

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

Docket No. EL11-007

In the Matter of the Petition for Declaratory
Ruling of Black Hills Power, Inc.,
Regarding the Proposed Black Hills Power
Wind Project

Motion to Dismiss

I. INTRODUCTION

The Staff for the South Dakota Public Utilities Commission (Commission) submits this motion pursuant to SDCL 15-6-12(b)(1) and 15-6-12(b)(5) asking the Commission to dismiss the petition for declaratory ruling filed by Black Hills Power, Inc. (BHP or Company) in the above-captioned matter. The basis for Staff's motion is: 1) BHP has failed to state a claim on which relief may be granted, and 2) the Commission lacks proper subject matter jurisdiction.

II. BACKGROUND

On April 28, 2011, BHP filed a petition with the Commission regarding its proposed plans to construct a twenty (20) MW wind energy project north of Belle Fourche, South Dakota, in Butte County (Project). BHP proposed construction of the Project in an effort to comply with the 2008 legislation regarding South Dakota's renewable energy objective. The renewable energy objective is contained in Chapter 49-34A, Sections 101 through 104 of South Dakota Codified Law (SDCL).

In its petition, BHP states it made an evaluation of the Project and determined the use of renewable energy is reasonable and cost effective considering other electricity alternatives. The Company further determined this resource addition will be an appropriate alternative to meet its resource or customer needs (BHP's petition at pg. 2, part 2).

BHP now asks the Commission to validate its findings through a declaratory ruling. Specifically, the Company asks the Commission to determine whether it properly evaluated and determined under SDCL 49-34A-101 through 104, that the Project is: i) reasonable and cost

effective considering other electricity alternatives; and ii) an appropriate resource addition to meet BHP's resource or customer needs.

III. ARGUMENT

Staff recommends the Commission dismiss BHP's request for declaratory ruling, on the basis that:

- 1) BHP failed to state a claim on which relief can be granted. The applicable statutes do not permit the Commission to perform the examination BHP requests.
- 2) The Commission lacks proper subject matter jurisdiction to provide BHP with the declaratory ruling it seeks. The South Dakota Legislature has not extended Commission ratemaking authority with respect to procedure and scope.

A. Failure to State a Claim on which Relief may be Granted

As stated above, BHP asks the Commission to confirm it properly evaluated and determined the Project is: i) reasonable and cost effective considering other electricity alternatives; and ii) an appropriate resource addition to meet BHP's resource or customer needs. The language in (i) and (ii) of BHP's request is found in SDCL 49-34A-104, which reads:

Before using new renewable, recycled, and conserved energy after July 1, 2008, to meet the objective, the retail provider or the provider's generation supplier shall make an evaluation to determine if the use of new renewable, recycled, and conserved energy is reasonable and cost effective considering other electricity alternatives. After making such an evaluation and considering the state renewable, recycled, and conserved energy objective, the retail provider or the provider's generation supplier may use the electricity alternative that best meets the provider's resource or customer needs. (emphasis added).

This statute requires an evaluation be performed prior to using a new renewable energy resource to meet the state renewable objective. It specifically identifies the retail provider or the provider's generation supplier as the party to perform this evaluation and render a determination. This statute does not provide the Commission with authority to perform this function.

Staff notes the general hesitation to dismiss a filing for failure to state a claim. A pleading need only allege facts, which, when taken as true, raise more than a speculative right to relief. But where the allegations show on the face of a pleading, there is some insuperable bar to relief, dismissal for failure to state a claim is appropriate.” *See, Sisney v. State*, 754 N.W.2d 639, 643 (S.D.,2008).

Staff argues such a bar to relief exists in this case. In order to provide a declaratory ruling on BHP’s petition, the Commission must assume a function specifically assigned to another entity under statute. Any ruling of the Commission would substitute the determination made by the Company pursuant to its duty to perform the evaluation. Consequently, the statutory requirements would be defeated.

As an administrative agency, the Commission’s adjudicatory jurisdiction is conferred upon it by statute. *See generally, O’Toole v. Board of Trustees of South Dakota Retirement System*, 648 N.W.2d 342, 346 (S.D.,2002). The Legislature did not make the Commission a substitute decision-maker under SDCL 49-34A-104 and it can only be assumed this exclusion was intentional. Whatever facts may exist, the clear language of the controlling statutes do not provide the Commission with authority to perform the function necessary to grant BHP with the requested relief .

B. Lack of Subject Matter Jurisdiction

Staff does not allege the Commission is without authority to determine whether the investment of a regulated utility is reasonable and cost effective. To the contrary, Staff asserts Commission authority to conduct regulatory review is inclusive of the determination made under SDCL 49-34A-104. However, this function is performed through a rate proceeding and this authority is distinguished from that contained in SDCL 49-34A-104 by process and timing.

“In administrative law the term jurisdiction has three aspects: (1) personal jurisdiction, referring to the agency's authority over the parties and intervenors involved in the proceedings; (2) subject matter jurisdiction, referring to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs; and (3) the agency's scope of

authority under statute.” *O’Toole v. Board of Trustees*, 648 N.W.2d 342, 345 (S.D.,2002) (citing, 2 AmJur 2d *Administrative Law* § 274 (1994) (internal citations omitted).

The Commission holds broad inherent authority in matters involving utilities in this state. *Matter of Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D.,1992). Nevertheless, as an administrative agency, the Commission must lend credence to the guidelines established by the Legislature and operate under the framework for regulatory review set by statute. *See, Northwestern Public Serv. Co.*, 1997 SD 35, ¶ 29.

Commission jurisdiction in this area is set forth under, *inter alia*: SDCL 49-34A-4(1), 49-34A-6, 49-34A-8, 49-34A-8.4¹, 49-34-21². These statutes frame Commission authority in the context of reviewing rates for utility service. BHP has not made a request to change rates resulting from the Project as it has not yet been constructed or used to provide service. Although the evaluations performed by the Commission and BHP may encompass many similar elements, Commission authority is limited in subject matter to rate reviews.

BHP may distinguish its request for declaratory ruling from a consideration of rates. However, Staff argues a determination whether the Project is an appropriate addition to meet BHP’s resource or customer needs, cannot be performed without considering how it will affect consumers. To properly evaluate BHP’s request, the Commission would perform the same function it does in regular rate proceeding. Absent a consideration of the Project’s resulting rate implications, this matter is outside Commission jurisdiction. A utility does not obtain approval from this Commission for investments not recovered in rates. The rate implication, therefore, of an investment is the key element to Commission jurisdiction.

The scope of Commission authority is also limited by timing. The evaluation under SDCL 49-34A-104 is performed prior to a generation resource being placed in use. Commission authority to review investments occurs only after a unit is placed in service and a request is made to include the costs in rates. A declaratory ruling on BHP’s petition would effectively expand Commission authority to create a type of prior-approval mechanism. Conceivably, a utility could

¹ Although SDCL49-34A-8.4 does not specifically designate the Commission’s authority to determine the criteria listed in the provision, the statute speaks of a burden of proof on the public utility to establish certain criteria. SDCL49-34A-101 through 104 provide no such statement.

² Staff position that the Commission holds authority to determine whether a new renewable generation source is “reasonable and cost effective considering other electric alternatives” is based on Staff’s interpretation of Commission authority contained in SDCL49-34A-8.4.

request a declaratory ruling on any investment conforming to the state renewable energy objective. To perform this function outside the context of a rate proceeding is inconsistent with the regulatory framework established by the Legislature.

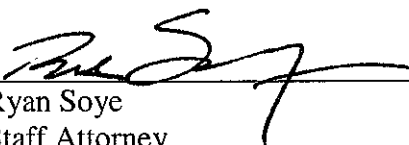
Finally, when the Commission is asked to review the costs for new generation, a utility must comply with certain requirements. Extensive filing and procedural rules are set forth under Chapter 49-34A of the SDCL and Chapter 20:10:13 of the Administrative Rules of South Dakota. These rules were created to ensure the Commission was provided necessary time and information to make an informed decision on such matters. BHP's petition does not adhere to these rules and a declaratory ruling is not a proper substitute to make such a determination.

IV. CONCLUSION

Staff recognizes the policy considerations created by the state renewable energy objective. However, if new processes must be created to accommodate changing policy considerations, such is the responsibility of the Legislature. As the regulatory framework currently exists, the PUC is limited in its authority set by the Legislature and cannot provide the relief requested by BHP its petition for declaratory ruling. Staff recommends the Commission dismiss this petition for the reasons stated above.

Dated this 18th day of May, 2011.

By:



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