

**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**

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**SETTLEMENT STIPULATION

EL18-038**

It is hereby stipulated and agreed by and between Black Hills Power, Inc. d/b/a Black Hills Energy (“Black Hills Energy”), Energy of Utah, LLC and Fall River Solar, LLC (“Fall River”) and the Staff of the South Dakota Public Utilities Commission (“Staff”), (individually each a “Party” or jointly “Parties”) as follows:

I. INTRODUCTION

On September 14, 2018, Fall River filed a Complaint for Determination of Avoided Cost (“Complaint”) against Black Hills Energy. The Complaint sought a determination of Black Hills Energy’s avoided cost in relation to an 80 megawatt solar generating facility it is developing near Oelrichs in Fall River County, South Dakota (“the Project”). The Project is certified as a Qualifying Facility under the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §824a-n (“PURPA”), as amended. Fall River filed the Complaint as it disputed Black Hills Energy’s calculation of an avoided energy and capacity rate for the Project.

This matter has been the subject of extensive discovery, including but not limited to data requests, and depositions. Direct, rebuttal, and supplemental testimony of lay and expert witnesses has been filed. Motions have been made and argued before the Commission and orders entered.

After extensive negotiation between Fall River and Black Hills Energy, the Parties have reached a negotiated settlement that resolves all matters related to the Complaint. The Parties jointly seek Commission approval of the settlement.

This Settlement Stipulation, together with the ancillary documents referenced herein, embodies the agreement among the Parties and resolves all issues in Docket No. EL18-038. Subject to the terms and conditions herein, the Commission may consider this Settlement Stipulation in support of the Parties’ Joint Motion for Approval of a Settlement Stipulation of even date herewith.

II. PURPOSE

This Settlement Stipulation has been prepared and executed by the Parties to resolve all matters in Docket EL18-038. The Parties acknowledge that they may have differing views that justify the end result, which they deem to be just and reasonable. The Parties stipulate and agree as follows:

1. The Parties shall file this Settlement Stipulation with the Commission together with a joint motion requesting that the Commission issue an order approving the Settlement Stipulation in its entirety without condition or modification.
2. The Settlement Stipulation shall become binding upon execution by the Parties.
3. This Settlement Stipulation includes all terms and conditions of the settlement and is submitted on the condition that, in the event the Commission makes any material changes or imposes any conditions which are unacceptable to any Party, this Settlement Stipulation may, at the option of any Party, be withdrawn and it shall be null, void, privileged, and confidential and shall not be admissible as evidence of avoided cost in any subsequent proceedings in this contested case or any other proceeding before the Commission.
4. All pre-filed testimony (direct, rebuttal and supplemental) and associated exhibits will be made a part of the record for purposes of the Commission's consideration of the settlement embodied herein. However, in the event that the Settlement Stipulation does not become effective in accordance with Section II, Paragraph 3, or Fall River or Black Hills Energy permissibly withdraws from the Settlement Stipulation, all objections to the admissibility of pre-filed testimony and associated exhibits are reserved.
5. The terms and conditions contained in this Settlement Stipulation shall inure to the benefit of and be binding upon the respective successors, affiliates, owners, stockholders, partners, parents, subsidiaries, directors, officers, agents, employees, representatives, attorneys, and assigns of the Parties.
6. The Parties expressly understand the Settlement Stipulation requires that Black Hills Energy and Fall River execute a Power Purchase Agreement ("PPA") and a Large Generator Interconnection Agreement ("LGIA") after Commission approval of the Settlement Stipulation. If the Settlement Stipulation is not approved, the PPA and the LGIA will not be executed. Because this Settlement Stipulation is being executed in advance of entry into the PPA and the LGIA, if Black Hills Energy and Fall River do not reach agreement on final terms for those documents, either Party may unilaterally withdraw from this Settlement Stipulation and any order entered by the Commission approving the settlement will be set aside, cancelled and held for naught, and the Parties will be returned to their respective positions prior to entry of the order(s).

7. This Settlement Stipulation may not be amended, modified, or supplemented, and waivers or consents to departures from the terms and conditions of this Settlement Stipulation will not be effective unless in writing and executed by all Parties.
8. This Settlement Stipulation shall be interpreted and construed in accordance with the laws of the State of South Dakota and shall be enforceable by the South Dakota Public Utilities Commission.
9. This Settlement Stipulation may be executed by electronic mail or facsimile and in multiple counterparts each of which shall be deemed an original and all of which together shall constitute one and the same document.

III. TERMS OF THE SETTLEMENT

1. PPA Rate

Black Hills Energy will pay Fall River ██████ per megawatt hour on a levelized cost basis for energy and capacity produced from the Project (“PPA Rate”) up to a limit of 80 megawatts each hour commencing upon commercial operation and the onset of actual deliveries of energy from the Project to Black Hills Energy, subject to the terms and conditions of the PPA. The PPA Rate is confidential with the exception that Black Hills Energy may publish the PPA Rate, as necessary, in any regulatory filings and proceedings and Fall River may publish the PPA Rate, as necessary, for financing and other limited commercial purposes as outlined in the PPA.

2. Renewable Energy Credits and/or Renewable Attributes of the energy and capacity produced by the Project

All Renewable Energy Credits (“RECs”), renewable attributes, clean energy attributes, and/or any other clean energy or renewable generation benefits associated with the energy and capacity produced by the Project will be transferred or assigned by Fall River to Black Hills Energy. The PPA will define the renewable, clean energy, and/or generation benefits or attributes to be transferred to Black Hills Energy.

No additional payments will be made by Black Hills Energy for the RECs, renewable attributes, clean energy attributes or other clean energy or renewable generation benefits associated with the Project’s energy and capacity.

3. Basic PPA Terms

The term of the PPA will be 20 years, beginning on the Commercial Operation Date set forth therein. The Commercial Operation Date will be between December 31, 2021 and December 31, 2022.

- The PPA will identify construction and commercial operation milestones and will include guarantees, assurances and/or remedies with regard to the achievement of certain construction milestones and commercial operation by the Commercial Operation Date as mutually agreed to by Fall River and Black Hills Energy.
- The PPA will set forth the Parties' respective responsibility for ancillary services, including generator imbalance and regulation services.
- The PPA will include additional generally accepted commercial terms including but not limited to billing and payment, facility operation and maintenance, security for performance, termination provisions, default provisions and remedies.

4. Large Generator Interconnection

Black Hills Energy and Fall River will promptly enter into a Large Generator Interconnection Agreement (LGIA) that is consistent with the *pro forma* LGIA contained in the Black Hills Energy, Basin Electric Power Corporation and Powder River Energy Corporation Joint Open Access Tariff ("JOATT"). Fall River shall be responsible for the interconnection costs identified in and to the extent specified in the LGIA, consistent with the JOATT.

5. Disputed Facts and Disputed Claim Settlement

This settlement is on the basis of disputed facts, disputed testimony, and disputed claims. For this reason, neither this settlement nor any of its terms shall be construed to have any type of precedential value or be characterized as an accepted practice in a current or future proceeding before the Commission involving a determination of Black Hills Energy's avoided cost or the methodology used, or to be used, in determining a utility's avoided cost under PURPA.

Because the Settlement Stipulation resolves all matters in Docket EL18-03, Fall River, for itself, and on behalf of its parent companies, members, managers, officers, directors, affiliates and successors, if any; hereby releases, discharges, and satisfies each and every claim, demand, action, and/or cause of action, whether known or unknown, that it has against Black Hills Energy and its officers, directors, agents, employees, affiliates, and subsidiaries arising from or in relation to Black Hills Energy's actions or alleged omissions in calculating an avoided cost rate or processing Fall River's request for an avoided cost rate including any claim that Black Hills Energy failed to deal with Fall River in good faith and in a non-discriminatory manner. If Fall River and Black Hills Energy do not reach agreement on final terms for a Power Purchase Agreement and a Large Generator Interconnection Agreement and, as a result, either Party permissibly

withdraws from the Settlement Stipulation, this release shall be considered null, void, privileged and confidential.

6. Stipulation for Dismissal

Upon approval of this Settlement Stipulation without condition or modification and execution of a Power Purchase Agreement and Large Generator Interconnection Agreement by Black Hills Energy and Fall River, as described herein, the Parties will execute and file a Stipulation for Dismissal with prejudice in Docket EL18-038.

The Stipulation is entered into effective this 12th day of August, 2020.

Black Hills Power, Inc. d/b/a Black Hills Energy

By: *Kyle D. Winter*

Its: Vice President – Regulatory Strategy

Energy of Utah, LLC and Fall River Solar, LLC

By: *William Taylor*

Its: *Attorney*

Public Utilities Commission Staff

By: *Krista Edwards*

Its: Staff Attorney