

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

IN THE MATTER OF THE)	Docket No. EL 18-038
COMPLAINT OF ENERGY OF UTAH)	
LLC, AND FALL RIVER SOLAR, LLC)	BLACK HILLS POWER’S BRIEF IN
AGAINST BLACK HILLS POWER)	SUPPORT OF ITS MOTION TO QUASH
INC. DBA BLACK HILLS ENERGY)	PORTIONS OF ENERGY OF UTAH, LLC
FOR DETERMINATION OF)	AND FALL RIVER SOLAR LLC’S
AVOIDED COSTS)	NOTICE OF DEPOSITION PURSUANT TO
)	SDCL 15-6-30(b)(6) AND FOR A
)	PROTECTIVE ORDER

Introduction

Black Hills Power Inc., d/b/a/ Black Hills Energy (“BHE”), respectfully submits this Brief in Support of its Motion to Quash Portions of Energy of Utah, LLC’s and Fall River Solar, LLC’s (“Fall River’s”) Notice of Deposition Pursuant to SDCL 15-6-30(b)(6)(“30(b)(6)Notice”). Coincident with the Motion to Quash, BHE seeks a Protective Order in relation to the same portions of Fall River’s 30(b)(6) Notice. For the reasons set forth herein, BHE respectfully requests that its Motion to Quash and for a Protective Order be granted as to Topics 2, 5(a), 5(b), 5(c), 5(e), 6, 7, and 8. BHE further represents that the Parties have worked in good faith to resolve this discovery dispute before seeking Commission intervention; however, they have determined that further efforts would be unsuccessful.

Procedural and Factual Background

The Complaint in this matter alleges that BHE failed to accurately determine its avoided costs in relation to Fall River’s proposed 80MW solar facility. Fall River’s Complaint does not include any allegations regarding the development of a Power Purchase Agreement (“PPA”) or regarding claimed inappropriate terms, conditions or provisions in a PPA. Indeed, the Parties had not progressed beyond a discussion of avoided costs, so as to even begin negotiation of potential PPA terms, when Fall River filed its Complaint. Consequently, the only questions

before the Commission are: (1) whether BHE's methodology for determining its avoided costs is reasonable under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and (2) whether the avoided cost figure that results from use of that methodology is representative of BHE's actual avoided costs?

The Commission is familiar with this docket. In May of 2019, the Parties brought a prior discovery dispute before the Commission for decision. Specifically, on May 30, 2019, Fall River filed a Motion to Compel discovery after BHE objected to a number of Fall River's 141 written discovery requests. BHE opposed Fall River's motion, urging that many of the requests were overly broad and were not reasonably calculated to lead to admissible evidence in light of the limited issues presented in this docket. The Commission took up Fall River's motion at its June 11, 2019 meeting. Thereafter, the Commission issued an order ("June 2019 Discovery Order") granting Fall River's motion in part and denying it in part.

In its June 2019 Discovery Order, the Commission allowed Fall River to proceed with discovery on BHE's prior calculations of avoided cost in relation to three QF projects (SD Sun I, II and III). The Commission also allowed some very limited discovery in relation to BHE's acquisition of the SD Sun projects. Specifically, the Commission granted Fall River's request for certain modeling associated with BHE's later acquisition of the SD Sun projects. By way of comparison, the Commission sustained BHE's objections in relation to all other disputed acquisition discovery. Table 1 and Table 2 set forth below represent a direct comparison of the discovery requests the Commission deemed permissible and those for which further discovery was denied.

Table 1: Discovery Requests approved by the Commission in Fall River's Motion to Compel

Request Nos.	Nature of the Request
5, 7-10, 12, 16-19, 22-336, 38, 42-48, 52-62, 65-67, 69-72, 74, 78-87	Requests related to methodology for modeling, model outputs, model inputs, reference cases, and model results related to BHE's calculation of avoided costs for SD Sun I, II and III
21, 50, 51	Final PPA price for SD I, II and III and PPA's for SD Sun I and II
111-113	Modeling accomplished prior to the acquisition of SD Sun I, II and III

Table 2: Discovery Requests for which BHE's objections were sustained

Request Nos.	Request
105	What was the purchase price for the [SD Sun Project] interests?
106	Why did Black Hills acquire the interests in the SD Sun projects?
107	Produce copies of the agreement(s) pursuant to which Black Hills acquired the SD Sun projects.
114	Produce copies of all Black Hills documents that contain, summarize, memorialize or otherwise reflect the calculations, forecasts, and the data employed to calculate and determine the impact of the acquisition on Black Hills revenue requirements.

Fall River did not seek reconsideration of the Commission's decision, and on June 28, 2019, BHE provided supplemental responses to the discovery requests identified in Table 1. Fall River did not, and has not challenged the sufficiency of BHE's supplemental responses.

On July 31, 2019, Fall River wrote BHE and advised that it sought to utilize the authority granted by SDCL Section 15-6-30(b)(6) to require BHE to designate a deponent (or deponents)

who could testify on behalf of the corporation on approximately 16 topic areas.¹ Many of those 16 topics were significantly similar (if not identical) to matters already addressed by the Commission in its June 2019 Discovery Order. On August 5, 2019, BHE provided a detailed response to Fall River, which included BHE's position on each of the 16 topic areas. BHE identified 4 topics for which it had no objection and indicated it would designate a deponent upon receipt of a formal deposition notice. For 3 topics, BHE proposed a modification in scope designed to align the topic with the scope of discovery allowed by the Commission's June 2019 Discovery Order. With regard to the 9 remaining topics, BHE expressed its intent to object and indicated the topics were outside the permissible scope of discovery, and explained that the proposed discovery was contrary to the Commission's June 2019 Discovery Order.

After the Parties undertook efforts to resolve the discovery dispute, Fall River served its formal 30(b)(6) Notice, which included 17 proposed deposition topics. *See* Attachment 1. Two days later, BHE served its Response and Objections to Fall River's 30(b)(6) Notice. *See* Attachment 2. BHE designated a deponent for 9 of 17 topics; thus only 8 topics remain in dispute. The disputed topics are summarized in Table 3 below:

¹ SDCL 15-6-30(b)(6) is the state corollary to the Federal Rule of Civil Procedure 30(b)(6). SDCL 15-6-30(b)(6) provides a party with the ability to seek binding testimony from a corporate defendant by identifying topic areas for deposition. If those topic areas are identified with "reasonable particularity," the corporation has an obligation to designate and prepare personnel with knowledge on the topic. The statutory language reads as follows:

A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with *reasonable particularity* the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify... The persons so designated shall testify as to matters known or reasonably available to the organization.

Table 3: Deposition Topics that Remain in Dispute

30(b)(6) Topic Nos.	General Description of Topic Area
2, 5(c), 5(e)	Negotiations of the SD Sun I, II and III PPAs including business and commercial terms of those agreements.
5(a), 5(b), & 7	Negotiations with 174 Power Global Regarding acquisition of the SD Sun projects including negotiation of acquisition contract terms
6 & 8	BHE internal discussions regarding the potential of acquiring the SD Sun Projects and the reason behind the acquisition

BHE respectfully submits that the discovery proposed in Table 3 is not reasonably calculated to lead to admissible evidence given the nature of Fall River’s Complaint. This conclusion is supported by the Commission’s June 2019 discovery order, which denied discovery on significantly similar, if not identical topics. Consequently, BHE asks that the Commission grant its Motion to Quash the portions of Fall River’s 30(b)(6) Notice enumerated herein and also grant BHE a Protective Order limiting the scope of deposition discovery.

Argument and Analysis

Because a deposition sought under SDCL §15-6-30(b)(6) is simply one of a number of different types of discovery, the propriety of Fall River’s 30(b)(6) topical requests must be viewed in the context of the general rules that govern discovery. Under those rules, a party “may obtain discovery regarding any matter, 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[.]” *See* SDCL §15-6-26(b)(1)(emphasis added). “Relevant evidence” is evidence that has a tendency to make a fact of consequence to determining the action “more or less probable than it would be without the evidence.” SDCL §19-19-401. In summary, though the scope of discovery is broad, it still must be considered in

light of the matters at issue in the proceeding. *See* SDCL 15-6-26(b)(noting that the test for discovery is whether the information sought is “reasonably calculated” to lead to the discovery of admissible evidence.”) Consequently, when reviewing BHE’s motion, the Commission must consider how the 30(b)(6) topics could possibly lead to evidence that would assist it in determining: (1) whether BHE has used a reasonable methodology in determining its avoided costs and (2) whether the avoided cost that results from that methodology is representative of BHE’s actual avoided costs?

In addition, because Fall River seeks to require BHE to designate a corporate deponent to testify on matters “known or reasonably available” to BHE, Fall River’s proposed 30(b)(6) topics must satisfy the “reasonable specificity standard of Rule 30(b)(6).” *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 506 (D.S.D. 2009)(internal quotations omitted). The “reasonable specificity standard” is inherent in the plain language of SDCL 15-6-30(b)(6) and requires the party requesting a 30(b)(6) deposition to describe the topics to be discussed with “reasonable specificity.” *Id.* This requirement serves to ensure that the recipient of a Rule 30(b)(6) deposition notice can appropriately designate and prepare its deponents for questioning and also protects the recipient party from having to “interpret” what types and categories of information the noticing party actually seeks. *See id* at 506 (granting a defendant corporation’s motion to quash, in part, and requiring the plaintiff to narrow and/or clarify areas of inquiry pursuant to a Rule 30(b)(6) notice). Indeed, specificity and clarity is of vital importance in a Rule 30(b)(6) deposition as the failure to adequately prepare a deponent can give rise to a motion for sanctions. *Id.*

It is in light of these basic rules governing discovery and the limited issues to be resolved by the Commission in this docket that BHE has moved to quash Topics 2, 5(a), 5(b), 5(c), 5(e),

6, 7, and 8 of Fall River's 30(b)(6) Notice. Coincident with its motion to quash, BHE seeks a protective order under SDCL Section 15-6-26(c). SDCL Section 15-6-26(c) provides that the Commission, upon a showing of good cause and when necessary to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense," may order:

- that discovery not be had;
- that discovery may be had only on specified terms and conditions;
- that certain matters not be inquired into; or
- that the scope of discovery be limited to certain matters.

Because Fall River's proposed deposition topic areas are outside the permissible scope of discovery and fail to meet the reasonable specificity test under SDCL 15-6-30(b)(6), BHE respectfully submits that its Motion to Quash and for Protective Order should be granted.

1. Acquisition of South Dakota Sun I, II, and III

BHE has objected to three of Fall River's 30(b)(6) Notice topics that seek a deponent to testify as to: (1) BHE's internal discussions relating to acquisition of the SD Sun projects; (2) why BHE ultimately decided to acquire the SD Sun projects; and (3) BHE's negotiations with 174 Power Global as to the acquisition and acquisition contract terms. BHE's objections are based on the fact that the proposed topic areas are not reasonably calculated to lead to admissible evidence given the matters at issue before the Commission.² The validity of BHE's objection is underscored by the fact that, in its June 2019 Discovery Order, the Commission upheld BHE

² With regard to the negotiations between 174 Power Global regarding the acquisition and development of acquisition contract terms, BHE also preserved the objection that those discussions would constitute confidential information under an NDA which was in place between the parties when those negotiations occurred.

objections and refused to compel discovery with regard to nearly identical Fall River discovery requests.

When opposing Fall River's prior Motion to Compel, BHE urged the Commission that the following Fall River interrogatories did not have any tendency to "make the existence of any fact that was of consequence to the determination of this case more or less probable[.]"

- **Request 105**: What was the *purchase price* for the interests?
- **Request 106**: *Why did Black Hills acquire the interests* in the SD Sun projects?
- **Request 107**: Produce *copies of the agreement* pursuant to which Black Hills acquired the SD Sun projects?
- **Request 114**: Produce copies of *all Black Hills documents* that contain, summarize, memorialize or otherwise reflect the calculations, forecasts, and the data employed to calculate and determine the impact of the acquisition on Black Hills revenue requirements.

With the exception of allowing discovery of certain modeling undertaken in advance of the acquisition, the Commission sustained BHE's objections and refused to compel discovery in each of the areas identified above. Nevertheless, just two months later, Fall River issued its 30(b)(6) Notice demanding that BHE produce a deponent to give testimony on topics substantially similar, if not identical, to those for which its earlier Motion to Compel had been denied. Those 30(b)(6) topics include:

- **Topic 6**: BHE's *internal discussions* regarding the potential for acquiring 174 Power Global's interest in the SD Sun projects, including timelines. (Compare Request No. 106 above)
- **Topic 7**: BHE's discussions and negotiations with 174 Power Global regarding the potential for acquiring 174 Power Global's interest in the SD Sun Projects, *including development of the contract terms governing the acquisition of the project*. (Compare Request No. 106 and 107 above).
- **Topic 8**: The business case and rationale behind BHE's decision to acquire the SD Sun projects including the *reasoning behind the acquisition and how an*

acceptable purchase price was determined and the modeling that was done relating to the acquisition.³ (Compare Request 106 and 105 above)

Though slightly rephrased, these three topics cannot be meaningfully distinguished from Fall River's prior written discovery requests and, for which, BHE's objections were sustained in the Commission's June 2019 Discovery Order.

Fall River has provided no persuasive argument as to how the topics are reasonably calculated to lead to admissible evidence given the matters before the Commission or as to why the Commission should change its position on these areas of inquiry. After all, Fall River's Complaint has not changed since the Commission issued its June 2019 Discovery Order. Moreover, Fall River did not challenge the Commission's prior conclusions or seek reconsideration of the Commission's decision on the proper scope of discovery. In the end, Fall River's current requests in Topic 6, 7 and 8 are nothing more than an attempt to circumvent the Commission's prior order and accomplish discovery on the very topics the Commission determined were not reasonably calculated to lead to admissible evidence. For this reason, and because these proposed deposition topic areas are not reasonably calculated to lead to admissible evidence given the limited issues before the Commission, BHE seeks an order quashing these three topics from the Deposition Notice and also seeks a Protective Order prohibiting further discovery in this area.

³ Because the Commission did compel production of certain modeling completed in relation to the acquisition, BHE did not object and is not seeking to quash the notice of deposition Topic 8 to the extent it sought a deponent to speak to modeling BHE produced pursuant to the Commission's July 2019 Discovery Order.

2. BHE negotiations with 174 Power Global

Topics 6, 7 and 8 are not the only topics wherein Fall River has attempted to take a “second bite at the apple” in terms of previously refused acquisition discovery. In Topic 5, Fall River starts its inquiry with the phrase “BHE’s discussions and negotiations with 174 Power Global,” and goes on to seek a BHE deponent to testify as to a number of subcategories including: (1) discussions and negotiations regarding its acquisition of SD Sun I and SD Sun II; (2) “[c]hanges in the proposed projects during the time 174 Power Global owned the SD Sun companies/projects;” and (3) PPA development for SD Sun II and SD Sun III. *See* Attachment 2 at ¶5(a), ¶5(b) ¶5(c), and ¶5(e). BHE has objected that these topics as not reasonably calculated to lead to admissible evidence considering the limited issues before the Commission.⁴ BHE additionally objects that the topic designations in 5(a) and 5(b) are stated in overly vague terms, so as to make the underlying intent wholly ambiguous. As such, topics 5(a) and 5(b) do not satisfy the “reasonable specificity” standard under SDCL Section 15-6-30(b)(6).

Via topic 5(a) Fall River seeks a deponent to testify as to: “BHE’s discussions and negotiations with 174 Power Global regarding its acquisition of SD Sun I and SD Sun II.” Though BHE advised Fall River on August 5, 2019 that it would object that Topic 5(a) was not reasonably calculated to lead to admissible evidence, Fall River has not provided an explanation of how negotiations leading up to BHE’s acquisition of the SD Sun projects between 174 Power Global and BHE would have any tendency to validate or invalidate the methodology BHE used in its determining Fall River’s avoided costs or the resulting avoided cost. Just as the Commission previously determined that BHE’s reasons for acquiring SD Sun were outside the reasonable scope of discovery, the negotiations and discussions between BHE and 174 Power

⁴ Subcategories 5(c) and 5(e) are discussed in Section 3 below.

Global leading up to the acquisitions are similarly beyond the bounds of even liberal discovery practice. In addition, BHE would submit that Fall River's general reference to all negotiations between 174 Power Global and BHE relating to the acquisition fails the reasonable specificity standard, as it does not identify what aspects of those commercial negotiations it seeks information on and, as such, preparation of a deponent would be difficult, if not impossible.

Fall River's Topic 5(b) seeks a BHE deponent to testify on "changes in the proposed projects during the time 174 Power Global owned the SD sun companies/projects." BHE is simply unsure as to what types of "project changes" to which Fall River is referring. Likewise, it is equally difficult to envision how BHE is the entity best situated to address planned or contemplated changes by 174 Power Global during its ownership of the project. Finally, from the broad topic designation it is unclear how this question would be addressed in terms of substantive or temporal scope. Topic 5(b), as currently proposed, could cover many categories of information, information that is outside BHE's knowledge or possession, and information that is largely, if not completely, irrelevant to Fall River's current claim. Without further clarification, BHE cannot "reasonably designate and properly prepare a corporate representative to testify on its behalf with respect to this broad line of inquiry." *Compare Murphy*, 255 FRD at 506 (requiring a plaintiff to narrow and clarify the scope of a 30(b)(6) notice to relevant and defined subjects, and noting a corporation should not have to "interpret" what the plaintiff meant in his deposition notice).

Setting aside the fact that the topic area is overly broad, vague, and ambiguous in both scope and intent, it is difficult if not impossible to determine how this request could satisfy even the minimal standard requiring that discovery be "reasonably calculated to lead to admissible evidence," given Fall River's claims or BHE's defenses. Whether the projects "changed" while

owned by 174 Power Global simply does not shed light on whether BHE used an appropriate method to determine its avoided costs in response to Fall River's request, or whether BHE has accurately determined its avoided costs. For the reasons set forth herein, BHE respectfully requests that the Commission quash Topics 5(a) and 5(b) and also grant BHE a Protective Order prohibiting inquiry in these areas.

3. Negotiations of Commercial Terms within the SD Sun I, II and III PPAs

Fall River's proposed Topic 2, 5(c) and 5(d) seek a deponent to testify in the following particulars:

- **Topic 2:** BHE's discussions and negotiations with Energy of Utah and its subsidiaries SD Sun I and SD Sun II regarding the power purchase agreements that were entered. The witness need only be prepared to testify about the business and commercial aspects of the discussions and negotiations and not technical matters concerning, interconnection, engineering and transmission or the legal interpretation of contract terms.
- **Topic 5(c):** BHE's discussions and negotiations with 174 Power Global regarding the power purchase agreement for SD Sun II.
- **Topic 5(e):** BHE's discussions and negotiations with 174 Power Global regarding the development of a power purchase agreement for SD Sun III.

BHE has objected to all three topic areas. BHE objected to Topic 2 and 5(a) because interrogation as to the negotiation of PPA terms and conditions for SD Sun I and II is not reasonably calculated to lead to admissible evidence given either the complaints of Fall River or the defenses of BHE. After all, the Complaint does not allege a PPA was unfairly withheld or urge that BHE proposed unreasonable or unconscionable terms. Indeed, Fall River and BHE never even reached the point of negotiation of a PPA. Moreover, Fall River already has in its possession the PPAs for SD Sun I and II. Both contracts speak for themselves and include integration clauses that provide that all prior negotiations and discussions are supplanted by the

PPAs themselves. Given the nature of the issues to be resolved in this case, proposed Topics 2 and 5(c) are outside the scope of permissible discovery.

While this same analysis applies to Topic 5(e), which seeks a deponent on the “development of a power purchase agreement for SD Sun III,” BHE also objects as it is simply not possible to comply with this request. Fall River has been advised in written discovery answered under oath (Response to Fall River Interrogatory No. 88) that there is no PPA for SD Sun III. BHE simply cannot designate a witness “with knowledge” of the development of a PPA which was not developed.

Conclusion

The disputed deposition topic areas described in this motion do not meet the fundamental test for discovery. In addition, at least two of the requests fail to meet the “reasonable specificity” standard for a Rule 30(b)(6) deposition notice. Finally, the cumulative nature and lack of meaningful value of these requests in resolving the current dispute is underscored by the type and volume of information already in Fall River’s possession for which BHE has issued no objection to 30(b)(6) Notice Topics. Fall River is now in possession of the all modeling outputs for each SD Sun Project and to its own project. Fall River is in possession of a written description of changes in modeling between each project. Fall River has been provided the final avoided cost for each project as well as the PPA for each project that indeed culminated in a PPA. In addition, BHE has designated a deponent to speak for the corporation on the following topics:

- BHE’s discussions and negotiations with Energy of Utah and its subsidiaries SD Sun I LLC and SD Sun II, LLC and its principal Ros Vrba about BHE’s proposed avoided cost, avoided cost methodology and avoided cost model employed for the solar generating facilities they proposed to construct.
- The general methodology, including modeling methodology, sources of information for that modeling, and computer programs and software employed in

and the general parameters of BHE's avoided cost calculations for the SD Sun I, II and III projects, including how the methodology employed differed from calculations done for the Fall River project.

- BHE's rationale behind the differences in calculations done for the SD Sun projects avoided cost and Fall River avoided cost.
- BHE's discussions and negotiations with 174 Power Global regarding [d]etermination of avoided cost for the solar generating facilities commonly called SD Sun III[.]

See Attachment 2 (noting BHE's designation of a deponent on areas 1, 3, 4 and 5(d)).

Responding to the previous written discovery and preparation of deponents on the agreed upon topics has already taken up significant time and expense for discovery that is only marginally related to the current dispute. By way of comparison, the topics for which BHE has filed its Motion to Quash and for Protective Order simply represent additional time and expense without providing any meaningful value to the Commission in its task of resolving the issues before it.

Thus, for all of the reasons set forth herein and in light of the Commission's June 2019

Discovery Order, denying similar, if not identical types of discovery, BHE requests that its Motion to Quash and for Protective Order be granted.

Dated this 25th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2019, I served the foregoing Black Hills Power's Brief in Support of its Motion to Quash Portions of Energy of Utah, LLC's and Fall River Solar, LLC's ("Fall River's") Notice of Deposition Pursuant to SDCL 15-6-30(b)(6) and for a Protective Order by email to the following:

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