BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition for a Declaratory Ruling Determining if South Dakota Law Would Allow Petitioner to Develop and Own its Own Renewable Energy Generation System	**EL 18-061** **ARGUMENT**

COMES NOW, the South Dakota Electric Utility Companies (SDEUC), by and through its attorney, Brett Koenecke of May, Adam, Gerdes & Thompson, LLP, of Pierre, South Dakota, and submits this brief argument in writing for purposes of appearing at the Commission Meeting on February 1, 2019.

Statutes Referenced

49-34A-1. Definition of terms. Terms used in this chapter mean:

(6) "Electric service," electric service furnished to a customer for ultimate consumption, but not including wholesale electric service furnished by an electric utility to another electric utility for resale;

(7) "Electric utility," any person operating, maintaining, or controlling in this state, equipment or facilities for providing electric service to or for the public including facilities owned by a municipality;

49-34A-42. Electric utility's exclusive rights in assigned service area--Connecting facilities in another area. Each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area. No electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless such other electric utility consents thereto in writing and the agreement is approved by the commission consistent with § 49-34A-55. However, any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

The commission shall have the jurisdiction to enforce the assigned service areas established by §§ 49-34A-42 to 49-34A-44, inclusive, and 49-34A-48 to 49-34A-59, inclusive.

Argument

Randall Community Water District (RCWD) has submitted a Petition for a Declaratory Ruling, purportedly on the topic of self generation of electricity. The Petition is devoid of facts;

no affidavit signed and sworn by anyone was submitted to create a factual record. All we have to go on are the scant representations of counsel, which were briefly supplanted in a letter. It appears that the Commission would be acting well within its bounds to require a more definite statement of facts from the Petitioner in order to proceed. It's asking much of the Commission to decide a question without offering a full set of facts on which to make a determination. The weight of the Commission's decision will no doubt be affected as a result.

Furthermore, the exact question offered and argued by the Petitioner is somewhat unclear. The question which the Petitioner offers on page 1 in the first paragraph is not the same as the question finally offered at subsection 3 on page 2. The question offered on page 1, "Would South Dakota law preclude RCWD from developing and owning its own renewable energy generation system?" is dramatically different from that asked on page 3 "Under the facts and circumstances laid out above, would the development entity be subject to the provisions of SDCL § 49-34A-42 or not?"

With respect to the first question, it is the position of the SDEUC that state law does not preclude Petitioner from generating its own electricity using its own renewable energy generation system as long as Petitioner:

a. owns its system in total (Under the definitions in code, no one other than the incumbent electric utility could be supplying electricity to Petitioner at retail);

b. does not sell electricity to another party for use by that party (offer electricity to other parties at retail); and

c. comports with all other applicable South Dakota law on the topic such as zoning, taxation, employee safety, etc.

Whether the development entity is subject to the provisions of SDCL § 49-34A-42 is perhaps not a question properly before the Commission. It would seem that the development entity would have standing to ask its question rather than have it asked by another, as it has been. Be that as it may, it appears that a threshold question is whether such an actor would be an "electric utility" under 49-34A-1(7) and then, if so, whether it would be rendering electric service at retail as contemplated in 49-34A-42.

To be an Electric Utility, one must be a person "operating, maintaining or controlling, in this state, equipment or facilities for providing electric service to or for the public..." Without seeing the agreement between the parties, it's not possible to know whether the Development Entity is "operating, maintaining or controlling." It seems quite possible based on the language in the letter that such is in fact occurring or intended to occur.

Secondarily, an Electric Utility must provide "electric service (defined as furnished to a customer for ultimate consumption) to or for the public." While perhaps more capable of being understood without further facts or access to the agreements, at least some doubt is left as to the offering made by the development entity and the limits upon that offering.

Finally, SDEUC offers that it is important for the Commission to act precisely and narrowly in responding to the declaratory ruling petition. While the ultimate ruling on the questions expressed is for the courts to determine, those courts and the parties will be aided by a narrowly constructed opinion based on facts squarely before the Commission. The Commission should avoid assuming or supplying facts which haven't been supplied by the Petitioner and seek to answer the question, if it can, as narrowly as possible.

For example, stating that "South Dakota law does not preclude RCWD from so acting", is a different statement from "South Dakota law permits RCWD to so act." There is no affirmative

statement in state law to the knowledge of SDEUC that "permits" such an action. It is simply "not prohibited." There is a difference, and we ask that the Commission seek the necessary facts, consult the definitions in code and then act narrowly and precisely in answering the question.

Dated this 30 day of January, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 30 day of January, 2019, he electronically filed and served a true and correct copy of the foregoing in the above-captioned action to the following at their last known address, to-wit:

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