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. DBA BLACK HILLS ENERGY FOR DETERMINATION OF AVOIDED COST	**)**	**BLACK HILLS POWER, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**
		EL18-038

I. Introduction

Black Hills Power Inc., d/b/a, Black Hills Energy ("BHE") respectfully moves the Commission for an order granting partial summary judgment in this matter. Particularly, BHE seeks partial summary judgment on the date of the legally enforceable obligation ("LEO") and on responsibility for regulation costs. For the reasons outlined in this Motion, BHE respectfully asserts that the undisputed facts of this case justify a finding that the LEO on September 14, 2018, which is the date that the Complaint for Determination of Avoided Costs ("Complaint") was filed. In addition, prior decisions of the Commission and the undisputed facts show that the Fall River should bear responsibility for regulation costs.

II. Summary of Undisputed Facts Supporting the Motion

Fall River made its initial request for avoided cost on February 13, 2018.[1] BHE provided an initial avoided cost calculation on April 27, 2018.[2] Thereafter, the parties exchanged correspondence relating to the basis for the April 27, 2018 avoided cost that BHE had provided.[3] On June 8, 2018 Fall River sent Black Hills an email and letter which rejected BHE's April 27, 2018 avoided cost, proposed an avoided cost of $41.69 MW/hr (which Fall River believed to be

[1] Vrba pre-filed testimony at page 10, line 15-16.
[2] Vrba pre-filed testimony at page 11, line 1.
[3] Vrba pre-filed testimony at page 11, line 8-14.

the avoided cost quoted to a different solar developer in 2017) and attached a proposed PPA.[4] Though Fall River's June 8, 2018 correspondence also referred to the filing of a formal complaint by June 14, 2018, no formal complaint was filed at that time.[5]

Some months later, on August 14, 2018, Fall River's counsel wrote BHE.[6] He noted ongoing discussions between BHE and Fall River over the last six months as to avoided costs, represented that Fall River would enter into a PPA for a slightly lower price of $41.66 MW/hr, and reiterated Fall River's willingness to enter into in a PPA in the form previously provided. BHE was given seven days to respond or the proposal would be considered rejected.[7] BHE sought an extension of time to consider the letter and prepare a response, which extension was granted by Fall River until August 29, 2018.[8] On August 29, 2018, BHE provided an updated avoided cost to Fall River, which included use of the Spring 2018 reference case and the removal of a portion of a the previously planned SD Sun utility solar project from the utility's resource stack.[9] BHE's modeling resulted in an increased calculated avoided cost of $21.77/MW/hr.[10] When it provided the updated offer, BHE offered to meet with Fall River to discuss additional views on avoided cost.[11]

During this same time-period, Fall River had also made a Large Generator Interconnection Application under BHE's Joint Open Access Tariff ("JOATT") with Basin Electric Power Cooperative and Powder River Energy Corporation. Application for

[4] Vrba pre-filed testimony Exhibit E, F and G. Vrba pre-filed testimony at page 12, line 2.
[5] Vrba pre-filed testimony Exhibit F.
[6] Vrba pre-filed testimony Exhibit I.
[7] Vrba pre-filed testimony Exhibit I.
[8] Vrba pre-filed testimony at page 13, line 19-20.
[9] Vrba pre-filed testimony at Exhibit J. The Exhibit reflects an initial email to Fall River's counsel on August 29, 2018, but due to technical difficulties appears to have been received on August 30, 2018.
[10] Vrba pre-filed testimony at Exhibit J.
[11] Vrba pre-filed testimony Exhibit J.

interconnection and the provision of a study deposit allows certain transmission interconnection study work to commence.[12] The first transmission study in the FERC *pro forma* Large Generator Interconnection process and the OATT is a feasibility study.[13] The feasibility study is designed to "preliminarily evaluate the feasibility of the proposed interconnection to the Transmission System."[14] The Interconnection Feasibility Study for Fall River was completed on August 16, 2018. [15]

On September 6, 2018, Fall River rejected the updated avoided cost that had been provided by BHE in late August and indicated it would be filing a Petition in the near future.[16] On September 14, 2018, Fall River filed its Petition.[17] BHE filed its answer on October 4, 2018.

At various times during this case, the Parties discussed a potential stipulation relating to the LEO date. Indeed, the existence of the discussions can be seen in both pre-filed testimony of Fall River's proffered expert Mark Klein and in the pre-filed testimony of Staff Witness Darren Kearney. For instance, Klein testified: "Black Hills, PUC Staff and Fall River have agreed that September 6, 2018, is the date a legally enforceable obligation was created."[18] Kearney also notes the Parties' discussions, but also noted the absence of a formal stipulation: "[i]in order to limit the issues litigated before the Commission, the Parties agreed to stipulate to a LEO date of September 6, 2018[;] [h]owever a formal stipulation memorializing the agreed upon LEO date

[12] *See* Joint Open Access Tariff at Attachment P.
[13] *See* Joint Open Access Transmission Tariff, Attachment P at Section 6.
[14] Joint Open Access Transmission Tariff, Attachment P, Section 6.2. The second study is a System Impact Study. This System Impact Study is more detailed "evaluates the impact of the proposed interconnection on the safety and reliability of Transmission Provider's Transmission System and, if applicable, an Affected System[.]"
[15] The Interconnection Feasibility Study has been provided as a confidential attachment to the Confidential Affidavit of Eric Egge, which has been file simultaneously with BHE's Motion for Summary Judgment.
[16] Vrba pre-filed testimony Exhibit K.
[17] *See* Petition filed in Docket No. EL18-038.
[18] Klein pre-filed direct testimony at page 10, line 12-15.

was never filed with the Commission for approval."[19] Because it now appears that a stipulation will not be culminated, BHE has filed this motion for partial summary judgment. It has also moved for partial summary judgment as to the legal responsibility for regulation services. Both issues can be resolved on undisputed facts or as a matter of law.

III. Standard for Summary Judgment

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions of file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* SDCL 15-6-56(c). On a motion for summary judgment, the moving party bears the burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Saathoff v. Kuhlman,* 2009 SD 17, ¶11, 763 NW2d 800. The non-moving party, however, bears a responsive burden of presenting specific facts showing that a "genuine issue of material fact for trial exists." *Id.*

IV. Argument and Analysis

As the Commission is well-aware, a legally enforceable obligation is a statutory construct that arises under PURPA and serves to prevent a utility "from circumventing the requirement that it provide a capacity credit for a qualifying facility merely by refusing to enter into a contract." *See* FERC Order 69.[20] Neither Congress, nor FERC has defined the phrase "legally enforceable obligation;" instead the appropriate definition was left to each individual state. *In the Mater of the Petition by Highwater Wind LLC and Gadwall Wind LLC for Resolution of a Cogeneration and Small Power Production Dispute with Minnesota Power,* 2013 WL 683041,

[19] Kearney pre-filed testimony at page 10, line 31-34.
[20] Order 69 is attached as Exhibit 1 to Kearney's pre-filed direct testimony. Order 69's discussion of the concept of a legally enforceable obligation can be found on page 11.

Docket No. E-015/CG-11-1073 (Minn. P.U.C 2013)(noting "PURPA and FERC delegate to states the authority to implement PURPA's policies, which necessarily requires states to exercise their own judgment on matters not specified by federal law.")

Thus far, South Dakota has not enacted any regulations defining a LEO. It has, however, issued two decisions which contained findings of fact and conclusions of law regarding LEO formation. In *Oak Tree*, the Commission found that a LEO attached when Oak Tree issued a document it termed "a notice to [the utility] of the establishment of a LEO for the delivery of energy and capacity by Oak Tree to [the utility]," which notice was accompanied by a commitment to make delivery of energy and capacity and an executed PPA. *See In the Matter of the Complaint by Oak Tree Energy LLC, Against Northwestern Energy for Refusing to Enter into a Purchase Power Agreement*, EL11-006 (May 17, 2013).

In a more recent decision, the Commission seemed to move away from the concept that a bare assertion by the QF of a commitment to deliver coupled with a cessation in continual negotiations was enough to trigger a LEO. *In the Matter of the Complaint by Consolidated Edison Development, Inc. against NorthWestern Corporation, d/b/a, NorthWestern Energy for Establishing a Purchase Power Agreement*, Docket EL16-021 (December 2017). Specifically, in *Consolidated Edison* Conclusion of Law, No. 5 the Commission concluded:

> A legally enforceable obligation occurs when the qualifying facility has made and communicated a r*eal and true* commitment and *ability to deliver energy, capacity or energy and capacity* entitling it to a long term avoided cost rate. The qualifying facility must communicate and memorialize that the qualifying facility and the public utility were unable to contract for the sale of electricity.

Id. (Emphasis added). This conclusion of law illustrates that a QF's bare assertion that it will "commit its energy," standing alone is insufficient, absent some communication that the QF has the "real and true" "ability to deliver energy, capacity, or energy and capacity." *Id.* Equally important under the undisputed facts of this case is the fact that the Commission did not find that

a LEO occurred when "negotiations ended," but rather found that the LEO was created on the date the Complaint was filed. *See Id.* It did so because the Complaint constituted a clear statement and memorialization that the parties were unable to mutually agree to contract for energy. *Id.*

Requiring some evidence of project viability (beyond a bare assertion that it is committed to delivering) is consistent with decisions in other state commissions. Indeed, state commissions in other surrounding states have expressly recognized that a bare commitment to sell without further evidence of an ability to actually deliver does not create a legally enforceable obligation. *See In the Matter of the Petition by Highwater Wind LLC and Gadwall Wind LLC for Resolution of a Cogeneration and Small Power Production Dispute with Minnesota Power*, 2013 WL 683041. Section B "Legally Enforceable Obligation" (explaining that the Minnesota PUC focuses on the viability of a qualifying facility's proposal). The Minnesota PUC favorably cited the following factors as instructive on the question of project viability: (1) price; (2) site and design details of the proposed QF; (3) interconnection plans; (4) financing for the project; and (5) fuel supply. *See Id.* (Citing *In the Matter of the Complaint of LS Power Corporation Against Northern States Power Company*, 1993 WL 732529, Docket No. E-002/C-92-899, Order Requiring Negotiations (April 12, 1993)). In addition, it expressly considered evidence of financing, equipment supply (there turbine supply), easements, and progress on interconnection as indicators of project viability. *Id.*

As noted by Darren Kearney in his pre-filed testimony, Montana has also included a project viability approach by regulation. Montana Administrative Rule 38.5.1909 requires the following factors to trigger a LEO for a generator the size of Fall River: (1) tendered PPA consistent with the utility's avoided cost (2) written documentation confirming site control; (3)

proof of all land use approvals and environmental permits; (4) submission of a completed generator interconnection request; and one of the following additional steps: (i) return of a signed System Impact Study or (ii) proof that 90 days has elapsed since the qualifying facility submitted a completed interconnection request with the interconnecting utility, and all of the following conditions exist: the qualifying facility has not been provided a System Impact Study Agreement within 60 days of the initial interconnection request; the qualifying facility has not waived the timeline associated with the work of the interconnecting utility associated with the LGIP process; and the qualifying facility has timely met its deadlines established in the LGIP). Thus, like the Minnesota PUC, the Montana PUC has required some assurance of a "real and true commitment and ability to deliver energy and capacity" or similar assurance of project viability. *Compare Consolidated Edison, supra*.

While the cases from other jurisdictions provide additional support, in the end, the Commission can grant BHE's motion for partial summary judgment based solely on the language in *Consolidated Edison* and its recognition that a LEO requires: (1) a real and true commitment and ability to deliver energy, capacity or energy and capacity and (2) that the QF communicate and memorialize "that the qualifying facility and the public utility were unable to contract for the sale of electricity." Under the undisputed facts of this case, the first element was not satisfied until August 16, 2018 when the Interconnection Feasibility Study was completed. *Accord* Kearney pre-filed direct testimony at 12 (indicating that before a LEO attaches a QF must have committed to sell its energy and completed certain development activities including an interconnection feasibility study). Indeed, Ros Vrba conceded this conclusion in his deposition. There when discussing the LEO date Vrba stated, "Mr. Kearney raised a valid point as to not only demonstration to sell the entire output of the plant to the utility, *but also supported*

by a transmission study allowing that generation being delivered in a timely fashion[.][21] Stated simply, before August 16, 2018, there was no evidence that the proposed solar facility could even feasibly connect to the transmission system, thus there could have been no "real and true commitment and ability to deliver." *See Consolidated Edison, supra*.

While the first factor noted in *Consolidated Edison* was satisfied on August 16, 2018, the second *Consolidated Edison* factor remained unsatisfied. Specifically, the QF had not unequivocally communicated and memorialized "that the qualifying facility and the public utility were unable to contract for the sale of electricity." Indeed, at the time the Interconnection Feasibility Study was completed, the Parties were involved in ongoing discussions on avoided cost. Notably, Fall River had provided BHE an extension until August 29, 2018 to respond with an updated avoided cost. Pursuant to that extension, BHE provided an updated avoided cost on August 29, 2020, but that update was apparently received on August 30, 2018. This updated avoided cost represented an increase over BHE's April avoided cost. On September 6, 2018, Fall River rejected BHE's August 29, 2018 avoided costs, but it also indicated it remained open to entering into a PPA at its prior offer. In light of this statement in Fall River's September 6, 2018 correspondence, and the Parties prior negotiations in the summer of 2018 (wherein a Complaint was discussed but not filed), the actual filing of the Complaint in this matter should constitute the operative communication and memorialization that the Parties were "were unable to contract for the sale of electricity." *See* Consolidated Edison, *supra*. Thus, the Commission can find under the undisputed facts (largely documented in the communications of the Parties) and its prior decisions that the LEO was triggered on September 14, 2018.

[21] Vrba deposition at 137, line 3-13.

V. Regulation Costs

Consistent with the pre-filed supplemental testimony of Darren Kearney, BHE is also moving for partial summary judgment on responsibility for integration/regulation costs. Kearney has explained "in order to integrate solar resource with the power system additional regulation services will need to be procured by either the QF or the utility. The regulation services are needed to respond to the fluctuation of energy production for the solar resources." He further explains that "since integration costs would not be incurred but for the QF those costs should be paid by the QF in order to hold utility customers indifferent."[22] The Commission has previously addressed the issue of integration/regulation costs. Indeed, in *Consolidated Edison*, the Commission specifically recognized that interconnection of the QF would result in regulation costs and that the QF should be responsible for paying this cost. *See Consolidated Edison,* EL11-006 at ¶39.

VI. Conclusion

No genuine triable issues of fact exist with regard to the attachment of a LEO in this case. Similarly, the question of responsibility for regulation services does not present a factual issue, but rather a question of legal responsibility under PURPA. For all of the reasons set forth herein, BHE respectfully requests the Commission grant its motion for partial summary judgment and find that, as a matter of law, the LEO was triggered on September 14, 2018. BHE further requests the Commission to grant partial summary judgment finding that, as a matter of law, Fall River is responsible for regulation costs.

[22] Kearney pre-filed supplemental testimony at page 12, lines 31-33.

Dated this 17th day of June, 2020.

By: 

Catherine M. Sabers
Associate General Counsel
Black Hills Power, Inc.
7001 Mt. Rushmore Road
Rapid City, SD 57702
(605) 721-1914
Cathy.Sabers@blackhillscorp.com

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2020, I served the foregoing Black Hills Power's Brief in Support of its Motion for Partial Summary Judgment by email to the following:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
Patty.Vangerpen@state.sd.us

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
Kristen.Edwards@state.sd.us

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
Darren.Kearney@state.sd.us

Mr. Jon Thurber
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
Jon.Thurber@state.sd.us

Mr. William Taylor
Mr. John E. Taylor
Mr. Jeremy Duff
4820 E. 57th Street, Ste. B
Sioux Falls, SD 57108
bill.taylor@taylorlawsd.com
john.taylor@taylorlawsd.com
jeremy.duff@taylorlawsd.com
Attorneys for Energy of Utah, LLC and Fall River Solar, LLC

Ms. Brittany Mehlhaff
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
Brittany.Mehlhaff@state.sd.us

By: 
Catherine M. Sabers
Associate General Counsel
Black Hills Power, Inc.
7001 Mt. Rushmore Road
Rapid City, SD 57702
(605) 721-1914
Cathy.Sabers@blackhillscorp.com