

STATE OF SOUTH DAKOTA
BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE PETITION
FOR DECLARATORY RULING OF
BLACK HILLS POWER, INC.**

Docket No: EL 11-007

**BLACK HILLS POWER, INC.'S OPPOSITION TO
STAFF'S MOTION TO DISMISS**

The Staff for the South Dakota Public Utilities Commission (herein referred to as "Staff") has submitted its Motion to Dismiss. Black Hills Power, Inc. ("BHP") opposes Staff's motion and submits this Opposition to Staff's Motion to Dismiss.

Introduction and Summary of Argument

BHP has stated a claim on which relief may be granted, and the South Dakota Public Utilities Commission ("Commission") has proper subject matter jurisdiction to determine BHP's Petition for Declaratory Ruling ("Petition"). Staff's argument related to both of these issues is essentially an assertion that the legislature does not permit the Commission to issue declaratory rulings regarding the applicability and application of statutory provisions. This narrow view of the regulatory authority of the Commission is not consistent with the inherent powers granted the Commission by the South Dakota Legislature.

The South Dakota Legislature has charged the Commission with regulating public utilities, and making declaratory judgments regarding statutory provisions within its area of regulatory authority, including the objective to add renewable, recycled and conserved energy (the "SD Renewable Objective"). (See, SDCL 1-26-15 & 49-34A-4). Answers to questions regarding the SD Renewable Objective can come only from the Commission. There is no other agency or governmental body charged with the authority to regulate the SD Renewable Objective. Without the guidance, instruction, and perspective of the Commission as to the BHP Wind Project, BHP has inadequate information to go forward with construction of the BHP Wind Project. The Petition for Declaratory Ruling sets forth the proper jurisdiction and parameters for the Commission to decide the applicability of the SD Renewable Objective to BHP's Wind Project.

Underlying both of Staff's arguments is an apparent concern that BHP is seeking rate recovery through this proceeding. BHP wishes to make it very clear, if it has not already done so, that it is NOT seeking rate recovery for the BHP Wind Project in this proceeding. Rather, BHP is seeking a determination as to whether the Commission views the project to

be “reasonable and cost effective, in light of the alternatives” under the SD Renewable Objective statutes. In effect, BHP is seeking guidance from the Commission as to prudence of the project as an addition to BHP’s resource mix. Without question, the prudence of all costs related to the BHP Wind Project will need to be demonstrated in a separate rate recovery proceeding. Under no circumstances could any costs related to the project be included in customer rates without a separate, subsequent, and fully reviewed rate proceeding.

BHP believes it is acting in a prudent manner by looking to the Commission for guidance on an issue that the South Dakota Legislature believes is important. Further, BHP believes it is prudent to seek input and guidance from the Commission on the utility’s determinations and evaluations under the statute prior to making a capital investment in a renewable energy project. Simply put, if the Commission grants Staff’s Motion to Dismiss resulting in no further review of the Petition, the Company will not be in a position to proceed with the capital investment required by the Project given the absence of guidance from the Commission regarding its view of the policy considerations related to the renewable energy objective in South Dakota. BHP needs instruction, guidance, insight, and the perspective of the Commission as to the relation of the BHP Wind Project to the SD Renewable Objective. Providing instruction, guidance, insight, and perspective on matters within the Commission’s statutory authority is clearly within the powers granted the Commission by the South Dakota Legislature.

Background:

The BHP Wind Project described in the Petition for Declaratory Ruling presents a unique and timely opportunity for BHP to add renewable generation to its resource mix in compliance with the SD Renewable Objective. But as noted in the Petition, the timing for decision in this matter is critical, due to the need to complete construction by the end of 2012 to maintain eligibility for federal production tax credits and bonus depreciation.

Staff’s position that BHP’s Petition for Declaratory Ruling should be dismissed simply means that BHP would be forced to make a \$38 million decision without guidance from the Commission. Renewable generation is unique. If the Commission were to grant Staff’s motion to dismiss, it would have the effect of stifling construction of renewable generation, and economic development in western South Dakota. Failure to act in this case would have the further effect of preventing utilities from making timely decisions regarding renewable generation - decisions that may benefit utility customers and the state, while enabling South Dakota utilities to meet the SD Renewable Objective or prepare for possible federal legislation setting forth a renewable portfolio standard.

In 2008, the South Dakota Legislature enacted the SD Renewable Objective. See SDCL 49-34A-101. As a public utility operating in South Dakota, BHP is subject to the voluntary objective. The Commission oversees the SD Renewable Objective, the statutory provisions of which are set forth in SDCL 49-34A-101 to 105.

No person or entity has intervened in this matter. Therefore, the question posed to this Commission is not contested by any intervenor nor have any intervenors sought to limit the authority of the Commission, as Staff seeks to do through its Motion to Dismiss.

Argument:

1. *BHP has stated a claim on which relief may be granted.*

The SD Renewable Objective applies to BHP, and BHP has made decisions based on the language of the SD Renewable Objective statutes. BHP now asks the Commission to determine, within its authority under South Dakota law and its own administrative rules, whether BHP made the proper evaluations and determinations.

Staff has identified no case law supporting the proposition that it would be inappropriate for the Commission to make a declaratory ruling on BHP's Petition. Admittedly, the situation here presents a unique set of facts and circumstances. Nevertheless, reviewing as a whole the statutes that govern BHP and the Commission, the Commission has the authority and it is in the public interest to address the issue presented by BHP in its Petition for Declaratory Ruling.

As Staff noted in its motion, the Commission holds inherent authority in matters involving utilities in this state and is vested with authority to regulate public utilities under SDCL Ch. 49-34A. *Matter of Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992). The South Dakota Supreme Court has further recognized that “[w]here the legislature prescribes a standard of guidance for the administrative agency to follow, the necessary implied authority may also be delegated to the administrative agency to carry out the specific purposes prescribed and to exercise the appropriate administrative power to regulate and control.” *In the Matter of Northwestern Public Service Company*, 560 N. W.2d 925 (S.D. 1997), citing *In re Application of Kohlman*, 263 N.W.2d 674, 678 (S.D. 1978); See also, *In the Matter of Northern States Power Co.*, 489 N.W.2d 365 (S.D. 1992).

In addition to this inherent authority, however, the legislature has made a clear delegation of authority for state regulatory agencies to make declaratory rulings and determinations regarding statutory provisions within the purview of its regulatory area. SDCL 1-26-15 requires that “[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of *any* statutory provision or of any rule or order of the agency.” (emphasis added) See also, *Romey v. Landers*, 392 N.W.2d 415 (S.D. 1986). The Commission falls within the definition of “agency” under this statute. See, SDCL 1-26-1(1).

Moreover, the administrative rule promulgated under these statutes provides that the Commission shall issue rulings “as to the applicability . . . of *any* statutory provision or rule or order of the commission.” ARSD 20:10:01:34 (emphasis added). The Legislature has vested authority in the Commission to make declaratory rulings regarding the application of statutory provisions such as the SD Renewable Objective statutes, and this authority has been recognized by the Commission through the promulgation of rules. The delegation has been

made and accepted, and BHP respectfully requests that the Commission regulate within the scope of its authority in this matter.¹

BHP has stated a claim on which relief may be granted and the Commission clearly has the authority to make a declaratory ruling on BHP's Petition. There is no other agency that has either jurisdiction or the authority to make a decision on BHP's Petition. Nor is there a more appropriate process to obtain this decision.

2. *Subject matter jurisdiction:*

Staff also takes the position that the Commission does not have subject matter jurisdiction because BHP's Petition does not constitute a rate proceeding. As identified above, however, the Commission's jurisdiction is not narrowly or strictly limited to the review of rate applications. The South Dakota Legislature has specifically delegated the Commission authority to rule on the application of statutory provisions to a specific set of facts, and the Commission has accepted this delegation. SDCL 1-26-15; ARSD 20:10:01:34. In addition, the South Dakota Supreme Court has recognized inherent regulatory authority of the Commission to regulate within its area of expertise. *Matter of Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992); *In the Matter of Northwestern Public Service Company*, 560 N. W.2d 925 (S.D. 1997), citing *In re Application of Kohlman*, 263 N.W.2d 674, 678 (S.D. 1978); See also, *In the Matter of Northern States Power Co.*, 489 N.W.2d 365 (S.D. 1992).

Staff is correct to the extent that this Petition does not constitute a rate proceeding. But Staff is incorrect in asserting that the Commission does not have subject matter jurisdiction because the Petition is not a rate proceeding. The Commission clearly has subject matter jurisdiction. The SD Renewable Objective falls within the Commission's authority, and within its subject matter jurisdiction, and application of the SD Renewable Objective to the BHP Wind Project is well within the Commission's authority. As Staff indicates, the Commission holds inherent authority in matters involving utilities in South Dakota.

Staff argues that a determination of whether the Project is an appropriate addition to meet BHP's resource or customer needs cannot be performed without considering how it will affect consumers. BHP agrees with that statement, and accordingly BHP included in its Petition an analysis of how the Project, if constructed as set forth in the Petition and ultimately approved for rate recovery, would affect customer rates. Furthermore, BHP is

¹ In addition, pursuant to SDCL 49-34A-4 the Commission "shall regulate to the extent provided in this chapter every public utility as defined herein." The SD Renewable Objective, including SDCL 49-34A-101 and 104, is located in SDCL chapter 49-34A and therefore the Commission has the authority under SDCL 49-34A-4 to regulate matters regarding the SD Renewable Objective. BHP has requested a declaratory ruling from the Commission regarding the applicability of the SD Renewable Objective to BHP, which is directly within the authority of the Commission to regulate.

eager to work with Staff to timely provide Staff with additional information that may be requested through data requests.

Staff also argues that the scope of the Commission's authority is limited by timing, arguing that the extensive filing and procedural rules were created to ensure that the Commission was provided necessary time and information to make an informed decision. However, BHP has not asked the Commission to make a final determination on whether the costs associated with the Project should be approved for rate recovery, which is the objective of the extensive filing and procedural rules referred to by Staff. This is not a rate case.

A rate proceeding will be necessary for BHP to put the BHP Wind Project into rates. BHP has only asked the Commission to confirm that BHP made a correct evaluation under the South Dakota Renewable Objective statutes: The Commission's guidance, instruction and decision go to the prudence of BHP's decision to construct this wind generation. Specifically, BHP is seeking a determination as to whether the Commission views the project to be "reasonable and cost effective, in light of the alternatives" under the SD Renewable Objective statutes. Any and all costs related to the project must be reviewed in a separate, subsequent, and fully reviewed rate proceeding prior to inclusion in customer rates.

3. *Public Policy Considerations*

There are significant public policy considerations related to the decision whether or not to dismiss BHP's Petition for Declaratory Ruling. The South Dakota statutes set forth a renewable objective. BHP has a unique opportunity to construct South Dakota renewables in the form of wind generation in order to further advance its efforts to meet this objective. As set forth in the Petition, this is the best time for the Company to add wind generation for the following reasons: 1) there are federal production tax credits available for projects placed in service before December 31, 2012; 2) bonus depreciation for federal tax purposes is also available for projects placed in service by December 31 2012; 3) wind turbine generators are currently available at prices much lower than recently experienced; 4) there is presently available a very favorable opportunity to contract for the regulation of the Project; 5) there is presently an opportunity to purchase at a very reasonable cost, and develop, one of the best potential wind sites in or near BHP's service area; and 6) customers will receive the benefits of diversification by adding wind to the Company's resources in an ever changing energy environment.

As set forth in its 2010 South Dakota Renewable Objectives Report, BHP has continued to pursue prudent renewable energy generation to achieve environmental improvements. As stated in that report, BHP's challenges include the physical location of its system and quality of renewable opportunities available in the area. In the present situation, BHP has been presented with a project that negates those challenges and, with the benefit of temporarily available federal tax incentives, creates potentially very little rate impact to customers.

Due to the reasons set forth above, BHP believes that its decision is best for its customers. Nevertheless, BHP and other utilities in the state have received little or no

guidance or direction from the Commission on how a project should be evaluated under the SD Renewable Objective statutes. Without that guidance, how can any utility make a \$38 million investment in renewable generation without some indication from the Commission that the utility has made the right decision? For example, is adding wind generation only going to be approved by the Commission if there is an immediate net benefit to customers or will it be approved by the Commission only if customer rates do not increase as a result of the addition of the renewable generation? What is considered “cost effective in light of the alternatives” as that phrase is used in the SD Renewable Objective statutes? Is it reasonable for BHP to add this wind generation because of unique benefits and an uncertain future when BHP is already adequately meeting the energy needs of its customers?

Moreover, it must be emphasized that granting Staff’s Motion to Dismiss would result in no further review of the Petition. In this circumstance, the Company will not be in a position to proceed with the capital investment required by the Project, given the absence of guidance from the Commission. BHP needs instruction, guidance, insight, and the perspective of the Commission as to the relation of the BHP Wind Project to the SD Renewable Objective. The Legislature adopted the SD Renewable Objective but the Commission regulates and oversees the utilities that must meet the SD Renewable Objective.

BHP is providing the Commission with the opportunity to give BHP and Staff direction on a very important and economic decision, and to give other utilities guidance on interpretations of the SD Renewable Objective. The Commission has the authority to rule on BHP’s Petition for Declaratory Ruling, and should exercise its authority in this matter. BHP believes it is acting in a prudent manner by looking to the Commission for guidance on an issue that the South Dakota Legislature believes is important. Further, BHP believes it is prudent to seek some input and guidance from the Commission on the utility’s determinations and evaluations under the statute prior to making a capital investment in a renewable energy project.²

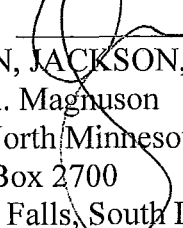
Conclusion:

The South Dakota Legislature has charged the Commission with regulating public utilities, including the SD Renewable Objective. Therefore, answers regarding the SD Renewable Objective can come only from the Commission. There is no other agency or governmental body charged with the authority to regulate the SD Renewable Objective. Without the guidance, instruction, and perspective of the Commission as to the BHP Wind Project, BHP has inadequate information to go forward with construction. The Petition for Declaratory Ruling sets forth the proper jurisdiction and parameters for the Commission to decide the applicability of the SD Renewable Objective to BHP’s Wind Project. BHP respectfully requests that the Commission reject Staff’s motion to dismiss and allow the

² BHP has requested a decision by September 1, 2011 and has advised Staff that it will extend the time for a decision on BHP’s Petition for another sixty (60) days beyond the sixty (60) day provision in the declaratory ruling regulations. Accordingly, BHP has filed simultaneous with this filing, its Consent to Extend Time of BHP.

Petition for Declaratory Ruling to proceed so that the Commission may provide its input on the SD Renewable Objective.

Dated this 29th day of May, 2011.

By: 
LYNN, JACKSON, SHULTZ & LEBRON, P.C.
Lee A. Magnuson
110 North Minnesota Avenue, Suite 400
P.O. Box 2700
Sioux Falls, South Dakota 57101-2700
Telephone: (605) 332-5999
Facsimile: (605) 332-4249

Glynda Rahn
Counsel - Black Hills Corporation
625 Ninth Street
Rapid City, SD 57701
(605)721-2439

Attorneys for Black Hills Power, Inc.