public Service Commission can authorize a non-unanimous settlement, and, if so, what procedures it must follow to remain within the spirit of the D.C. Administrative Procedure Act”); *In re Public Service Company of Indiana, Inc.*, 72 P.U.R.4th 660, 683 (Indiana P.S.C. 1986)(“This situation poses two particular issues for the commission’s consideration: first, whether the commission can accept the terms of a contested settlement agreement; second, what procedural obligations are owed to

objecting parties”); *Re Iowa Electric Light and Power Company*, 46 P.U.R. 130, 145-46 (Iowa S.C.C. 1982).

I. If the Commission finds that the settlement results in just and reasonable rates and is supported by substantial evidence, it should be accepted as a resolution of the case.

The United States Supreme Court decision in *Mobil Oil Corp. v. Federal Power Commission* is a frequently cited case regarding the legal standard for addressing a rate case settlement when one party is not in agreement with the settlement. *Mobil Oil*, 417 U.S. at 283. *Mobil Oil* was a multi-party proceeding initiated at the Federal Power Commission to establish a rate structure for the sale of natural gas produced in Southern Louisiana. *Id.* at 288. After extensive litigation, a settlement was proposed and agreed to by a large majority of the parties and interests involved. *Id.* at 297.

At the outset, the Commission stated that it believed that adoption of the settlement proposal was precluded unless the Commission found the terms to be in the public interest and supported by substantial evidence.

Id. The Commission applied this standard in evaluating the settlement agreement, and found the settlement to be just and reasonable, and also found that the settlement was supported by substantial evidence in the record. *Id.* at 289.

On appeal, a non-settling party contended that the Commission “is without power to adopt as a rate order a settlement proposal that lacks agreement of the parties to the proceeding.” *Id.* at 312. The United States Supreme Court summarily dismissed the argument of the non-settling party with remarkable

brevity, stating simply: “That contention has no merit.” *Id.* The Court went on to affirm the Commission’s role in reviewing a non-unanimous settlement, stating that “[n]o one seriously doubts the power – indeed the duty – of the [Commission] to consider the terms of a proposed settlement which fails to receive unanimous support” *Id.* at 313. In addition, the Court adopted the Commission’s standard for reviewing settlements of this nature, holding that “even if there is lack of unanimity,” the settlement “may be adopted as a resolution on the merits,” if the Commission “makes an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates for the area.” *Id.* at 314.

This standard has been applied on numerous occasions by federal regulatory bodies and state utility commissions both before and after *Mobil Oil*.¹ In addition, the *Mobil Oil* standard is consistent with SDCL 49-34A-6, which provides that “[e]very rate made, demanded, or received by any public utility should be just and reasonable,” and SDCL 49-34A-18 which references the South Dakota Public Utilities Commission’s role in determining “just and reasonable rates.” Black Hills Power respectfully requests that the South Dakota Public

¹ See, e.g., *Placid Oil*, 483 F.2d at 893 (“But even if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if FPC makes an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates for the area.”); *Bryant v. Arkansas P.S.C.*, 877 S.W.2d at 599-600; *New Mexico P.S.C.*, 808 P.2d at 608-11; *U.S. v. Public Service Commission of the District of Columbia*, 465 A.2d at 832 (“This court has recognized that the Commission has both the flexibility to consider settlement offers and the responsibility to evaluate such offers on their merits in light of the evidence of record even if the proposed settlement fails to receive the unanimous support of the parties.”)

Utilities Commission apply this well-settled standard in reviewing and approving the settlement between Black Hills Power and PUC Staff, which was reached after many months and countless hours of intensive discovery, review, investigation, and analysis.

II. Intervenors that do not join a rate case settlement agreement have the right to cross-examine witnesses offered in support of the settlement, and present evidence in opposition to the settlement.

Though there was no dispute in *Mobil Oil* regarding an objecting party's procedural rights, several courts have considered this question in affirming the *Mobil Oil* holding and rationale. In *A.G. of the State of New Mexico v. New Mexico Public Service Commission*, the Supreme Court of New Mexico reviewed the settlement of a rate proceeding related to the Public Service Company of New Mexico's investment in a nuclear generating facility, which was approved by the New Mexico Public Service Commission over the objection of an intervening party. *New Mexico Public Service Commission*, 808 P.2d at 607. The New Mexico Supreme Court both affirmed the central holding of *Mobil Oil*, and addressed the underlying procedural issues in stating the following:

By the holding in *Mobil Oil*, the PSC can adopt a contested stipulation by, first, affording any non-stipulating party an opportunity to be heard on the merits of the stipulation (i.e., whether it is a fair and reasonable resolution of the controversy before the Commission) and second, making an independent finding, supported by substantial evidence in the record, that the stipulation does indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.

Id. at 610. Applying this standard, the New Mexico Supreme Court affirmed the Public Service Commission's approval of the non-unanimous settlement. *Id.* The decision was based on the evidentiary record, including the objecting party's pre-filed testimony, which the Court noted would have been the same had the case not settled but rather proceeded to a hearing fully contested by all parties. In sum, the Court stated that the objecting party "received all the process to which he was due in advancing his case before the Commission and failed to win his case."

Similarly, the Indiana Public Service Commission addressed the "procedural obligations owed to objecting parties" in its review of a settlement of a rate proceeding brought by Indiana Public Service Company, Inc. *In re Public Service Company of Indiana, Inc.*, 72 P.U.R.4th at 685. The Commission rejected the intervenor's argument that an objection to the settlement proposal "automatically forces the Commission into an adjudicatory mold, which would place rigid procedural obligations upon the Commission's independent inquiry." *Id.* Rather, the Commission found, in order to build an adequate record to satisfy the rationale of Mobil Oil, "an agency should employ procedures appropriate to the issues raised." *Id.* at 686. To that end, the Indiana Public Service Commission conducted a hearing where witnesses were presented in support of the settlement, and all parties were afforded the opportunity to conduct cross-examination in order to address and create a record regarding the central issue: whether the settlement established just and reasonable rates. *Id.* at 686. The Commission

noted that “many of the issues raised by the objecting parties involved disagreement over matters of policy rather than conflict on basic facts,” – which appears to be very similar to the posture of the Black Hills Power case – and found that the witness testimony and cross-examination at the hearing, along with the written submissions and pre-filed testimony satisfied the parties’ procedural rights and created a record to support the Commission’s finding approving the settlement. *Id.* at 686-87.²

In light of the three residential intervenors and South Dakota Peace and Justices Center’s unwillingness to agree to the Settlement Stipulation, this Commission should proceed to a hearing on the Joint Motion for Approval of Settlement Stipulation, allowing Black Hills Power and Staff to present evidence in support of the Settlement Stipulation, and further allowing the objecting party the opportunity to present evidence opposing the merits of the Settlement Stipulation. At the conclusion of the hearing on the Settlement Stipulation, the Commission should either 1) approve and adopt the Settlement Stipulation by making an independent finding supported by substantial evidence on the record as a whole that the Settlement Stipulation establishes just and reasonable rates, giving due consideration to the criteria set forth in SDCL 49-34A-8 for determination of rates, or 2) reject the Settlement Stipulation, in which event the parties will

² See also, *Re Iowa Electric Light and Power Company*, 46 P.U.R. 130, 146 (Iowa S.C.C. 1982)(“We find that by scheduling a hearing and allowing cross-examination of witnesses explaining the terms of the settlement, [the objecting party] has been afforded an opportunity for a hearing.”)

proceed to hearing on Black Hills Power, Inc.'s Application for Authority to Increase its Electric Rates.

Conclusion

Based upon the foregoing analysis, Black Hills Power respectfully requests that the Commission proceed to hearing on this matter to determine whether the settlement between Black Hills Power and PUC Staff – which is the product of extensive and time-consuming review, investigation, and analysis, following tens-of-thousands of pages of written discovery – results in just and reasonable rates, and is supported by substantial evidence. Black Hills Power further requests that the three intervening residential customers and the South Dakota Peace and Justice Center be afforded the opportunity to cross-examine witnesses presented in support of the settlement, and present evidence in opposition to the settlement.

Dated this 25th day of May, 2010.

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