

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE)
COMPLAINT OF ENERGY OF UTAH)
LLC, AND FALL RIVER SOLAR, LLC)
AGAINST BLACK HILLS POWER)
INC.)
)**

**Docket No. EL 18-038
BLACK HILLS POWER INC.'S
RESPONSE TO STAFF'S MOTION FOR
PROCEDURAL SCHEDULE**

Black Hills Power Inc., d/b/a Black Hills Energy (“Black Hills”) hereby files its response to the Motion for Procedural Schedule filed by staff on December 19, 2018 (“Staff’s Motion for Procedural Schedule”).

INTRODUCTION

Black Hills fully supports Staff’s Motion for a Procedural Schedule. As indicated in Staff’s motion, the Parties have been in discussions about an appropriate schedule since October 2019. The matter is now before the South Dakota Public Utilities Commission (the “Commission”) due to a difference of opinion between Energy of Utah, LLC and Fall River Solar, LLC (“Fall River”) and Black Hills (individually referred to as “Party” and collectively the “Parties”) with regard to the appropriate framework under which this matter should proceed to hearing. For the reasons set forth more fully below, Black Hills respectfully requests that the Commission approve its proposed procedural schedule, which is consistent with accepted Commission practice and appropriately addresses the fact that Fall River has been in possession of all of the modeling underlying Black Hills’ avoided cost calculation since August of 2018.

PROCEDURAL AND FACTUAL BACKGROUND

The facts most relevant to the current dispute pre-date Fall River's September 14, 2018 Complaint. In the spring of 2018, Fall River contacted Black Hills about a proposed 80 MW Qualifying Facility ("QF") solar project. Fall River sought to engage in discussions about a Power Purchase Agreement and associated avoided cost price for the output of that facility. On April 27, 2018, Black Hills provided Fall River with an avoided cost price that is consistent with the Commission's decision in *In the Matter of the Complaint by Consolidated Edison Development, Inc., Against Northwest Corp. d/b/a Northwestern Energy for Establishing a Purchase Power Agreement*, Docket EL16-021. See Complaint at ¶ 21; Answer at ¶ 20.¹ On August 14, 2018, Fall River rejected Black Hills' avoided cost price and proposed a Power Purchase Agreement with an avoided cost price substantially higher than that calculated by Black Hills. See Complaint at ¶ 23; Answer at ¶ 22. Fall River has not provided any basis for its proposed price - other than its proposed price was similar to the avoided cost price given to a different QF project 2 years earlier. See Complaint at ¶ 23.

Black Hills reviewed Fall River's proposal as well as the inputs to its own model, and on August 29, 2018, Black Hills proposed an updated avoided cost price with updated inputs. See Complaint at ¶ 24; Answer at ¶¶ 23-24. At the same time, Black Hills provided Fall River with a description of the change in inputs and the modeling behind its calculation. See Exhibit 1. Fall River rejected Black Hills' updated avoided cost pricing and, on September 14, 2018, filed this Complaint. See Docket No. EL18-038. Black Hills timely filed an Answer to the Complaint on October 4, 2018. *Id.* Fall River has not served any discovery in this matter.

¹ BHP also provided the modeling which formed the basis for that calculation.

ARGUMENT AND ANALYSIS

On October 9, 2018, shortly after filing its Answer, Black Hills reached out to Staff and Fall River and inquired about the possibility of a Stipulated Procedural Schedule. *See* Exhibit 2. Though the Parties have intermittently engaged in discussions about a potential procedural schedule since that time, they have been unable to reach an Agreement as to the form that procedural schedule should take.

Black Hills has proposed that, consistent with Commission practice and given the technical aspects underlying the topic of appropriate avoided cost modeling and calculation, the Parties should provide pre-filed testimony in this docket. Furthermore, Black Hills has proposed that, since Fall River did not submit pre-filed testimony with its Complaint, it should be the first Party to provide pre-filed testimony, so as to advise the Commission Staff and Black Hills of its basis for disputing Black Hills' avoided cost price and/or calculation methodology. After all, Fall River has been in possession of Black Hills' avoided cost price, the modeling underlying that price, and Black Hills statement that it acted in conformance with the Commission's decision in *In the Matter of the Complaint by Consolidated Edison Development, Inc., Against Northwest Corp. d/b/a Northwestern Energy for Establishing a Purchase Power Agreement* (Docket EL16-021) since August of 2018.

To that end, on October 16, 2018, Black Hills proposed a routine procedural schedule in the manner set forth below:

Avoided cost Testimony from Fall River	November 15, 2018
Other pre-filed testimony from Fall River, as necessary	December 15, 2018
BHP responsive testimony	January 30, 2019

Staff Testimony	March 30, 2019
Completion of Discovery	April 20, 2019
Pre Hearing Motions Deadline	April 30, 2019
Pre-Hearing Motions Hearing	May 14, 2019
Evidentiary Hearing	June 4-5, 2019

See Exhibit 3. Obviously, some of the dates included in Black Hills’ original proposal have passed and thus the specific dates set forth above require modification due to the passage of time. In light of this fact, Black Hills has submitted a Proposed Procedural Schedule with this response, which tracks the general substantive construct of its October 16th proposal, however, it includes dates that are more practical given the passage of time. *See* Proposed Procedural Schedule at Exhibit 4.

By way of comparison, Fall River is objecting to the concept of filing pre-filed testimony. Based on the most recent communications between the Parties, Fall River’s alternate approach proposes written discovery, expert reports, and expert depositions rather than a submission of pre-filed testimony for Commission Staff or Black Hills to review. *See* Exhibit 5. This is despite the following undisputed facts: (1) Fall River purported to have a basis for its own avoided cost price back in August 14, 2018; (2) Fall River has now had at least four months with Black Hills’ avoided cost price and supporting modeling; and (3) Fall River has had the opportunity to conduct discovery since October, but has not.² Fall River’s approach is inconsistent with Commission practice and is not appropriate in this situation, given Fall River’s Applicant status and the factual evolution of the case as described above.

² *See Complaint at* ¶23.

Black Hills reviewed the Commission's electric dockets in the period from 2015-2018. In situations where procedural schedules were entered by the Commission, all but one order involved submission of pre-filed testimony. *See e.g. In the Matter of the Application by Dakota Range I, LLC and Dakota Range II LLC for a Permit of a Wind Energy Facility in Grant County and Codington County South Dakota*, Docket No. EL18-003; *In the Matter of the Application by the Prevailing Wind Park Project for a Permit of Wind Energy Facility in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*, Docket EL18-026; *In the Matter of the Application by Crocker Wind Farm LLC for a Permit of Wind Energy Facility and a 345kV Transmission Line in Clark County South Dakota, for Crocker Wind Farm*, Docket No. EL17-028; *In the Matter of the Complaint by Juhl Energy, Inc. Against Northwestern Corporation d/b/a Northwestern Energy For Establishing a Purchase Power Agreement*, Docket No. EL16-021; *In the Matter of Commission Staff's Request to Investigate Northern States Power Company d/b/a Xcel Energy's Proposed Fuel Clause Rider*, Docket No. EL 16-037. Similarly, it appears fairly uniform that the Applicant (here Fall River) should bear the burden of moving the case forward in advance of Commission Staff, Intervenors and/or the Respondent. *See e.g. In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC*, Docket No. EL18-003; *In the Matter of the Application by Prevailing Wind Park, LLC*, Docket EL18-026; *In the Matter of the Application by Crocker Wind Farm, LLC*, Docket No. EL17-028; *In the Matter of the Complaint by Juhl Energy, Inc.*, Docket No. EL16-021. *See also* ARSD 20:10:01:15:01 ("In any contested case proceeding, the complainant, counterclaimant, applicant or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission.")

CONCLUSION

In light of the foregoing, Black Hills respectfully requests approval of its proposed procedural schedule, which comports with Commission practice. Moreover, Black Hills proposed procedural schedule, including pre-filed testimony from Fall River at the outset, appropriately recognizes (1) that Fall River has been in possession of Black Hills' avoided cost pricing, the modeling which underlies that pricing, and has been aware of Black Hills use of the Commission approved *Juhl Energy* methodology since August of 2018; (2) that the Commission's regulations generally recognize that the Fall River should bear the burden of moving forward; (3) that Fall River purported to have a basis for its own proposed avoided pricing since at least August 2018, yet it has not provided any pre-filed testimony to describe its theory of the case; and (4) Fall River has had the opportunity to conduct written discovery since October, but has elected not to do so. For all of these reasons, Black Hills respectfully request that the Commission enter a procedural schedule consistent with, or substantively similar to that it has proposed in this response to Staff's Motion for Procedural Schedule.

Dated this 3rd day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2019, I served the foregoing Black Hills Power, Inc.'s Response to Staff's Motion for Procedural Schedule by email and by first class mail, postage prepaid, to the following:

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