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. | : | Docket No. EL18-038 |
| | : | BRIEF IN SUPPORT OF FALL RIVER SOLAR'S MOTION TO COMPEL DISCOVERY |

Fall River Solar, LLC has moved the Commission for an order compelling Black Hills Power, Inc. to fully and completely answer interrogatories and produce documents responsive to discovery requests served March 26, 2019.

Background

Fall River Solar is developing an 80-megawatt solar generating facility in Fall River County. Fall River's solar project is located in Black Hills Power, Inc.'s exclusive service territory. Ros Vrba, whose testimony is filed and of record, is the principal in Fall River. In February 2018, Mr. Vrba solicited an indication of avoided cost from Black Hills of behalf of Fall River. Black Hills responded, proposing an avoided cost of $17.06 per megawatt hour, levelized over twenty years, for energy and capacity produced by Fall River's generators.

In 2015, Mr. Vrba's company, SD Sun I, solicited an indication of avoided cost for a solar project also located in Fall River County, north of Hot Springs, about 30 miles from the present site. Although smaller in capacity, the proposed project was otherwise virtually identical to Fall River's project. Black Hills calculated its levelized avoided cost to be in the $44 range. SD Sun I and Black Hills entered into a Power Purchase Agreement in June of 2016 at $44.54, levelized over twenty years, for the energy and capacity produced by SD Sun I.

In mid-2016, Mr. Vrba proposed a second project immediately adjacent to SD Sun I, called SD Sun II. In late 2016, Black Hills determined its avoided cost rate for energy and capacity produced by the project was $41.44 per megawatt hour, levelized over twenty years.

Before completing a Power Purchase Agreement for SD Sun II, Mr. Vrba sold his interest in SD Sun I and II to 174 Power Global, a U.S. subsidiary of Hanwha Q-cell, one of the world's largest manufacturers of solar energy generating equipment. Although he is not privy to the exact price, Mr. Vrba understands that in the spring of 2017, 174 Power Global and Black Hills negotiated a Power Purchase Agreement in the $41 range for the energy and capacity produced by SD Sun II.

Later in 2017, 174 Power Global proposed expanding the SD Sun project by an additional 12 megawatts, for a total of 52 megawatts, called SD Sun III. Not long after avoided cost discussions were opened for SD Sun III, Black Hills made overtures to purchase the entire project from 174. As revealed in answers to the data requests that are subject to this motion, in March of 2018, Black Hills purchased the entire 52-megawatt project. Later in 2018, in its regulatory filings, Black Hills indicated that it intended to build the entire 52-megawatt project for commercial operation in 2019.

Scant months after Black Hills priced levelized avoided cost at more than $41 per megawatt hour for the SD Sun projects, in April 2018 Black Hills asserted $17.06 was now its avoided cost for a project nearly identical in nature and less than 30 miles away. Black Hills also asserted that it intended to construct all three SD Sun facilities within the next year, which affected its pricing for Fall River. In subsequent iterations of Fall River avoided costs, Black Hills withdrew bits and pieces of the SD Sun projects from its generation fleet, ultimately saying, in early March 2019, well after this case was underway, that it was withdrawing SD Sun generation altogether, and reporting a new avoided cost calculation.

The Law Regarding Discovery

Public Utilities Commission rules address discovery at ARSD 20:10:01:22.0, which provides

> A party may obtain discovery from another party without commission approval. The commission at its discretion, either upon its own motion or for good caused shown by a party to a proceeding, may issue an order to compel discovery. *The taking and use of discovery shall be in the same manner as in the circuit courts of this state*. (emphasis added).

Discovery in the circuit courts is governed by the Rules of Civil Procedure, specifically SDCL chap. 15-26. SDCL 15-6-26(b)(1) defines the scope of discovery. The statute provides

> Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action . . . it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery admissible evidence.

In *Kaarup v. St. Paul Fire Marine Insurance Company*, 436 N.W.2d 17 (SD 1989) the Supreme Court said the scope of pretrial discovery is broadly construed. The Court held "a broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issue; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." The Court referenced its prior cases and the seminole holding of the U.S. Supreme Court on discovery matters in *Hickman v. Taylor*, 329 U.S. 495 (1947). In *Kaarup* our Supreme Court said

> The deposition/discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of fishing expedition serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disclose whatever facts he has in his possession. The deposition/discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. . . . All relevant matters are discoverable unless privileged. This interpretation [of SDCL 15-6-26(b)(1)] implies a broad construction of "relevancy" at any discovery stage because one of

> the purposes of discovery is to examine information that may lead to admissible evidence at trial.

Our Supreme Court has rarely spoken about the scope of discovery since *Kaarup*, the reason being that *Kaarup* clearly and unqualifiedly defines the scope of discovery as broad and directs that "relevancy" be broadly construed in favor of discovery response. In *Sorenson v. Bar Harbor LLC,* 2015 SD 88, 871 N.W. 2d 851, ¶ 31, quoting *Schrader v. Tjarks,* 522 N.W.2d at 210 (S.D 1994), the Court recently said discovery rules are meant to promote, not stifle, the truth-finding process.

Discovery statutes and the case law mandate in favor of broad, wide ranging discovery and require full, fair and complete responses. SDCL 15-6-37(a) directs that the proper method of dealing with a party's refusal to make discovery as a motion for an order to compel. Hence this motion.

Fall River's Discovery Requests

Fall River prepared and submitted discovery requests to Black Hills on March 26, 2019. The requests were divided into six categories. The first category solicited information regarding Black Hills' calculation of avoided cost in the three SD Sun projects. The second area of inquiry addressed Black Hills' purchase of the SD Sun facilities from 174 Power Global. The third area addressed Black Hills' plans to construct the SD Sun projects and the costs associated therewith. The fourth area addressed Black Hills' agreements for the sale of excess energy and capacity when it is in the so-called "long situations." The fifth area of inquiry addressed Black Hills' method of rate forecasting. The final area addressed energy and capacity contracts entered into after Fall River's February 2018 request for an indication of avoided cost. In response, Black Hills objected to virtually all of the interrogatories, didn't answer concerning avoided cost

calculations for SD Sun I, II, and III and many of the other interrogatories and requests for production of documents. This motion to compel ensued.

Discovery Requests Regarding Avoided Cost Calculations

The majority of the discovery requests Fall River served on Black Hills asked questions about and sought copies of the data and calculations underlying Black Hills' avoided cost determination for the three SD Sun projects in an obvious effort to understand why Black Hills' avoided cost went from $44 to $17 in eighteen months. It's hard to imagine how that information could not be relevant to the avoided cost calculations that are the subject of this case.

The discovery requests pertaining to each of the three SD Sun projects are essentially identical. The requests are rifle-shot specific, tailored to obtain information regarding how avoided cost and the rates embodied in the Power Purchase Agreement relating to each project were calculated. The obvious purpose for obtaining the information is to learn and understand the methodology employed to determine avoided cost for the SD Sun projects and the rate employed in the power purchase agreements. Obviously, the information in Black Hills' responses will be analyzed to determine if Black Hills has changed its methodology or approach to calculating avoided cost in this case, and if the change is fair and reasonable. The information is clearly discoverable, as it is obviously relevant to determining whether Black Hills' avoided cost calculation in this case is consistent with what Black Hills claimed to be accurate calculations less than two years ago under remarkably similar circumstances.

Black Hills asserted the same objection to each discovery request, that the information requested ". . . is not reasonably calculated to lead to admissible evidence in this case and is overbroad on its face . . ." The objection ignores South Dakota's standard for discovery,

propounded in SDCL § 15-6-26(b)(1), allowing discovery of anything "relevant to the subject matter involved in the pending action."

The subject matter before the Commission in this case is whether Black Hills has correctly calculated an avoided cost rate for the Fall River project. Clearly, without question and almost beyond argument to contrary, information pertaining to how Black Hills calculated avoided cost over the preceding 24 months for three solar generating projects less than 30 miles away, two of which were developed by the same person who is developing the subject project, is relevant to the case before the Commission.

Black Hills' objections to questions 5 through 99, uniformly couched on the argument that the information ". . . is not reasonably calculated to lead to admissible evidence . . . ," are specious, improper and contrary to the discovery standard propounded by statute. Accordingly, the Commission should overrule the objections and compel immediate, full and complete answers and production of documents from Black Hills to the inquiries concerning SD Sun avoided cost calculations.

Discovery Requests Involving the Purchase of SD Sun I, II, and III

In March 2018, Black Hills purchased, using its words in response to DR 104, "all equity interests" in SD Sun I, II, and III, the three solar generating projects proposed for construction near Hot Springs, and originally developed by Mr. Vrba. 174 Power Global advanced the projects to construction ready, then sold them to Black Hills.[1] In its April 2018 response to iteration of Fall River's avoided cost inquiry, Black Hills claimed it intended to construct all three projects and factored them into its calculation. In its August 2018 avoided cost calculation,

[1] Our firm did local legal work for 174 Power Global on the SD Sun projects, ranging from closing section line roads to land title work, but we did not represent 174 in negotiations with or in the sale to Black Hills. We have not seen the agreement between Black Hills and 174 nor are we aware of its terms.

Black Hills changed direction and said it only intended to build SD Sun I, claiming to have adjusted avoided cost accordingly. Seven months later, in March 2019, Black Hills unilaterally announced it was changing direction again and that it would not be constructing SD Sun I and modified its adjusted cost again.

Fall River asks, in discovery request 105, for the purchase price Black Hills paid to acquire the project and, in 107, asked for a copy of the purchase agreement. Black Hills refused to answer 105 or produce the agreement, first asserting its usual objection that the question is not "reasonably calculated to lead to admissible evidence," and then that the sale agreement contains a confidentiality provision but making no provision for addressing the questions otherwise. Both Mr. Vrba and expert witness Mark Klein have explained in their pre-filed testimony that capital costs for the SD Sun projects are material to calculating capacity values for the projects. Mr. Klein explained that he used proxy information based on his experience and that his testimony would likely change once he had the actual capital and construction costs in hand. Clearly that information is relevant to the issues in the case and discoverable, given that Black Hills calculated avoided cost including the projects in its generation fleet. SDCL 15-5-26(c) makes provision for restricted access to protected or confidential information. In the same manner, ARSD 20:10:01:39 *et seq.* contain provisions allowing Black Hills to ask for confidentiality to be imposed on the information but puts the burden on Black Hills to make the request, not simply refuse to answer the discovery request. No case authority allows Black Hills to cloak a contract with confidentiality and then to prevent its discovery on the grounds it's confidential. Accordingly, Black Hills should be directed to either produce the information or seek a protective order and produce the information.

In discovery request 106, Fall River asked Black Hills why it acquired the SD Sun projects. Black Hills refused to answer, making its usual objection that the question is not "reasonably calculated to lead to admissible evidence." It is perfectly appropriate to ask why Black Hills bought the projects ... the answer could range from the need to satisfy renewable energy standards to a desire to own more renewable energy to having disastrously erred in calculating avoided cost, any one of which is relevant to the issues in this case. To simply stonewall and refuse to answer is inappropriate and contrary to the legal principle that discovery requests and statutory mandates are liberally construed in favor of discovery.

Fall River asked questions about Black Hills' performance of economic modeling in support of the SD Sun acquisition decision in discovery requests 108-114. Again, Black Hills asserted the information would not lead to admissible evidence. Commissioner Nelson, in the course of *Consolidated Edison Development* EL16-02, observed that the modeling used for avoided cost should be the same type of modeling the utility employs for rate forecasting and other business decisions that impact the utilities business operations. On that basis alone, 108 through 114 should have been answered, allowing Fall River to analyze which of Black Hills' modeling methods is appropriate for calculating avoided cost.

Discovery Requests involving SD Sun Construction Costs

In discovery request 122, Fall River asked for information relating to Black Hills' anticipated construction costs for the SD Sun projects. Again, Black Hills refused to answer, making the well-worn objection that the information would not lead to admissible evidence. The objection ignores the pre-filed testimony by expert Klein that capital costs, which includes the cost of construction, are material to evaluating the capacity component of avoided costs. Further, knowing to what extent Black Hills studied the cost of construction reflects on whether

Black Hills ever *really* intended to build the projects, or whether it was using the SD Sun projects as misdirection, which would be clear evidence of bad faith.

Discovery requests 124 and 125 ask for information on how the costs of construction of the SD Sun projects would affect Black Hills' revenue requirements. Again, Black Hills refused to answer, on the grounds that the information would not lead to admissible evidence. As expressed above knowing to what extent Black Hills studied the impact of constructing the SD Sun projects on its revenue requirements reflects on whether Black Hills ever *really* intended to build the projects, or whether it was using the SD Sun projects as misdirection, which again would be clear evidence of bad faith.

Conclusion

Black Hills chose to generally stonewall Fall River in response to its discovery requests. It objected to virtually every question, always on the grounds that the question or request for production didn't "lead to admissible evidence." The PUC regulations direct that the rules governing discovery in circuit court govern discovery before the Commission. Circuit Court discovery rules, per the statutes and the direction of the Supreme Court, are liberally construed in favor of free and open discovery. Discovery rules are meant to promote, not stifle, the truth finding process. Black Hills' objections and refusal to produce documents are nothing more than stonewalling, an effort to make this case as difficult as possible for Fall River and should be seen in that light.

Fall River prays the Commission so rule and grant its order compelling prompt, full, and fair responses and production of documents as requested herein.

Dated this 30th day of May 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of May 2019, I served the Brief in Support of Fall River Solar's Motion to Compel Discovery by email to the following:

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