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
	:	FALL RIVER SOLAR'S RESPONSE TO MOTION TO QUASH
	:	

Fall River Solar, LLC makes the following response to Black Hills Energy's Motion to Quash portions of its Rule 30(b)(6) deposition notice.

Procedural History

Fall River, anticipating a scheduled round of depositions, sent Black Hills' counsel an informal request to identify and make available corporate employees on a number of topics, including the matters considered in this hearing. Black Hills demurred on an informal approach, and, as is its right under the Rules of Civil Procedure, requested a formal notice. SDCL 15-6-30(b)(6), part of the Rules of Civil Procedure, allows Fall River to "notice" its desire to depose corporate representatives on given topics.[1] In August, responsive to Black Hills' request, Fall River prepared and served a 30(b)(6) notice on thirteen topics, Exhibit 1.

Rule 30(b)(6) requires Black Hills to designate the persons who will testify responsive to Fall River's notice. Black Hills identified witnesses for most topics but objected to identifying witnesses and to testimony relating to its negotiations with Energy of Utah regarding power purchase agreements pertaining to two proposed solar generating projects, SD Sun I and II and its subsequent acquisition of the projects. In support of its objections, Black Hills filed the subject motion to quash. This brief responds to Black Hills' motion.

[1] The federal rules of civil procedure contain a rule nearly identical to SDCL 15-6-30(b)(6). In legal circles, the process is referred to as a Rule 30(b)(6) notice.

Factual Background

As the record reflects, Ros Vrba, the principal of Fall River, began developing SD Sun solar generating facilities near Hot Springs in 2015 called SD Sun. After long and difficult negotiations with Black Hills, a $46 avoided cost was established for SD Sun I, followed by equally difficult negotiations resulting in a power purchase agreement. Shortly thereafter, SD Sun II was proposed, and again after difficult negotiation, a slightly lower avoided cost was established, and eventually a power purchase agreement was signed. Shortly before the SD Sun II power purchase agreement was signed, Mr. Vrba's company sold its rights in the projects to 174 Power Global.

174 Power Global continued development of the projects, including proposing SD Sun III. All three projects were appurtenant to each other and were designed to interconnect to Black Hills in an open bay at its Minnekahta substation. In early 2018, Black Hills purchased SD Sun I, II, and III from 174 Power Global before the third power purchase agreement was finalized, for $5.5 million.[2]

Fall River expects that depositions will confirm that Black Hills gave both Energy of Utah and 174 Power Global a difficult time developing the SD Sun projects. From the outset, Black Hills seemed to do everything it could to delay the development of the SD Sun projects. Black Hills postulated numerous avoided cost values, requested multiple time extensions, delayed interconnection studies, blurred the line between its commercial and transmission departments, proposed numerous drafts of required documents, imposed inappropriate milestones in agreements, imposed questionable conditions on the developers, and on its best day

[2] Black Hills refused to reveal the purchase price in early discovery in this case, but subsequently has opened a new docket before the Commission, seeking amortization of $5.5 million, which it claims to be the purchase price for the project. See Docket EL-19-028.

was uncooperative. In addition Black Hills refused to discuss matters unless SD Sun and Fall River signed overbroad and burdensome confidentiality agreements, which are largely unenforceable. Fall River believes Black Hills' recalcitrant and resistive attitude was a clear effort to make development of the projects as difficult as possible.

Fall River thinks that Black Hills, as part of its acquisition of the SD Sun projects, required 174 Power Global to agree to not propose or develop future alternative energy generation projects in its service territory and paid a substantial sum for the promise.[3] Fall River suspects the promise not to compete may not be enforceable, may be an unlawful restraint of trade under South Dakota law, and may violate the spirit, if not the letter of PURPA and FERC regulations.

Fall River announced its intentions to develop Fall River Solar in early 2018 and requested Black Hills' indication of avoided cost. In its response, Black Hills priced avoided cost on the premise that all three SD Sun projects would be constructed before Fall River began generating electricity. In subsequent avoided cost calculations, Black Hills began to whittle the SD Sun projects out of its generation fleet, each time changing avoided cost. Eventually, in March 2019, after this case was well underway, Black Hills announced it would not build SD Sun at all, and accordingly changed its avoided cost proposal, but still not within what Fall River believes is appropriate. In addition, Black Hills has followed its past practice of delay and requests for more time on studies and interconnection issues.

Coupled with Black Hills' resistive attitude towards development of the SD Sun projects in the first place, Black Hills' potentially anti-competitive behavior in the projects may well demonstrate a pattern of discrimination against QF projects, which is contrary to federal law and

[3] Whether that sum was included in the purchase price Black Hills seeks to amortize is unknown.

regulation. Fall River suspects Black Hills purchased the SD Sun projects to kill them, that the whittling down of the projects was by design as demonstrated by the currently pending amortization docket, that its inclusion of the SD Sun projects in early avoided cost calculations was not done in good faith, and believes depositions of Black Hills' employees will confirm its suspicions. If that proves to be true, it may well impeach Black Hills' credibility in this proceeding and explain why it has proposed what appear to be low avoided cost payments.

Argument and Authorities

The Legislature has recognized that the ability of a party to engage in meaningful and complete discovery is an essential component to affording parties to proceedings due process rights. SDCL l5-6-26(b) addresses the scope of discovery:

> **Parties 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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. **It is not ground for objection that the information sought will be inadmissible** at the trial **if the information sought appears reasonably calculated to lead to the discovery of evidence.** (Emphasis added).

The Legislature has provided that in administrative contested cases a party has the right to cross-examine witnesses to the extent "required for a full and true disclosure of the facts" and to take depositions of witnesses for discovery ". . . in the same manner as in civil actions." SDCL 1-26-19(2), SDCL 1-26-19.2. In a discovery deposition, a party is entitled to conduct a ". . . cross-examination of witnesses . . . as permitted at the trial." SDCL 15-6-30(c).

Black Hills contends inquiry into its past practices and its arrangement with 174 Power Global would not lead to information relevant to the subject matter involved in the pending action. Black Hills cites part of the definition of *relevant evidence* from SDCL 19-19-401 but omits to note that the statutory definition of relevancy also includes subpart (b) "the fact is of

consequence in determining the action." Here Fall River seeks only to explore, by way of discovery, Black Hills' pattern of behavior towards QFs, its motives for acquiring the SD Sun projects, and how the SD Sun projects were factored into Black Hills' approach to Fall River avoided cost calculations. Fall River believes Black Hills' conduct may have crossed legal boundaries, all of which reflects its corporate bias, and is relevant to the degree of credibility to be afforded to its witnesses and concomitantly its avoided cost calculations in this case. Fall River respectfully contends the information sought by its Rule 30(b)(6) notice is relevant, would be admissible in the hearing before the Commission, and/or is potentially impeaching of testimony and evidence the Black Hills has presented or likely will present.

The South Dakota Supreme Court has ruled that the discovery rules are to be accorded a "broad and liberal treatment." *Kaarup v. St. Paul Fire and Marine Insurance Co.,* 436 N.W.2d 17, 21 (S.D. 1989). "A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Ibid,* 436 N.W.2d at 21 citing, 8 Wright and Miller, Federal Practice and Procedure, §2001 (1970). As noted by our Supreme Court, in contested cases before an administrative agency "Discovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process'." *Dudley v. Huizenga,* 2003 S.D. 84, ¶11, 667 N.W.2d 644.

Due process rights apply to contested cases before administrative agencies. *Matter of South Dakota Water Management Board,* 351 N.W.2d 119 (S.D. 1984) citing *Application of Union Carbide Corp.,* 308 N.W.2d 753 (S.D. 1981). A party's due process rights include the right to free and full discovery ". . . to promote, rather than stifle, the truth finding process'." *Dudley v. Huizenga,* supra. The right to discovery embodied in SDCL 1-26-19, necessarily includes questions leading to bias or interest. "An adverse witness on cross-

examination may be required to disclose any facts which tend to show bias and interest in the action so that the trier of fact may consider it in weighing his testimony". *Plank v. Heirigs,* 83 SD 173, 156 N.W.2d 193, (1968).

Black Hills argues that the Commission has already decided the topics covered in items 2, 5, 6, 7, and 8 of Fall River's Rule 30(b)(6) notice are not within the scope of permissible discovery. First, the Commission's June Discovery Order addressed *written interrogatories*, not depositions. The interrogatories considered in the June proceedings were narrow, tightly focused specific requests for certain documents or certain information. The Commission ruled narrowly and declined to compel answers to certain specific questions. It did not rule the entire topic was out of bounds or not permissible for discovery, as Black Hills now argues.

Black Hills characterizes the June proceedings as a determination of the relevancy of the topics it doesn't want to provide deposition testimony on. Review of the transcript of the June 11 motion hearing leads to a very different conclusion. The Commission discussed the interrogatories objected to and ruled Black Hills was required to answer some and not others, typically requiring the production of records. It did not address areas or topics as a whole.

The Rule 30(b)(6) notice does not request the production of any documents nor does it indicate an intention to inquire on technical matters. Rather, using item 2 as an example, the notice limits testimony to the business and commercial aspects of negotiations regarding SD Sun 1, 2 and 3. That theme follows in item 5 regarding negotiations between Black Hills and 174 Power Global regarding its acquisition of the SD Sun projects, changes to the projects during 174's ownership, and the negotiations leading to the power purchase agreement for SD Sun II and III. Item 6 asks for testimony regarding the business discussions inside Black Hills regarding the acquisition, 8 asks for the business rationale for acquisition, and 7 asks for

testimony regarding the course of negotiations with 174 to acquire the projects. No technical information or documents are requested, only non-technical testimony.

The June 11 hearing did not set a precedent that governs to the Rule 30(b)(6) notice, as the hearing transcript and Commission order confirm. The issues considered in the notice, although they address the SD Sun projects, are materially different from the interrogatories the Commission addressed in June, and the Commission should so rule.

Conclusion

Fall River Solar served notice on Black Hills, per SDCL 15-6-30(b)(6), requiring Black Hills to identify witnesses to be deposed on thirteen discrete topics. Black Hills now attempts to prevent Fall River from deposing witnesses on four topics, embodied in items 2, 5, 6, 7 and 8 of the notice. Those topics are:

1. Black Hills negotiations and discussions with Energy of Utah regarding power purchase agreements pertaining to SD Sun I and II, excluding anything of a technical nature.
2. Black Hills negotiations and discussions with 174 Power Global regarding the changes to, the development of and power purchase agreements for SD Sun II and III.
3. Black Hills internal discussions regarding the business case for acquiring the SD Sun projects and how the pricing was determined.
4. Black Hills discussions and negotiations with 174 Power Global leading to the acquisition, including the development of contract terms.

Black Hills first argues the Commission has already ruled those topics off limits for discovery, which is not borne out by the record of the prior discovery hearing, then contends the topics are not relevant to the avoided cost case. The topics are clearly relevant to bias of Black Hills and its

witnesses. The law of South Dakota is that discovery should be free and open, and to compel the production of evidence and to promote, rather than stifle, the truth finding process. Discovery need not be admissible into evidence, rather, it need only seek information that appears reasonably calculated to lead to the discovery of evidence. Discovery rules are to be broadly and liberally interpreted.

Fall River makes a compelling case for taking depositions on the topics noted above. It believes there is evidence that Black Hills pursued a course of action designed to discourage the development of QF facilities, borne out by its behavior with respect to the SD Sun projects, and that behavior has carried over into the Fall River project. It presents a challenge to Black Hills witnesses credibility, their calculations and conclusions, and their testimony as a whole. Without question Fall River is entitled to explore that circumstance in discovery.

Fall River prays the Commission rule accordingly.

Dated this 10th day of October 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the _10th_ day of October 2019, I served Fall River Solar's Response to Motion to Quash by email to the following:

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