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 RESPONSE TO FALL RIVER SOLAR'S OBJECTIONS AND MOTIONS TO STRIKE CERTAIN TESTIMONY**

EL18-038

Introduction

Fall River has moved to strike significant portions of the pre-filed testimony offered by Mr. Kyle White. White is the Vice President of Regulatory Strategy for Black Hills Power, Inc. d/b/a, Black Hills Energy ("BHE").[1] Fall River's motion relies on an overly technical and restrictive reading of the rules of evidence and their application in this administrative hearing, including an overly narrow interpretation of the rules surrounding expert qualification. In addition, Fall River's motion ignores the fact that the definition of relevance is broad and encompasses a wide range of evidence, including evidence that has any tendency to make a fact more, or less probable, and assists the trier of fact. Finally, when considered against the testimony offered by Fall River's expert ("Klein") and that offered by Commission Staff witness Darren Kearney ("Kearney"), it is clear that Fall River seeks to apply one set of evidentiary rules to White's testimony and an entirely different set of rules to its own proffered testimony. For these reasons and those set forth below, except as specifically set forth in Sections G and H below, Fall River's *Motion to Strike* be denied.

1. Pertinent Factual Background Regarding the Witnesses

Kyle White is BHE's Vice President of Regulatory Strategy. He has a bachelor's degree and master's degree in business administration from the University of South Dakota.[2] White has worked

[1] White pre-filed testimony at page 1, line 6-7. White deposition testimony at page 22, line 14-19.
[2] White pre-filed testimony at page 1, line 11-14.

for BHE for his entire professional career – a span of 37 years.[3] During his 37 years in the regulated electric utility industry, his primary areas of responsibility have included regulatory, rates, resource planning, and marketing related work.[4] However, he has also gained experience in other areas of utility work that are relevant to the current dispute including governmental affairs.[5]

During his career, White has testified in numerous rate cases, fuel and purchased power adjustment dockets, dockets involving changes in regulatory rules or regulations, dockets seeking approval for utility acquisitions, and in cases seeking certificates of public convenience and necessity ("CPCN") for both power generation and transmission.[6] At various times in his career, inquiries as to avoided costs would come through White or his group, so he had to have familiarity with the concept of avoided costs and providing indicative pricing.[7] Moreover, as the Commission is well-aware, rate reviews and CPCN's frequently involve issues similar to calculation of avoided costs, including the use of production cost modeling and also require close coordination with multiple areas of the company, including resource planning, regulatory, generation dispatch and power marketing and transmission. Through his extensive regulatory work with BHE, White has a strong understanding of the Company's geographic territory, its customer base and its generation and power resources.[8] White described his current position as requiring the examination of the regulatory climate and figuring out how the utility fits into that regulatory climate.[9]

Fall River does not include any of this information in its response and rather makes a conclusory allegation that White is not qualified to offer opinion testimony, as an expert, on any issue in this matter. By way of comparison, Fall River apparently believes Klein (their own witness)

[3] White deposition at 5.
[4] White pre-filed testimony at 1, line 14-15
[5] White deposition at 6-7;
[6] White pre-filed testimony at page 1, lines 18-21; White deposition testimony at Page 27, Lines 21-25.
[7] White deposition testimony at Page 31, line 25 and page 32, lines 1-9.
[8] White pre-filed testimony at page 10, lines 5-11.
[9] White deposition testimony at page 9, line 14-25 and page 10, line 1.

qualifies as an expert. In reality, Klein's education and background are quite similar to White's. Klein has a bachelor's and master's degree, but in mechanical engineering, rather than business.[10] He has worked in the energy industry for 35 years.[11] He worked for utility companies in rate-related and energy trading disciplines from 1995-2005. Like White, during his utility career, he testified before public utility commission's on rate matters, rate issues, and energy and capacity costs.[12] Unlike White, during the last 12 years, he became a consultant, developer, and professional witness.[13] This distinction alone, however, is not dispositive on the issue of qualifications and expertise to provide admissible opinion testimony to the Commission in the case.

2. Legal Principles

Fall River begins its legal argument with an incomplete recitation of SDCL §1-26-19. It does so in an unconvincing effort to persuade the Commission that strict construction of the South Dakota Rules of Evidence in this administrative matter is mandated and the mandate is without exception. Fall River's interpretation is discredited by a review of SDCL §1-26-19(1) in its entirety. SDCL §1-26-19(1) provides:

> Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. <u>When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.</u>

SDCL §1-26-19(1)(Emphasis added). Fall River omits any mention of the underlined language, which undercuts any conclusion that strict application of the evidentiary rules is required.

Equally incomplete is Fall River's discussion of the rules governing admissibility of opinion testimony from lay and expert witnesses. BHE agrees that, generally speaking, lay witness opinion

[10] Klein pre-filed testimony at page 2, line 12.
[11] *Id.* Line 12-13
[12] Klein pre-filed testimony at page 3, line 3-5.
[13] *Id*. Line 14-15.

testimony should be "be rationally based on the witness's perception" and "helpful" to determining a fact at issue (SDCL 19-19-701), however, in the context of this administrative hearing, this general statement must be considered against the backdrop of the underlined language of SDCL §1-26-19(1).

In addition, it is important to understand that witnesses qualified by "knowledge or experience" can give opinion testimony that arises out of topics beyond their direct perception. Indeed, under SDCL §19-19-702 (Rule 702):

> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on specific facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

Fall River's motion assumes that White cannot qualify as an expert witness on any topic in this case. Fall River's assumption is incorrect. Numerous South Dakota decisions have recognized that expertise can arise in a number of different ways, including the accumulation of knowledge, skill and experience over one's work life. *See Nickles v. Schild,* 2000 SD 131, ¶10 (explaining that expertise is not always the result of formal training and instead can arise from "all of the knowledge, skill, or experience that he or she has accumulated.") Moreover, as made clear by the statute, a witness that is qualified due to "experience," "skill" or "knowledge" can offer opinions that will help the trier of fact understand the evidence when the testimony is based on "specific facts or data," "is the product of reliable methods," and the result of reliable application. *See* SDCL §19-19-702. As will be explained in more detail below, it cannot reasonably be disputed BHE's Vice President or Regulatory Strategy with 37 years of experience in the utility industry (including resource planning, rate

development and regulatory policy) has appropriate experience and training to testify as an expert on the topics described herein, including the calculation of BHE's avoided cost.[14]

In reviewing Fall River's motion, it is also important to understand that "[a]pplication of the technical rules of evidence is not constitutionally required." *See Daily v. City of Sioux Falls*, 2011 SD 49, ¶29, 802 NW2d 905, 910 (SD 2011). "Numerous courts have recognized that this is especially true in administrative proceedings." *Id.* at ¶29. "Nevertheless, to the extent [the rules of evidence] are applied, it cannot be disputed that they must be applied in a fair and even-handed manner." *Id.* This statement, at first blush, might seem to state a truism. However, as demonstrated throughout this response, Fall River impermissibly seeks to apply one set of evidentiary rules to BHE and a different set to its own testimony and the testimony offered by Commission Staff Analyst, Darren Kearney.

3. Argument and Analysis

Rather than address Fall River's motion excerpt by excerpt, for efficiency, BHE has attempted to group and address like arguments together. BHE has grouped the challenged topics as follows: (A) testimony regarding PURPA's regulatory background, PURPA requirements and its prior application in SD; (B) testimony regarding BHE's method for determining avoided costs, (including inputs and assumptions within that methodology) and consistency with *Consolidated Edison*; (C) testimony summarizing the positions of the Parties and matters at issue; (D) testimony as to the customer impact of Fall River and Staff's avoided cost calculation methodology; (E) testimony comparing seasonal firm purchases and Cost of New Entry ("CONE") as the measure of avoided capacity; (F) testimony regarding the Long 2 Scenario[15] market risk and appropriate avoided cost

[15] The Parties have generally described "Long 2" as the situation where Black Hills has adequate or more supply resources than necessary to serve its system demand and due to operational or contractual limitations Black Hills resources cannot be backed down or reduced to accommodate the Fall River resource. Thus, excess or dump energy is created. White pre-filed testimony at 13-14, line 20-3 and 1-2.

methodology; and (G) testimony referring to Ros Vrba deposition and referring to SD Sun I and II; and (H) Fall River's general objection to duplicative testimony.

A. Testimony regarding PURPA's regulatory background, its requirements and its application in South Dakota.

Fall River has moved to strike any and all testimony offered by White relating to PURPA's regulatory background, its requirements, and its application in South Dakota. Fall River's arguments to exclude can be found at page 5-9, page 12 and page 16 of its *Motion to Strike* and involves responses to questions like those reproduced below: [16]

> Q: YOU INDICATED THAT THE FALL RIVER PROJECT HAS SELF-CERTIFIED WITH FERC AS A QUALIFIED FACILITY, WHAT DOES THAT MEAN AND WHAT IS ITS SIGNIFICANCE?
>
> Q: HOW DID CONGRESS IMPLEMENT PURPA'S REQUIREMENTS?
>
> Q: DID FERC PROVIDE ANY ADDITIONAL DEFINITION OF THE PHRASE "AVOIDED COSTS?
>
> Q: HAS FERC PROVIDED ANY GUIDANCE ON WHAT HAPPENS IF THE QUALIFIED FACILITY SEEKS TO REQUIRE A UTILITY TO PURCHASE ENERGY WHICH EXCEES THE AMOUNT NEEDED TO SERVE ITS LOAD?
>
> Q: YOU INDICATED THE LANGUAGE OF ORDER 69 IS RELEVANT ON THE ISSUE OF AVOIDED COSTS OF ENERY, IS IT RELEVANT WITH REGARD TO THE QUESTION OF AVOIDED COSTS RELATED TO CAPACITY?
>
> Q: HAS THE COMMISSION ENGAGED IN ANY RULEMAKING TO IMPLEMENT PURPA?[17]

Fall River has objected that Mr. White does not have the expertise to provide testimony of this nature, that the testimony is irrelevant, and that insufficient foundation was presented. Fall River's arguments

[16] *See generally* White pre-filed testimony at page 4-9.

[17] Similar examples are discussed at Page 12 of the *Motion to Strike* and include "Does the Commission's prior rule-making or precedent require capacity payments for 20 year term, regardless of a utility's capacity need," and "Does the position taken by the Commission in F-3365 align with relevant FERC rules." *See* White pre-filed testimony at 19-20.

are legally flawed and factually disingenuous considering its own pre-filed testimony. For these reasons, Fall River's motion to exclude can, and should, be rejected.

With regard to Fall River's challenge on insufficient expert qualifications, Fall River relies on two statements in White's deposition: (1) that White "did not consider himself an expert on PURPA" and that (2) White was "a senior in high school" when PURPA was passed.[18] First, it is important to understand that, in his same portion of the deposition, White offered the following additional testimony: "I think I can read [the regulations] as well as most, and I do know how to apply them to an avoided cost estimate."[19] Thus, Fall River's cited statement lack context. In addition, Fall River's reliance on the two excerpts is wholly misplaced, considering Klein and Kearney's pre-filed testimony and scope of experience. Indeed, BHE would respectfully submit that if the Commission were to use White's two isolated deposition remarks to exclude this testimony, it would also need to exclude significant portions of Klein and Kearney's testimony. After all, both Klein and Kearney have offered similar regulatory/legal testimony and have similar utility experience. *See Daily v. City of Sioux Falls*, 2011 SD 49, at ¶29 (noting that, to the extent that the rules of civil procedure are applied in administrative proceedings, "they must be applied in a fair and even-handed manner.")

As illustrated by the excerpts below, Klein has sought to testify to congressional intent, PURPA's goals, statutory interpretation, and the legal requirements placed on utilities. For example, at Page 5, lines 10-17 of his pre-filed testimony Klein was asked the following questions and gave the following answers:

> Q: In earlier testimony you described the Fall River facility as having "QF status." Explain to the Commission the significance of QF status
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> A: In 1978, Congress passed PURPA, partially in response to the then-perceived energy crisis. PURPA encouraged the generation of electricity from small scale domestic renewable resources owned by independent power producers. Wind and solar generation are examples. PURPA requires Black Hills offer to purchase electric

[18] *See* Fall River Motion at 6.
[19] White deposition testimony at page 52, line 10-12.

energy and capacity generated by QF's within its service territory. If a generator meets certain PURPA criteria, it is called a *qualified small power production facility*, or QF.[20]

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Q: Why is QF status important to the owner of a small energy generator like Fall River?

A: In Fall River's case, when it achieved QF status if could lawfully request Black Hills to calculate the rate it will pay for the energy ad capacity generating by Fall River's facility. Once an acceptable rate is determined, Black Hills must, per PURPA, enter into an agreement with Fall River to purchase the energy and capacity in produces.[21]

Later in his pre-filed testimony Klein offers legal opinions as to "legal restrictions" on the avoided cost rate and also offers his opinions on the definition of key PURPA statutory terms such as "avoided cost rate" and "Legally Enforceable Obligation."[22] Indeed, at one point, Klein purports to testify why the "Long 2 Case" is legally inconsistent with PURPA and also the appropriate interpretation of the statutory phrase "customer indifference."[23]

In terms of expert qualifications to give such legal/regulatory opinions, Klein and White have very similar backgrounds. Both have worked in the energy industry for more than 30 years and for their entire career.[24] Both have worked rate-related disciplines and other utility disciplines during their utility tenure.[25] Indeed, the only real difference is that, while White has continued to work directly for utilities, Klein migrated to consulting and expert witness work. Though Klein (unlike White) did self-proclaim his belief that he is an expert on "calculation of energy and capacity rates for solar generating facilities," he has not similarly proclaimed himself an expert on PURPA, statutory

[20] Klein pre-filed testimony at Page 5, line 10-17
[21] Klein pre-filed testimony at Page 6, lines 9-14.
[22] Klein pre-filed testimony at Page 6, line 18-22 and Page 7, lines 17-23.
[23] *See* Klein pre-filed testimony at 13 (testifying, "PURPA requires that avoided cost rates must be just and reasonable to Black Hills customers and in the public interest, but at the same time not discriminate against Fall River" and that "Determination of reasonableness verses discrimination has been described as "customer indifference," meaning that the avoided cost rate must result in no impact on Black Hills customers[.]")
[24] White deposition Page 5, line 9-11.; Klein pre-filed testimony at Page 2, line 12-13.
[25] *See* White deposition Page 6 (describing positions including marketing, public affairs, rates and regulatory, demand side management, governmental affairs and White pre-filed testimony at page 1 describing work rates, regulatory and resource planning). *See also* Klein pre-filed testimony at 2 (describing positions involving energy trading and utility rates).

interpretation or the like.[26] Like White, Klein is not a lawyer or a congressional researcher and, given his tenure of work in the utility industry, like White, it appears he may well have been in high school when PURPA was passed. Despite Fall River's criticism of lack of foundation for White's testimony, no further "foundation" for these various statements was included beyond Klein's utility experience. Given the foregoing, Fall River's complaints about lack of expert qualifications and insufficient foundation lack credibility, are unpersuasive at best, and disingenuous at worst.[27] Equally unpersuasive is any assertion that this type testimony lacks relevance when offered by the utility, but is relevant when offered by the Petitioner.

Fall River's desire to apply one set of "evidentiary rules" to testimony offered by BHE and another set of rules to other pre-filed testimony is further exemplified by its decision not to file a similar motion to strike Kearney's pre-filed testimony. Kearney has worked for the Commission for 6 years, his work has included a number of utility related disciplines, and his "relevant work experience" for this docket included review of PURPA dockets and production cost modeling experience.[28] Kearney does not hold himself as an expert on PURPA, avoided costs, or production cost modeling.[29] Nevertheless, similar to White and Klein, he provides testimony as to the following regulatory/legal topics: (1) Definition of PURPA, (2) FERC's implementation PURPA; (3) the Commission's implementation PURPA; (4) key aspects of prior Commission PURPA decisions; and (5) the definition and significance of a "Legally Enforceable Obligation."[30] Despite the fact that he has a significantly shorter term of utility industry experience, no other specialized training, and that

[26] Klein pre-filed testimony at Page 3, line 12-13. *See also* Klein pre-filed testimony at Page 8, line 15-19 where he was asked "How is the avoided cost rate determined," and gave the following answer PURPA and FERC regulations define avoided cost as "the incremental cost to an electric utility of electric energy or capacity or both, which but for the purchase from the qualifying facility … such utility would generate for itself or purchase from another source."
[27] Indeed, Fall River would apparently need to concede much of Klein and, for that matter, Kearney's testimony would need to be excluded if his citation to *In re Famous Brands*, 347 NW2d 882 (SD 1984) is accurate and holds that "testimony as to what any witness thinks the law means is entirely inappropriate."
[28] Kearney pre-filed testimony at Page 2, lines 17-34.
[29] Kearney pre-filed testimony at Page 25-26, line 31 and line 1 to 6.
[30] *See* Kearney pre-filed testimony Page 1-9.

no further foundation for the testimony of this nature was provided, Fall River apparently has no qualms with Kearney's "expert qualifications," the foundation for his testimony, or as to the relevance of this testimony that, in many aspects, is identical to that provided by White.

In the end, all three witnesses Klein, Kearney, and White have relevant experience in the utility industry and regulatory arena. Working in the utility industry and, particularly the regulatory segment of that utility industry, inevitably requires regulatory staff to review and evaluate regulatory requirements, assess how to comply with those requirements, and (at times) to testify to these types of matters. The Commission is certainly capable of considering all the evidence presented, including information as to witness expertise, foundation and credibility and make its own determination on the weight to be afforded to such testimony. This conclusion is supported by the Commission's order denying similar *Motions in Limine In the Matter of the Complaint by Consolidated Edison Development, Inc. Against Northwestern Corporation DBA Northwestern Energy for Establishing a Purchase Power Agreement*, EL 16-021 (March 21, 2017). There, the Commission unanimously denied the developer's motions to exclude portions of Northwestern and Staff witness testimony that discussed PURPA's regulatory history, the requirements PURPA places on utilities, and prior Commission action relating to PURPA. Just as the Commission denied Consolidated Edison's *Motion in Limin*e regarding this type of evidence, the current motion can, and should be, denied. The only other logical and sustainable conclusion would be to exclude all witness testimony of this type as this would ensure that, to the extent the rules of civil procedure are applied in this administrative proceeding, they are applied in a fair and even-handed manner. *See Daily v. City of Sioux Falls*, 2011 SD 49 at ¶29.

B. Testimony regarding the methodology BHE used to determine avoided costs, including inputs and assumptions within that methodology and consistency with prior Commission decisions.

Fall River seeks to strike testimony wherein White: (1) explains and describes the methodology BHE used to determine its avoided costs; (2) describes certain inputs into the modeling methodology (including the use of certain contracts and a 20% premium for seasonal firm capacity); and (3) explains whether BHE's methodology is consistent with *Consolidated Edison*. These arguments are contained on pages 9-10, and page 20 of Fall River's *Motion to Strike*. For the reasons set forth below, Fall River's complaints can be disregarded.

Fall River's argument is largely premised on the fact that White began his work on this matter in September of 2018. This was after two avoided cost models were completed and the associated results were provided to Fall River. While accurate, this fact is of no import to admissibility of the testimony. Indeed, though White did not begin his work until September 2018, he was actively involved when additional modeling (using the same methodology) was accomplished in March and June of 2019. Thus, he can testify as to BHE's methodology and the inputs and the assumptions into its models based on his personal observations in 2019.

Additionally, once the Commission appropriately rejects Fall River's assertion that White's 37 years of service in the utility industry, as described herein, provides insufficient specialized knowledge, Fall River's argument fails in light of SDCL Section 19-19-703 (Rule 703). Rule 703 explicitly provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

See Rule 703(emphasis added). In light of the foregoing, this is not a matter of hearsay, as Fall River urges, but rather White testifying based on the information that he knows first-hand (due to the later

modeling in this case) or has been made aware of during this case. In addition, the testimony is helpful in illustrating the foundation for White's opinion testimony regarding the fallacies in Fall River's approach, the overall impact to customers, and what methodology best reflects BHE's actual avoided cost.[31]

Rule 703 is not, however, the only basis for allowing White to testify as to Black Hills' modeling methodology, including use of a 20% adder for seasonal firm purchases and as to the contractual inputs to the production model.[32] Support for admitting the challenged testimony can be found in the portion of SDCL §1-26-19(1) which is underlined for emphasis:

> The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. <u>When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.</u>

The practice of calculating avoided costs, like other types of rate-making, involves use of various inputs, assumptions and forecasts into the future – much of which is not reasonably susceptible of proof under the usual rules of evidence. These assumptions and forecasts are, however, the type of evidence that regulatory professionals use in the conduct of their affairs. Consequently, the challenged testimony is admissible under SDCL §1-26-19(1).

Finally, contrary to the assertions of Fall River, the testimony challenged does not squarely fit within the definition of hearsay. The rule regarding hearsay testimony limits the admissibility admission of an out of court statement, made by the declarant, which is offered for "the truth of the matter asserted." *See* SDCL §19-19-801. As noted above, Fall River's hearsay assertion is based on

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[31] At page 20, Section 2, Fall River challenges testimony describing BHE's justification for inclusion of a 20% adder in pricing seasonal firm energy purchases. Fall River asserts that the testimony relies on "certain unidentified empirical data" that is not offered into evidence. On the contrary, the data referenced by Fall River is described in detail at Page 6-7 of White's rebuttal testimony and is illustrated at Rebuttal Exhibit KDW 6. KDW 6 provides a comparison of the average on peak AZ-PV energy pricing to the price of firm energy purchases actually made by BHP. Fall River's arguments in this section are without merit.

[32] *See* Fall River's *Motion to Strike* at page 9-11, including arguments numbered 4, 5 and 6.

the idea that White was not "on the team" producing avoided costs until September of 2018.[33] This wholly ignores the fact that he was "on the team" when two additional modeling efforts and two additional avoided costs were produced. White can permissibly testify as to the modeling methodology and the inputs to that methodology based on his personal observations. His personal observations are facts, not hearsay This testimony will assist the Commission in understanding how BHE produced its avoided cost model in this case, and the Commission is capable of ascertaining the weight to be provided to the evidence and whether it comports with the other testimony it receives at hearing regarding BHE's modeling methodology.

Fall River also objects to White testifying as to whether BHE's modeling methodology is consistent with *Consolidated Edison.* Fall River's objections can be rejected. First, Fall River repeats its assertion that White cannot testify as to the modeling methodology because the modeling "was completed in September 2018" before White was involved.[34] For the reasons above, this argument should be rejected. Fall River also repeats its assertion that White lacks the specialized knowledge or expertise to express this opinion. As argued throughout this brief, Fall River takes an unreasonably narrow approach as to the type of knowledge and experience that is required to offer an opinion on the calculation of avoided costs. Fall River's narrow approach can and should be rejected. Finally, Fall River urges that testimony as to consistency with *Consolidated Edison* is irrelevant and invades the Commission's role in determining the key matters at issue.

On the contrary, this testimony meets the liberal test for relevance. Evidence is relevant if: "It has <u>any tendency</u> to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." SDCL §19-19-701(Emphasis added). Testimony as to whether BHE's methodology can be squared with the most recent Commission

[33] *See* Fall River *Motion to Strike* at Page 10 arguing "Everything Mr. White knows about what happened prior to September 1, including the calculation of avoided cost, is based on what someone else told him, or by reading email."
[34] *See Motion to Strike* at Page 11, Item 6.

decision on avoided cost satisfies this liberal standard. This is especially true in a case where the petitioning party has accused BHE of being "arbitrary" in their modeling work and generating an avoided cost that was "completely flawed," "incorrect," and exhibited a change in methodology that was "not approved by the Commission."[35] Finally, White's testimony does not impermissibly tell the Commission what result to reach on the key question at issue: what is Black Hills' avoided cost based on the inputs, assumptions and calculations that the Commission will hear about in the evidence presented at trial?

C. Testimony regarding the positions of the Parties and Matters at issue

Significant portions of Fall River's motion seek to strike testimony that summarizes/describes Parties' positions or testimony, that differentiates the avoided cost approaches utilized by the Parties, and that involve a description of the matters at issue for determination by the Commission. These arguments can be found within the following portions of Fall River's *Motion to Strike*:

Page	Fall River Argument
3-4	Motion to strike summary of McMahon testimony
12-13	Motion to strike description of Fall River's methodology;
14-15	Motion to strike description of Fall River's position on LEO
15	Motion to strike testimony summarizing positions of Fall River and Black Hills pre-complaint
18-20, 24-25, 24-25	Motion to strike description of Kearney testimony on avoided capacity and LEO
25	Motion to strike description of issues in dispute

By way of example, at page 3-4 of its motion, Fall River objects that a statement by White that McMahon (another BHE witness) "validates [BHE's] modeling, including its inputs and assumptions and rebuts the testimony of Fall River's retained expert, Mark Klein." Fall River urges that the statement goes to the "ultimate issue" and inappropriately vouches for another witness's credibility. Both arguments lack merit. White's statement goes nowhere near "vouching for [McMahon's]

[35] Vrba deposition at page 114, lines 5-25 and page 115, lines 1-14.

credibility." *Compare State v. Edelman,* 1999 SD 52, ¶21 (recognizing general rule that a witness "may not testify as to another witness's credibility or truth-telling capacity[.]") Indeed, White does not say McMahon should be believed, is truthful, credible, or even correct. Similarly, nothing in this statement could reasonably be construed as telling the Commission the result to reach on the ultimate question, which is the end is BHE's actual avoided cost. *Accord Nickles,* 2000 SD 131, at ¶12-13.[36]

Fall River raises similar objections in relation to portions of White's testimony that describes Fall River's position on capacity payments and notes BHE's disagreement with that position. White explains his understanding of Fall River's position as follows:

> First, Fall River's witness Mark Klein urges that Black Hills' proposed avoided cost provides no consideration for capacity. He is incorrect. Second, Fall River asks the Commission to utilize a "solar proxy" method for determining avoided capacity payments. Specifically, Fall River urges that, because Black Hills considered building a solar project with a similar in-service date ("SD Sun Project") the "all in" costs of constructing and operating that project should be used as a proxy in determining the capacity costs avoided. Finally, it appears that Fall River urges for a capacity payment for the entire QF period.

In addition, at page 21, line 7-23 and page 22 lines 1 and 2, White explains why Fall River's proposed capacity approach is flawed. Additional examples include excerpts from White's rebuttal testimony. At page 18-19 of its *Motion to Strike*, Fall River urges the Commission to exclude testimony that summarized Kearney's position and why BHE disagrees with any assertion that CONE should be the measure of avoided capacity.

> Mr. Kearney has offered two opinions on the issue of capacity costs. Black Hills agrees with one of those positions and disagrees with the other. First Mr. Kearney has emphasized language from the Commission decision in Docket F-3365 that indicates capacity credits "should be based on capacity costs actually avoided, and if the purchase does not allow a utility to avoid capacity costs, capacity should not be allowed. Black Hills agrees with this statement and believes that it aligns with PURPA's requirement that a utility pay no more than its avoided costs. Mr. Kearney's second opinion is that Fall River's avoided capacity credit should be based on the Cost of New Entry or "CONE" for a simple cycle gas plant. Black Hills disagrees with this

[36] To the extent Fall River's argument is based on lack of relevance, the standard for relevance is very liberal, allowing evidence that has *any tendency* to make an issue more or less probable and that assists the trier of fact. This testimony is merely introductory and intended to assist the trier of the fact understand the witnesses that will be testifying.

> second opinion, as CONE does not reasonably represent what Black Hills customer would have paid for identified short-term periodic seasonal capacity deficits in the 20-year Power Purchase Agreement ("PPA") had there been no QF. (White rebuttal at 2-3).
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> Stated simply, [the CONE] is not representative of the true costs which are expected to be avoided if Black Hills enters into a PPA with Fall River for its intermittent solar generation. The Load and Resource balance in this case does not support the construction of generation or acquisition of a long-term PPA during the planning period. To ensure that PURPA's customer indifference standard is satisfied, it is imperative that the avoided capacity rate actually match the costs which would be avoided by the QF purchase. Absent construction of the Fall River solar project, consistent with its historical practice, Black Hills would fill short-term periodic seasonal capacity gaps with seasonal firm purchases or, given the very small nature of some of the capacity deficits in this matter, in the day ahead market[.] (White rebuttal at 4)

Fall River urges that the testimony described above is irrelevant, invades the province of the Commission, and that White has inadequate qualifications and experience to provide expert opinion testimony in this area.

As demonstrated throughout this submission, White has sufficient experience and knowledge to provide expert opinion testimony on the issues in this docket including BHE's load and resource balance, resource planning practices, and avoided capacity cost. Fall River's objections to the contrary can be disregarded. Moreover, while BHE agrees, that it is the province of the Commission to ascertain the weight to be given to the differing expert testimony in this case, it disagrees that anything in the challenged portions of the testimony prevent the Commission from doing just that. Rather than "invading the ultimate issue," this testimony assists the Commission in understanding the positions of the Parties, explains why BHE believes the other avoided cost approaches do not square with the costs its customer's would actually avoid through construction of the project, and assists the Commission in determining facts in issue. *Compare* SDCL §19-19-702.

Fall River's challenge to this type of testimony is very similar to a challenge raised by the developer in *Consolidated Edison*. There, Consolidated Edison urged that testimony by Commission Staff expert Kavita Maini, which summarized "the litigant's views on avoided cost [was] not

admissible." Like Fall River, Consolidated Edison urged the testimony was irrelevant and inadmissible under Rule 401 and Rule 402.[37] For its part, Northwestern urged that testimony helped illustrate the foundation for the witness's opinions and would assist the Commission in making a decision in the docket.[38] In *Consolidated Edison,* the Commission denied the Motions in Limine and allowed the testimony.[39] BHE respectfully urges that a similar result in warranted in this case.[40] [41]

Finally, as was the case with the legal/regulatory testimony discussed *supra* at pages 6 to 10, Staff witness Kearney has offered similar testimony summarizing the Parties' positions, the avoided cost methodologies, and describing his disagreement with the same. *See e.g.* Kearney pre-filed testimony at 11, 12, 14 & 29. Among other items, Kearney offers testimony summarizing "Fall River's position on the LEO," "BHE's position on the LEO," and "The reasons he disagreed with BHE's position [on the LEO]." In the cited excerpts Kearney, like White, also summarizes the Parties' respective positions on the appropriate avoided cost methodology and offers an opinion as to whether he agrees or disagrees with those positions. Nevertheless, Fall River has raised no concerns with this testimony. Fall River's actions in doing so belie its concerns of relevancy, expertise and invasion of the ultimate issue.

[37] *See* Consolidated Edison's *Motions in Limine* at 6-7 and, Docket EL16-021 (February 27, 2017.
[38] *See Northwestern Energy's Response to Consolidated Edison Development, Inc.'s Motion in Limine to Exclude Testimony of Bleau LaFave, Kavita Maini, and Jon Thurber*, Docket EL16-021 (March 7, 2017).
[39] *See* Order Denying Motions *in Limine*, Docket No. EL16-021 (March 21, 2017).
[40] Finally, Fall River urges that some of White's observation regarding the nature Fall River's capacity opinions are inaccurate. Fall River will certainly have the opportunity for cross-examination at hearing and had opportunity to address challenges to accuracy in its rebuttal testimony. Objections of this nature can and should be rejected.
[41] Black Hills would further note that this same response is applicable to Fall River's challenge at page 14 regarding White's summary of Fall River testimony as to the LEO date in this matter. Thus, the motion to strike this testimony can be rejected.

D. Testimony as to the impact that Fall River and Staff's respective avoided cost calculation methodology would have on customers.

Fall River has urged that White should be precluded from offering testimony as to the impact that Fall River's and/or Staff's avoided cost calculation methodology would have on BHE's customers.[42] Fall River urges that this testimony is irrelevant and that the impact on customers is "immaterial" and "inconsequential" given PURPA's requirements. *See id.* On the contrary, under a regulatory construct where one of the stated requirements is "customer indifference" to the source of the generation, the impact to customers cannot be reasonably characterized is irrelevant or immaterial.

Fall River's objection as to the foundation for this testimony is equally without merit. Indeed, the testimony challenged immediately above, (wherein White explains his understanding of Fall River's and Staff's methodology) illustrates that he is familiar with both Klein's and Staff's avoided cost methodology. To the extent Fall River wants to further challenge the accuracy of foundation of the cost comparison, it is certainly a matter that can be addressed through robust cross-examination rather than via outright exclusion of otherwise relevant evidence.

E. Testimony Comparing Seasonal Firm Purchases and CONE as the measure of avoided capacity

Fall River inaccurately characterizes a portion of White's testimony as offering an opinion as to "adjustments" to the ABB energy forecast and also argues that those opinions were provided without foundation or necessary expertise. Fall River has either misunderstood or mischaracterized White's testimony. The question and answer are reproduced below:

> Q: WHAT TYPE OF PREMIUM WOULD NEED TO BE APPLIED TO AZ-PV FIRM ENERGY PRICING FOR A PEAKING UNIT, SUCH AS THAT DESCRIBED BY MR. KEARNEY, TO BE THE MORE REASONABLE APPROACH FOR DETERMINING AVOIDED CAPACITY?
>
> A: Under resource planning modeling parameters. Seasonal firm energy (purchased in 25 MW blocks) is purchased only for a single month (July) in 10

[42] *See Motion to Strike* at 14, 20.

> of the 20 years of the PPA term. Consequently, the inflation adjusted ABB forecasted Purchased Energy price for energy purchased at AZ-PV would need be increased by over 400% for Black Hills customers to be indifferent to his recommendations when compared to Black Hills actual and expected practice for acquiring peaking and reserve capacity[.] (White rebuttal at 8-9)

White was not positing that ABB forecasts need to be, or should be, adjusted. Instead, he was seeking to respond to questions raised by Commission Staff as to whether the 20% adder BHE applied to ABB energy forecasts for "firm" energy was appropriate. White's testimony is simply illustrative of how incorrect the adder would have to be to roughly equal the customer cost that would result from use of a CONE methodology for avoided capacity costs.

In an attempt to exclude this otherwise relevant evidence, Fall River relies on prior arguments relating to expert qualification and lack of foundation. BHE incorporates prior arguments that White has sufficient experience and knowledge through his extensive work in the utility industry to make this comparison. In addition, BHE would respectfully submit that the foundation for this opinion can be found in White's pre-filed testimony that describes use of the ABB forecasts, the company's practice in procuring seasonal firm energy for seasonal capacity deficits, and White's review of Kearney's testimony and estimated CONE pricing. As noted above, if foundation is the concern, White will certainly be subject to cross-examination at hearing. There is no need to exclude this relevant and probative testimony on the question of avoided capacity costs.

F. Testimony Regarding the Long 2 Scenario Market Risk and Appropriate Avoided Cost.

Fall River urges that two portions of White's rebuttal testimony discussing the "Long 2 Case" are inadmissible. Specifically, Fall River characterizes the testimony on Pages 18-19 of White's rebuttal as discussing "market risk" and alleges that it is inadmissible due to lack of expert qualifications, lack of foundation, and adds a new assertion that the testimony is argumentative. The challenged testimony is reproduced below:

Q: CAN YOU PROVIDE MORE DETAIL AROUND THE MARKET RISK REFERENCED IN YOUR LAST ANSWER?

A: Under normal power supply acquisition practices customers have confidence the power acquired will be used to serve them and that it will have a predictable price (cost to construct or PPA pricing terms). If the Commission were to require that a QF be paid the forecasted market price in the Long 2 Scenario, the QF will enjoy rate certainty (the avoided cost rate customers will pay), but the customers will have none. Instead, customers will only experience market uncertainty. The market price over twenty years will at times be lower than the QFs avoided cost rate, at times higher, and at times may even be negative.

Q: IF THE COMMISSION WERE TO REACH A DIFFERENT CONCLUSON ON THE LONG 2 SCENARIO THAN IT DID IN *CONSOLIDATED EDISON*, IS IT POSSIBLE THAT, AT SOME POINT, A QF PROJECT COULD BE WHOLLY FINANCED ONLY ON EXCESS ENERGY?

A: Yes, I believe that is possible.

Q: WHAT WOULD BE THE PRACTICAL RESULT OF SUCH A SITUATION?

A: Reversal of the Long 2 Scenario could result in South Dakota customers being the market guarantors and the utility being the involuntary marketer for all of the QF's production as in that situation none of the QF energy could actually be used to serve the utility's load or customer's needs.

White has worked for BHE for 37 years, primarily in rates and regulatory, but also in resource planning and customer facing positions. He has testified before Public Utilities Commissions in rate-making proceedings. He is very familiar with BHE's generating resources, supply resources, load profile and customer base. Moreover, utility ratemaking and resource planning necessarily involves consideration of the costs of generating and procuring energy and how those costs are passed through to customers. White is plainly qualified to offer the testimony excerpted above. These same facts together with the remainder of his pre-filed testimony provide extensive foundation for this testimony.

Contrary to Fall River's arguments, this is not argument, but a reasonable analysis of the practical and logical impacts of a decision which would require payment of forecasted market prices to a developer when its energy cannot, by definition, be used to serve load and instead must be sold into the market. Finally, nothing in these excerpts "invades the province of the Commission." Rather,

they are conclusions based on the evidence presented, including the relative size of the proposed project BHE's system demand. The testimony will assist the Commission in determining whether customers are indifferent, under PURPA, if Long 2 energy is paid at a forecasted market price.

Fall River makes similar arguments at Page 21 of its brief, urging that White's rebuttal testimony inappropriately provides an opinion on "the appropriate method of determining the capacity component of avoided costs." Specifically, Fall River repeats its arguments regarding lack of foundation, insufficient expert qualifications, and that the testimony invades the province of the Commission. Fall River's characterization of the testimony is inaccurate. The question and answer are reproduced below.

> Q: WHY IS IT IMPORTANT TO ESTABLISH A RATE FOR PURCHASES THAT DOES NOT EXCEED BLACK HILLS' AVOIDED COST?
>
> A: As is well-stated in the testimony of Mr. Kearney, Black Hills customer's will ultimately be responsible for paying the avoided cost rate for purchases ordered by the Commission during the 20- year term of the PPA. Thus, the avoided capacity cost should not exceed what Black Hills' customers would have expected to pay absent the QF; this is the true meaning of customer indifference.

First, this testimony does not tell the Commission the result to reach on the ultimate issue, thus it does not impermissibly invade the province of the Commission. Second, contrary to Fall River's arguments, the record before the Commission, including that summarized herein, shows that White has sufficient foundation and more than sufficient experience to offer the opinion quoted above.

G. Testimony referring to Ros Vrba deposition and referring to SD Sun I and II.

BHE would stipulate that the questions and answers at Page 9, line 13-20; Page 12, line 7-20; Page 13, line 1-11 and Page 16 line 13-16 continuing through page 17 line 10 can be considered withdrawn or alternatively can be stricken. As noted by Fall River, the enumerated excerpts respond to allegations Mr. Vrba made in his deposition testimony, and at this time, the deposition testimony

is not in the record. BHE reserves the right to offer responsive rebuttal testimony at hearing if the deposition is introduced or similar testimony is presented.

BHE will also stipulate that a portion of the question contained at page 13, line 12-16 of White's rebuttal testimony that references Mr. Vrba's deposition can be stricken, however, the remaining portion of the question and answer set forth on pages 13-15 is permissible. Specifically, after removal of the reference to deposition testimony the question would read: "Can you explain the change in calculated avoided cost rates provided by Black Hills in April 2018, August 2018, March 2019 and July of 2019?" Black Hills assumes that Fall River will respond by stating that White is not qualified to offer the testimony. For all of the reasons stated herein, including the discussion of Rule 703 *supra* at page 11, Black Hills would urge that White is qualified to offer opinions on avoided cost and that the testimony is otherwise is admissible.

Similarly, Black Hills would also stipulate that the short reference to Mr. Vrba's deposition contained at the end of a question on Page 17, line 12 and the portion of the answer at line 13-14 could be stricken. As modified the Q and A would read:

> Q: DO YOU BELIEVE THAT CONTINUED RECOGNIZTION OF THE LONG 2 SCNARIO BY THE COMMISSION IRRELEVANT?
>
> A: Recognition of the Long 2 Scenario is necessary to ensure that PURPA's customer indifference standard is satisfied. In *Consolidated Edison*, the Commission correctly determined that, in the Long 2 Scenario, the utility avoids no costs; thus the energy has zero value. Changing this practice of the Commission could have serious financial implications for electric utility customers in South Dakota.

This proposal eliminates Fall River's concern as to the relevance of referencing deposition testimony and appropriately focuses the testimony on the matters at issue in the case.

Finally, Fall River has moved to strike testimony on pages 27 and 28 of White's direct pre-filed testimony, which included some brief discussion of negotiations which occurred between Mr.

Vrba and BHE in relation to prior solar projects commonly referenced as SD Sun I and SD Sun II.[43] As the Commission is aware from prior briefing, BHE has taken the position that SD Sun I and SD Sun II are largely, if not completely, irrelevant to the current proceedings. Indeed, one of the excerpts Fall River has objected to merely reflects BHE's position that these prior negotiations are irrelevant. As the Commission is well-aware of this position from prior motions to compel, BHE will stipulate these questions and their corresponding answers can be considered withdrawn, or alternatively can be stricken.

H. General objection as to "duplicative testimony"

BHE would respectfully submit that "preliminary objection" to certain rebuttal testimony contained at page 17-18 of the *Motion to Strike*, not only elevates form over substance, but also provides an insufficient basis for Fall River to request that listed portions of White's pre-filed testimony be stricken. Specifically, other than a general opinion from Fall River's counsel that there is duplication between pre-filed direct and rebuttal testimony, no other rationale or legal argument is raised; consequently, it is impossible to meaningfully respond. BHE would further urge that, in a matter where there is sequenced testimony and pre-filed and live testimony, some duplication is likely unavoidable and should not provide a basis for excluding testimony. Beyond the foregoing, BHE would note, however, that due to the portions of testimony which BHE stipulated to withdraw or stipulated could be stricken in Section G, items (c)–(h) set forth by Fall River are likely moot.

Conclusion

For all of the reasons set forth above, Black Hills urges that, without the exception of those items set forth with particularity in section G of this Response to Fall River Solar's Objection and Motions to Strike Certain Testimony, Fall River's motion can and should be denied.

[43] *See* Fall River *Motion to Strike* at page 15-16.

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 Response to Fall River Solar's Objections and Motions to Strike Certain Testimony 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