BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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 PETITIONER'S REPLY TO BLACK HILLS' BRIEF

Black Hills objected to and refused to make any meaningful response to discovery requests aimed at obtaining information on how it calculated avoided cost a year earlier for three solar projects located less than thirty miles from Fall River's project. A year ago, Black Hills bought the three projects and said, as part of its calculation of avoided cost in this case, that it intended to build them. Black Hills then refused to answer questions about capital costs for the three South Dakota Sun projects, arguing it now doesn't intend to build them.

SD Sun I, II, and III Avoided Cost Calculations

Although Black Hills scrupulously avoids mentioning it in its briefing, the avoided cost for at least two of the SD Sun projects was in the $40 per megawatt hour range, about 60% higher than the initial avoided cost outcome for Fall River. Obviously, Fall River is pursuing discovery regarding the SD Sun avoided cost calculations in an effort to understand why avoided cost in the spring of 2018 was nearly 60% lower than a year before, with no discernable difference in Black Hills' load/demand profiles and generation package.

Fall River has, as allowed by Commission regulations and federal law, challenged Black Hills' calculation of avoided cost for its proposed project. Within the preceding two years, Black Hills had calculated avoided cost a number of times for the SD Sun projects which are materially similar to Fall River's project. Black Hills characterizes the inquiry about SD Sun avoided cost as "burdensome" and "not reasonably calculated to lead to admissible information," but makes no effort at explaining why the details of avoided cost calculations done for virtually identical

projects under similar conditions only months earlier are anything but relevant and admissible in this proceeding. Fall River is clearly entitled to inquire into the details of the calculations, if for no other reason, to test whether the assumptions and methodology employed aligns with the methodology employed to calculate Fall River's avoided cost.

Black Hills concedes, both in its brief and in its pre-filed testimony, that its avoided cost calculations in response to Fall River were done differently than for the three SD Sun projects. It asserts that the SD Sun calculations are not relevant to this case because it is now following new precedent "endorsed" by the Commission in determining avoided cost. Black Hills ignores the South Dakota Supreme Court's direction that agency decisions are not precedent and that the only "endorsement" an agency can give is through the rule making process.

In *In re West River Elec. Ass'n, Inc.*, 675 N.W.2d 222, 2004 S.D. 11, the South Dakota Supreme Court ruled an administrative agency ". . . is not bound by stare decisis and therefore it can redefine its views to reflect its current view of public policy. . ."[1] In *Yellow Robe v. Board of Trustees of South Dakota,* 664 N.W.2d 517, 2003 S.D. 67, the Supreme Court noted

> In the judicial setting, previously decided questions of law involving similar fact situations often provide precedential value, embodying the concept of stare decisis. Both federal and state courts have repeatedly noted, however, that administrative agencies are not bound by stare decisis *as it applies to previous agency decisions.* The U.S. Supreme Court has stated that, "An agency's view of what is in the public interest may change, either with or without a change in circumstances."

Arguing that the Commission's decisions in *Consolidated Edison* and *Oak Tree* somehow justifies not answering discovery requests is legally flawed because neither decision is precedent

[1] Black Hills was a party to *In re West River Elec. Ass'n*. Linden Evans, its then associate general counsel and currently its president and CEO, successfully argued the case before the Supreme Court. It's difficult to understand how Black Hills can claim the case doesn't apply here.

for the outcome of this case, per the teaching of the Supreme Court cited above.[2] Further, *Oak Tree* was decided in 2013, well before the SD Sun projects were proposed. If Black Hills believes *Oak Tree* is precedent surely Black Hills applied *Oak Tree's* logic in SD Sun I, II, and III calculations *and* the Fall River calculations. It doesn't seem unreasonable to ask Black Hills to produce the information, if nothing else, to confirm, or perhaps disprove, those representations.

Black Hills speaks of the Commission's "endorsement" of certain ways of calculating avoided cost. South Dakota is a strict notice and comment rule-making state. SDCL Chap. 1-26, the Administrative Procedures Act, provides that agencies can only make policy through rule-making, which requires public notice and hearing, not through "endorsement." The PUC opened a rule-making docket aimed in no small part at calculating avoided cost several years ago. After taking extensive comments the docket was closed without making new rules. The Commission didn't "endorse" any particular method of calculating avoided cost in its rule-making docket, instead leaving the decision to a case by case approach, the method it has honored since its 1982 PURPS rules were adopted.

Black Hills argues that it is burdensome to produce information Fall River's principal, Ros Vrba, may already have. Note however, what Black Hills gave Mr. Vrba in support of avoided cost calculations was not presented under oath, as is the case with discovery responses. Note also that Mr. Vrba has no ability to know exactly what Black Hills may have in its files that the subject discovery requests may turn up, nor has Black Hills made the contention that what it supplied Mr. Vrba fulfilled what is requested in this discovery effort.

---

[2] In *Consolidate Edison* Northwestern Corporation, ironically, made the argument that FERC decisions adverse to its position were hortatory and not binding precedent, almost exactly contrary to what Black Hills contends in this case.

Black Hills contends, in essence, that it correctly calculated avoided costs and Fall River should not be allowed to look behind the curtain. All Fall River asks for is the opportunity to compare the work done then and now and see for itself what variances exist. That outcome is what discovery is intended to do and is fair and reasonable.

Construction and Acquisition Costs

Black Hills concedes it purchased the three SD Sun projects from 174 Power Global about the same time Fall River solicited an indication of avoided costs. It also concedes that in at least two iterations of avoided cost responsive to Fall River, it expressed an intent to build the SD Sun projects on the same timeline as Fall River's construction. But yet it persists in arguing that the capital costs involved in the projects are not discoverable, now on the premise that it calculated avoided cost having a Commission "endorsed" method, and therefore discovery of capital costs isn't relevant, even under the low thresholds for discovery.

As put to rest above, the Commission's prior decisions are not precedent for the outcome of this case. The Commission may have made decisions on the facts as presented in *Oak Tree* and *Consolidated Edison*, but those decisions were fact specific based on the evidence offered, which is materially different from what will be offered in this case. Expert Klein opined that capital costs are a material part of determining Black Hills' capacity value, that he estimated the capital costs for SD Sun construction and that he would modify his testimony once the actual costs were determined. Black Hills included the SD Sun projects in the mix of avoided cost. Discovery of those acquisition and construction costs is fair and reasonable and clearly leads to what could be admissible and highly relevant evidence. Black Hills offers no basis for refusing discovery, other than claiming some of the information may be subject to a confidentiality agreement, but yet it made no effort to protect the information using the Commission's

confidential filing regulations, nor did it ask for a protective stipulation from Staff or Fall River. Instead it simply said "no," and now offers no reasoning in support other than it thinks its calculation of avoided cost is correct. Black Hills' efforts are the essence of stonewalling and the Commission should not tolerate it.

Conclusion

PURPA requires Black Hills to act in good faith in every aspect of its dealings with Fall River. That includes, presumably, this litigation. Black Hills' contentions in its briefing strain the concept of good faith and are not credible. For example, Black Hills contends it answered 64 of the questions put to it. Read the answers to discovery requests 63-87 and look at 65 and 66 as examples of Black Hills' "answers" to discovery requests. 65 asks if more than one levelized avoided cost rate was calculated for SD Sun III. 66 asks the date on which those rates were calculated. Answers to both 65 and 66 direct the reader to Black Hills' answer to 63, which simply says "some avoided cost modeling was accomplished on SD Sun III." The answers to 65 and 66 are non-answers. Those are the types of answers Black Hills asserts show its good faith.

Black Hills devotes several pages of its briefing to criticizing Fall River's approach to discovery, contending in one spot somehow Fall River waited too long to serve its discovery requests, that its discovery requests are voluminous, and then, of all things, criticizes Fall River for not asking about certain areas. Black Hills omits mentioning that the case management stipulation it signed makes no limit on the number of or timing of discovery requests, save for an end date for discovery.

Black Hills criticizes Fall River for waiting a month to make its motion to compel. Note that Black Hills filed its responses on April 23rd. By stipulation, Black Hills' pre-filed testimony was due and filed two weeks later, May 7. It only makes sense that Fall River would wait to see

if Black Hills' pre-filed testimony would answer some of the unanswered discovery questions, which, unfortunately, it did not. The rules of civil procedure require a "meet and confer" among counsel before a motion to compel can be filed, which took a week or so to get scheduled. Then it took a few days to determine the proposed compromise made by Black Hills was insufficient, then Fall River had to write the motion and brief. Black Hills criticizes Fall River's timing but makes no explanation of how it was prejudiced.

Black Hills' criticism of Fall River's timing and numbers of discovery requests are nothing more than an effort to deflect the Commission from considering the real fact, which is that Black Hills is stonewalling on supplying legitimately discoverable information.

Black Hills wrote a fourteen-page brief arguing it is entitled to decide what discovery requests are relevant to the case Fall River will make. Notably absent in the fourteen pages is a clear expression of why the SD Sun information is not discoverable. The law doesn't require Fall River to prove the requested information will lead to admissible evidence, only that, in the words of SDCL 15-6-26(b), that the request is reasonably calculated to lead to the discovery of admissible evidence. Comparing substantially inconsistent avoided cost calculations made within a year or so of each other for almost exactly identical projects is obviously reasonable and likely will lead to the discovery of admissible evidence. Reviewing capital costs for nearly identical projects that Black Hills liked well enough to buy and build is equally reasonable. The discovery threshold is low, Fall River has well exceeded the threshold, Black Hills has made no contrary case.

Fall River respectfully requests the Commission enter its order requiring Black Hills to fully and fairly respond to the discovery requests it refused to answer, that it fully and fairly

respond to discovery requests 63-87, and that it be awarded costs, terms and sanctions for Black Hills actions.

Dated this 10th day of June 2019.

TAYLOR LAW FIRM, LLC

By [signature]

William Taylor
John E. Taylor
Jeremy Duff
4820 E. 57th Street, Suite B
Sioux Falls, South Dakota 57108
Telephone: (605) 782-5304
bill.taylor@taylorlawsd.com
john.taylor@taylorlawsd.com
jeremy.duff@taylorlawsd.com
Attorneys for Energy of Utah, LLC and Fall River Solar, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June 2019, I served Fall River Solar's Reply to Black Hills' Brief by email to the following:

Ms. Cathy Sabers
cathy.sabers@blackhillscorp.com

Ms. Kristen Edwards
Kristen.edwards@state.sd.us

Ms. Patricia Van Gerpen
patty.vangerpen@state.sd.us

Mr. Todd Brink
todd.brink@blackhillscorp.com

Mr. Darren Kearney
darren.kearney@state.sd.us

Mr. Jon Thurber
jon.thurber@state.sd.us

[signature]

One of the Attorneys for Energy of Utah, LLC and Fall River Solar, LLC