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

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| **IN THE MATTER OF THE COMPLAINT OF ENERGY OF UTAH LLC, AND FALL RIVER SOLAR, LLC AGAINST BLACK HILLS POWER INC. DBA BLACK HILLS ENERGY FOR DETERMINATION OF AVOIDED COSTS** | ) ) ) ) ) ) | **Docket No. EL 18-038**<br><br>**BLACK HILLS POWER'S BRIEF IN RESPONSE TO FALL RIVER'S MOTION FOR ORDER COMPELLING RESPONSES TO DISCOVERY REQUESTS** |

## Introduction

Black Hills Power Inc., d/b/a/ Black Hills Energy ("BHE"), respectfully submits this brief in response to the Motion to Compel filed by Energy of Utah, LLC and Fall River Solar, LLC ("Fall River') (collectively referred to as the "Parties"). For the reasons set forth in detail herein, BHE respectfully requests that Fall River's Motion to Compel be denied.

## Procedural and Factual Background

This case has been pending since Fall River filed a Complaint for Determination of Avoided Costs on September 14, 2018. BHE timely filed its Answer on October 4, 2018. After filing its Complaint, Fall River undertook no substantive action on its Petition until it was required to file testimony under the Commission's Procedural Schedule.[1] Fall River's initial pre-filed testimony was filed on March 22, 2019. Fall River did not serve initial discovery requests on BHE until March 26, 2019 – six months after filing its Compliant. BHE served answers and objections on April 23, 2019. After receipt of BHE's responses, Fall River waited over a month, or until May 30, 2019, to file the current motion to compel.

[1] Fall River originally objected to providing pre-filed testimony in this matter. *See* Fall River's Response to Staff's Scheduling Motion (January 3, 2019) and Commission Order Directing Parties to Develop Procedural Schedule (January 9, 2019).

In its brief, Fall River provides a very general description of its discovery requests, noting that its discovery was "divided into six categories." In actuality, Fall River's requests were divided into ten categories.[2] To fully and appropriately evaluate the propriety and reasonableness of BHE's objections, it is important to understand that Fall River's ten categories of discovery resulted in a total of one hundred and forty-one (141) discovery requests. By way of comparison, BHE served twenty-seven (27) data requests in its initial discovery to Fall River. Staff recently served its initial set of data requests to BHE which involves seventeen (17) requests. Though Fall River asserts that BHE, objected to "virtually all of the interrogatories," it fails to mention that in at least sixty-four (64) instances, BHE either answered Fall River's discovery request without objection, or provided an answer subject to objections. Answering discovery, subject to objections is a common practice to (1) provide clarity and transparency on the scope of the answer provided or (2) to avoid any argument that privilege, or other objections are waived by the failure to object or the existence of an answer.

Perhaps the most interesting observation to be made with regard to Fall River's discovery requests is that, despite the fact Fall River's initial set of discovery included one hundred and forty-one (141) discovery requests, there is not a single interrogatory or request which inquires as to the method used to calculate the avoided costs provided to Fall River or as to why BHE used that method. Similarly, there is not a single request as to the model inputs, outputs or results. This fact taken together with the sheer volume and frequent redundancy within Fall

[2] In its brief, Fall River characterizes all of its SD Sun I requests, all SD Sun II requests and all SD Sun III requests as three categories. However, in the actual requests there were 15 requests dedicated to SD Sun I Avoided Costs, 10 requests dedicated to the SD Sun I PPA (which was executed by Mr. Vrba); 19 requests dedicated to SD Sun II Avoided Costs, 14 requests dedicated to the SD Sun II PPA; 25 requests dedicated to "SD Sun III" and 13 requests dedicated to the existence or non-existence of a SD Sun III PPA. In large part, these requests are redundant seeking modeling and method information for the avoided cost price set in the PPA, and also other undefined "final avoided costs" *See e.g.* Exhibit A, to the Affidavit of William Taylor ("hereinafter Fall River Exhibit A").

River's requests led BHE to validly raise objections that Fall River's discovery requests were overbroad on their face, unduly cumulative and overly burdensome given the scope of issues before the Commission.

Fall River's brief similarly omits reference to the fact that BHE proposed a compromise solution to resolve this discovery dispute, which compromise solution could have avoided the need to seek intervention of the Commission. Specifically, though BHE remained of the opinion that its objections to Fall River's inquiries regarding SD Sun I and SD Sun II were valid and well-founded, BHE offered to provide responses to the discovery on SD Sun I and SD Sun II (the two projects that culminated in PPAs), if Petitioner would withdraw the remaining requests subject to dispute (primarily involving acquisition SD Sun and theoretical construction of SD Sun). This compromise approach would have had the practical effect of answering many, if not all, of the currently unanswered discovery requests located between Petitioner's discovery requests 5 through 62 and address the arguments contained in page 5-6 of Fall River's brief. Fall River rejected that offer and did so, at least in part, because Mr. Vrba already had much of that information sought in discovery.[3]

Fall River correctly indicates that in 2015 and 2016, Mr. Vrba and BHE were involved in extensive negotiations and discussion following a request for avoided costs made by Mr. Vrba in relation to a 20 MW solar project, commonly referred to by the Parties, as SD Sun I. The negotiations culminated in a Power Purchase Agreement, executed by Mr. Vrba with a price agreed to by Mr. Vrba, on behalf of SD Sun and its parent company, Energy of Utah. Similarly, in mid-2016, Mr. Vrba (again acting on behalf of Energy of Utah and SD Sun) requested and

[3] *See* Exhibit A to Black Hills Power's Brief in Response to Fall River's Motion for Order Compelling Responses to Discovery Requests.

received avoided cost pricing on behalf of an additional 20 MW phase of the project ("SD Sun II"). Thereafter, an additional course of negotiations ensued, however, before a PPA was executed Mr. Vrba sold his interest to 174 Power Global.

In July of 2017, BHE received a request for avoided cost pricing for a third 12 MW phase of solar development ("SD Sun III") from neither Fall River, nor Mr. Vrba, but from a third-party. As noted in BHE's discovery responses, some avoided cost modeling was accomplished, but no final avoided cost price was memorialized in a PPA.

Then in March of 2018, BHE purchased all of the equity interests in the SD Sun I, II and III projects from 174 Power Global. Not surprisingly, the purchase and sale agreement includes a confidentiality provision. However, the fact and the nature of the acquisition was disclosed to the Commission in June of 2018, as part of BHE's 2018-2027 biennial Ten Year Energy plan. There BHE noted "it had purchased *development rights for up to 52 MWs* of dispersed power producing resource (i.e. solar)." BHE further explained that development was in its early stages.[4]

A month before the purchase and sale agreement was executed (February of 2018), Mr. Vrba, this time acting on behalf of Energy of Utah and Fall River, solicited avoided cost pricing for a new and much larger 80 MW solar project.[5] This request post-dated the original SD Sun PPA by nearly two years and posted-dated the SD Sun II PPA by nearly a year. The request also post-dated the Commission's decision in *In the Matter of the Complaint by Consolidated Edison Development, Inc. against Northwestern Corporation, dba, Northwestern Energy For Establishing a Purchase Power Agreement*, Docket No. EL16-021 (December 20, 2017)

[4] *See* Fall River Exhibit A, BHE's Response to Fall River Discovery Request No. 119.

[5] The project, contrary to Fall River's assertions, is not in BHE's exclusive territory.

("*Consolidated Edison*"). From the outset, Fall River disputed BHE's determination of avoided costs, took issue with the validity of the *Consolidated Edison* decision, and urged Fall River should receive the same price SD Sun I received two years earlier.[6]

BHE admits that the avoided cost calculated in this new request (whether provided in April 2018, August 2018, or more recently in March 2019) is indeed lower. This fact is plainly addressed and explained in BHE's testimony.[7] BHE also admits that it re-calculated its avoided cost in August 2018 due to a reduction of the amount of solar resource potentially available from SD Sun, which was precipitated by a change in company planning. This fact was explained to Fall River when the August 2018 pricing was provided. At the same time, BHE explained that it was updating purchased power and natural gas forecasts due to the release of a new reference case. Finally, in March of 2019, BHE notified Fall River that it planned to update is avoided costs, as it had determined it would not be building SD Sun at that time. Both the August 2018 and March 2019 modeling effectively acted to raise the proposed avoided cost and, thus acted in Fall River's favor. As such, Fall River's assertion that additional discovery is necessary to determine if these adjustments were potentially the result of bad faith or malevolent intent are simply untenable.

## Argument and Analysis

BHE agrees that the scope of discovery is generally broad. It is not, however, without limit. South Dakota law defines relevant evidence, as "evidence having any tendency to make

[6] *See* Direct Testimony of Ros Vrba, Exhibits D, E, and F.

[7] *See* Direct Testimony of Kyle D. White at page 26 (explaining that "two factors at play in this matter include changes in price forecasts for key inputs (including natural gas and purchased power) and changes driven by inclusion of the Long-2 zero dollar cost consideration in light of the decision in *Consolidated Edison*.")

the existence of *any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." *See* SDCL §19-21-1(emphasis added). Stated similarly, at a minimum, the information sought must be "*reasonably calculated* to lead to the discovery of admissible evidence." See SDCL 15-6-26(b) (emphasis added). Importantly, a portion of SDCL 15-6-26(b) omitted by Fall River in its quotation of the statue (by inclusion of ellipses) mandates a conclusion that discovery is necessarily and integrally tied to the matters at issue in the proceeding. *See* SDCL 15-6-26(b)(1)("Parties may obtain discovery regarding any manner, not privileged, which is relevant to the subject matter involved in the pending action, *whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party*[.]")

In light of the foregoing, when reviewing the issues presented by Fall River's briefing, the Commission should do so mindful of the limited issue to be resolved in this litigation: Does the methodology utilized by BHE, and thus the avoided cost produced, accurately represent the utility's avoided cost, while comporting with the Commission's guidance in this area? Stated similarly, in adjudicating Fall River's motion, the Commission should inquire whether the requests propounded are reasonably calculated to assist its determination of whether BHE's methodology provides a result consistent with its avoided cost and with Commission precedent. BHE respectfully submits that the discovery Fall River has sought to compel does not meet this fundamental test.

In addition, though heavily relying on the broad scope of the discovery statutes, Fall River fails to appreciate that there are indeed limitations on discovery that are plainly recognized within those same statutes. Specifically, a court [here the Commission] may limit the "frequency or extent" of discovery if "(i) the discovery sought is unreasonably cumulative or duplicative, or

is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; (iii) or discovery is unduly burdensome or expensive, taking into account the needs of the case[.]" Fall River's one hundred forty-one (141) discovery requests (96 of which are on SD Sun I, II and III) are unreasonably voluminous, cumulative, and duplicative. This is perhaps best demonstrated by the fact that Fall River has not even addressed the requests on an individual basis in its motion.

**SD Sun I, II and III**

With specific regard to the avoided cost calculations for SD Sun I and SD Sun II, BHE would urge that avoided costs calculated before the Commission's recent decision in *Consolidated Edison* and which resulted from extensive discussions and negotiations surrounding the manner of modeling, the outputs of modeling and the terms of the Power Purchase Agreements (one of which was between BHE and Mr. Vrba as representative of SD Sun and the second of which was between BHE and an uninvolved third party) are not *reasonably calculated* to lead to admissible evidence on the key issue before the Commission. Does the methodology utilized by BHE and derived avoided cost accurately represent the utility's avoided cost in this case and comport with this Commission's more recent guidance on the calculation of avoided costs?

Though Fall River asserts that its Requests No. 5-100 are "rifle shot specific"[8] BHE respectfully submits that these ninety-six (96) requests are more akin to a "shotgun approach", than to "rifle- shot specific" discovery.[9] Moreover, contrary to the arguments now raised in Fall

[8] *See* Brief in Support of Fall River Solar's Motion to Compel Discovery at 5.

[9] *See* Brief in Support of Fall River Solar's Motion to Compel Discovery at 5.

River's briefing, questions 5-100 most certainly exceed a mere attempt to obtain the "data and calculations underlying BHE's avoided costs for [these projects]." This is perhaps best evidenced by the fact that there are fifty-eight (58) requests dedicated to the SD Sun I and SD Sun II projects alone and thirty-eight (38) requests involving SD Sun III. If Fall River's goal was to merely obtain the "data and calculations underlying BHE's avoided costs for [these projects]," it seems like that could be accomplished with fewer than ninety-six (96) requests on South Dakota Sun I, II and III. Indeed, this could seemingly be accomplished in a few carefully-drafted requests.

In reality, taken together, Fall River's fifty-eight (58) requests relating to SD Sun I and SD Sun II and Mr. Vrba's previously submitted testimony appear to display an intent or desire to use this proceeding as a forum to litigate the negotiations that led up to the agreed and compromised final PPAs in SD Sun I and II, rather than appropriately focus on the methodology utilized in this case or the accuracy of BHE's determination of avoided costs provided in response to Fall River's Spring 2018 solicitation.[10] For this reason, BHE appropriately objected that, "taken together with the totality of Requests 5-126," Petitioner's requests are overly broad and burdensome and exceeded the permissible scope of discovery." Rather than being "specious" as urged by Petitioner, BHE respectfully submits that its objections are well founded, reasonable, and consistent with the overarching concept that discovery be "reasonably calculated" to lead to admissible evidence. *See* SDCL 15-6-26(b)(A)("[T]he frequency or extent of use of the discovery methods set forth in §15-6-26(a) shall be limited by the court if it determines that: (A)(i) the discovery sought is unduly cumulative or duplicative … or discovery is unduly burdensome or expensive, taking into account the needs of the case[.]")

[10] *See* Direct Testimony of Ros Vrba at 6-7.

With final regard to Fall River's SD I and SD II Avoided Cost and SD Sun I and II PPA discovery requests, it is important to understand that BHE proposed a compromise solution wherein information relating to the data and calculations underlying BHE's avoided cost determination for SD Sun I and SD Sun II would be provided, if Fall River would withdraw the remaining requests subject to dispute (acquisition of SD Sun and theoretical construction of SD Sun).[11] This approach would have the practical effect of answering many, if not all, of the currently unanswered discovery requests encompassed within Fall River's Requests 5 through 62. Fall River rejected BHE's offer, at least in part, because Mr. Vrba already had much of that information encompassed within that group of requests.[12] For this reason alone, BHE would urge that it is within the Commission's discretion to deny Fall River's motion to compel additional responses on SD Sun I and II. *See* SDCL 15-626(1)(b)(A) (emphasizing that the extent of discovery can be limited by the court if the discovery is obtainable from some other source that is more convenient, or less burdensome). *See also Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (SD 1989)(denying duplicative discovery when Plaintiff was already in possession of information from another source). BHE would also respectfully urge that Fall River's arguments, characterizations of BHE's actions, and Fall River's request for assessment of costs be viewed in light of the foregoing.

Though Fall River does not distinguish between its requests for SD Sun I, SD Sun II and SD Sun III discovery, there are material differences with regard to both the baseline relevancy of Fall River's discovery requests and also with regard to the completeness of BHE's previously

[11] *See* Exhibit A attached hereto.

[12] *See id.* Indeed, Mr. Vrba not only received this information during the discussions and negotiations of SD Sun I and SD Sun II but had retained experts analyzing the information during those discussions and negotiations.

provided responses. With regard to the requests of SD Sun III, it is important to understand that no PPA was ever reached on SD Sun III; and thus no "final avoided cost price" was ever determined or set. For this reason, BHE would assert that its objections that this information sought in relation to this project is not reasonably calculated to lead to admissible evidence is well founded, justified and should be upheld.

Finally, it is important to understand that, because no SD Sun III PPA was ever reached, BHE's responses to Fall River Requests 88-100 are complete. Because Fall River has only referenced the "SD Sun I, SD Sun II, and SD Sun III" discovery requests (Requests 5-100) in a broad fashion, it is uncertain whether Fall River seeks an order compelling answers to Interrogatories 88-100. To the extent, Fall River moves to compel answers to Interrogatories and Requests 88-100, the motion is without basis, as BHE's answers are complete and appropriate as previously provided.

**Acquisition of South Dakota Sun I, II, and III (Requests 101-114) and Construction of SD I, II and III (Requests 120-126)**

Fall River propounded a series of fourteen (14) questions relating to BHE's acquisition SD Sun and the associated project development rights. In an effort to respond in good faith, and keeping in mind the broad scope of discovery, BHE provided answers to basic questions about the acquisition and its timing. Specifically, BHE's provided answers to the following questions: did an acquisition the acquisition occur; when did the acquisition occur; who was the counter-party; and what was acquired.[13]

Fall River's motion to compel, seeks much broader discovery. For instance, Fall River seeks information relating to the acquisition price, seeks a copy of the purchase and sale agreement

[13] *See* Fall River Ex A, Response to Interrogatories 101, 102, 103 and 104.

itself, inquires as to the reason behind the acquisition, and demands access to any analysis or modeling that was done in advance of the acquisition.[14] These discovery requests do not have a "tendency to make the existence of any fact that is of consequence to determination of the action more or less probable."

The SD Sun acquisition occurred on March 19, 2018. *See* Fall River Exhibit A at Response to Request No. 102. As such, the acquisition and its associated legal obligations arose well-before any alleged "breakdown in negotiations" or attachment of a legally enforceable obligation ("LEO") in this case. *See* Fall River's Complaint at ¶26.[15] Because avoided costs are legally defined as "the incremental costs to the electric utility of electric energy or capacity or both which, *but for the purchase from the qualifying facilities, such utility would generate itself or purchase from another source*," acquisition costs that were "sunk" well-before any plausible LEO date cannot, by definition, be considered costs that "could have been avoided" by Fall River's proposed project.[16] As Fall River finally concedes on Page 6 of its brief, the only subject for determination by the Commission is "whether BHE has correctly calculated an avoided cost rate for the Fall River project." Because the acquisition costs cannot be a component of avoided cost, those costs and the terms and conditions of the acquisition itself (represented in the purchase and sale agreement) do not meet the baseline test of making "the

[14] *See* Fall River Ex A Responses to Interrogatories and Requests 105-114.

[15] BHE has not agreed that a legally enforceable obligation was triggered on August 14, 2018, as alleged in Fall River's Complaint, however, that is the earliest a legally enforceable obligation has even been alleged to exist. Additional discussions and updated avoided cost pricing was provided on August 29, 2018, Fall River did not reject that price until September 6, 2018. *See* Complaint at ¶¶24-25. Finally, Fall River did not file its Complaint in this matter until September 14, 2018.

[16] 18 C.F.R. §292.101(b)(6).

existence of *any fact that is of consequence to the determination of the action more probable or less probable* than it would be without the evidence." *See* SDCL §19-21-1.[17]

Fall River urges the Commission that, despite the foregoing, the acquisitions costs and the terms and conditions of the purchase agreement are discoverable, because Mr. Vrba and his retained expert say they should be.[18] While the test for discovery is broad, the baseline consideration is not whether the opposing party is interested in the information, wants access to the information or can find a witness to say it is relevant, it is whether the discovery is reasonably calculated to lead to admissible evidence given the matters at issue in the litigation. *See* SDCL 15-6-26(b). Mr. Vrba's and Mr. Klein's assertions of discoverability are based on their assertions that the Commission should abandon its decisions in *Consolidated Edison* and *In the Matter of the Complaint by Oak Tree Energy, LLC Against Northwestern Energy for Refusing to Enter into a Purchase Power Agreement,* Docket No. EL11-006 (May 17, 2013) and use a "renewable proxy" to determine the avoided capacity value, whether or not capacity is actually needed by the utility. Because this methodology has not been endorsed by the Commission for determining avoided capacity costs, requests for acquisition costs cannot be justified on this basis. This same analysis applies to Fall River's generalized discussion relating

[17] Beyond the fact that these requests simply do not meet the basic test of relevance, the requests, by their very nature seek information which is subject to outside confidentiality obligations with a third party. The acquisition price as well as the terms and conditions of the agreement are encompassed within the definition of "Confidential Information" included in the purchase and sale agreement. Fall River faults BHE for including this objection, however ARSD 20:10:01:39, and its accompanying reference to SDCL 15-6-26(c)(7) makes clear that this is the exactly the type of information subject to protection. BHE raised this objection to preserve the right to seek confidential treatment in the event the Commission determined that it would allow the discovery. BHE would urge that the danger of production realistic as both Mr. Vrba and his expert are actively engaged in the same renewable energy development business as the counter-party to the acquisition.

[18] *See* Brief in Support of Fall River's Motion to Compel Discovery at 7.

"SD Sun Construction Costs," and specifically with regard to Interrogatory/Request 122, 124 and 125, which are the only un-answered requests in that series.[19] BHE's objection to producing estimates of construction costs and analysis on revenue requirements is further supported by the fact that BHE has notified Fall River that the project is not being constructed at this time.

Finally, in addition to objecting to production of the acquisition price and the purchase and sale agreement, BHE objected to Request 106 which inquired as to "why" BHE acquired the SD Sun projects and seven additional questions (108-114) all, which in one way or another, seek disclosure of financial analysis accomplished prior to the acquisition. With regard to Request 106, Fall River has not provided any explanation as to how this question "has any tendency to make a fact or claim at issue more or less probable than it would be without the evidence." Similarly, with regard to Requests 108-114, Fall River offers no explanation of how modeling related to the acquisition of "development rights" to a potential project could reasonably lead to admissible evidence as to the appropriate calculation avoided costs in this case. For these reasons and those previously stated, it is within the Commission's discretion to deny Fall River's motion to compel relating the acquisition of SD Sun and Requests 122, 124 and 125.

**Request for Attorney's Fees**

Fall River has asked the Commission to impose fees in this dispute, characterizing BHE's responses as "stonewalling." BHE respectfully disagrees with the characterization submits that Fall River's request for fees should be denied consistent with the discretion under SDCL 15-6-37(a)(4)(A). Indeed, as explained herein, BHE answered at least sixty-four (64) of Fall River's one hundred forty-one (141) Interrogatories and Requests for Production. This is nearly four (4)

[19] Notably, Fall River fails to acknowledge that the great majority of the requests contained in this sequence of requests were answered, albeit with objections preserved. *See* Fall River Exhibit A at page 28-29 (including responses to Interrogatory/Request 120, 121, 123, and 126.

times the number of discovery requests even served by Staff on BHE and twice the number of responses asked of Fall River. BHE remains of the opinion that, when viewed in their totality, Fall River's one hundred forty-one (141) interrogatories and requests were designed to be burdensome, were outside the scope of permissible discovery, were unnecessarily duplicative, or were so marginally related to the matters at issue in this proceeding, that a decision by the Commission was necessary and reasonable. Finally, BHE would ask that the Commission to consider the fact that it attempted to resolve this discovery dispute and that, Fall River's principal has conceded he is already in possession of much of the information sought when considering his request for imposition of fees.

**Conclusion**

For all of the reasons set forth in detail herein, BHE requests that Fall River's motion to compel and request for fees be denied. In the alternative, BHE asks that Fall River be ordered to limit its requests to discovery of information not already in its possession and, furthermore to revise and narrowly tailor its requests and interrogatories to reasonably address the matters at issue in this case.

Dated this 6th day of June, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of June, 2019, I served the foregoing Black Hills Power's Brief in Response Fall River's Motion for Order Compelling Responses to Discovery Requests to by email to the following:

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