

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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:

Docket No. EL18-038

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

:

FALL RIVER SOLAR'S RESPONSE
TO STAFF SCHEDULING MOTION

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Energy of Utah, LLC and its subsidiary Fall River Solar, LLC submit this response to the Staff's December 18, 2018 motion for a procedural schedule.

Background

Energy of Utah's subsidiary Fall River Solar is developing an 80-megawatt solar generating facility near Oelrichs in eastern Fall River County. Fall River is recognized by the Federal Energy Regulatory Commission as a Qualified Facility in the sense of the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. § 824 a-3. Fall River's project is within Black Hills Power, Inc.'s service territory.

As detailed in its Complaint, Fall River seeks determination of avoided cost and an order from the Commission requiring Black Hills to enter into a power purchase agreement for the electricity and capacity produced by its solar facility. Pursuant to PURPA and state law, Black Hills is obligated to purchase the electricity generated and capacity created by Fall River's solar generator at the cost to Black Hills which, but for the purchases from Fall River, Black Hills would incur generating or purchasing the power from another source, its so-called avoided cost.

Fall River requested an avoided cost rate from Black Hills early in 2018. In its first avoided cost calculation, Black Hills included 52 megawatts of unconstructed solar generation in its generation fleet. Two of the facilities, SD Sun 1 and 2, proposed to be constructed near Hot

Springs, were developed in 2016 by South Dakota Sun, also a subsidiary of Fall River's parent, Energy of Utah. Both were PURPA style QF projects. Black Hills negotiated power purchase agreements with SD Sun for units 1 and 2 at rates more than double the initial rate proposed by Black Hills for the Fall River project. Energy of Utah sold its interest in the projects to the U.S. subsidiary of Hanwah QCell, 174 Power Global Corp. 174 Power Global worked extensively to prepare the projects for construction. Black Hills acquired the rights to the projects from 174 Power Global in early 2018 but has not yet begun construction.

After exchanging avoided cost estimates with Fall River over the spring and summer of 2018, Black Hills submitted a final levelized twenty-year avoided cost rate to Fall River in late August 2018. The final iteration scaled back Black Hills solar generation to include only a single 20-megawatt facility, SD 1. Fall River rejected the proposed \$21.77 per megawatt hour rate and filed this action on September 9. Black Hills answered Fall River's complaint in early October, admitting that Fall River qualified as a QF and it was obligated to negotiate with Fall River to acquire its generation at avoided cost.¹

Legally Enforceable Obligation

PURPA requires that avoided cost be calculated in proximity to the date a legally enforceable obligation arose between Fall River and Black Hills. Typically, the LEO date is fact driven and a contentious point of litigation. Black Hills and Fall River, acting through their lawyers, have agreed to stipulate that a legally enforceable obligation arose in this case on September 6, 2018.

¹ Fall River applied for interconnection with Black Hills on its Westhill/Stegall 230 kV line at a point near the proposed facility. After several delays, Fall River understands Black Hills transmission division will complete a System Impact Study by January 25, 2019.

Scheduling Dispute

Despite several efforts, Black Hills and Fall River are unable to agree on a schedule for management of the case, hence the Staff motion of December 18. The principal point in dispute is when written expert witness testimony should be filed. Black Hills proposed that Fall River's written expert testimony be filed early in the case, before discovery has run its course. Fall River believes it makes more sense to complete discovery and then file written testimony, avoiding the possibility of amending or modifying testimony after motion practice and discovery are complete.

Although pre-filed testimony and exhibits are common in Public Utilities Commission proceedings, the Commission's regulations acknowledge pre-filing is not mandatory and certainly not required at the commencement of the hearing. ARSD 20:10:01:22.06 provides

When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order.

As the Commission is aware from prior cases, calculating avoided cost is technical and typically requires expert testimony involving construction costs, economic projections, assumptions and opinions. In this case Fall River's expert Mark Klein considered the costs of constructing Black Hills as yet unbuilt 20-megawatt solar facility as part of his avoided cost rate calculations. He employed generalized cost data from recent similar solar projects in the Rocky Mountain Region. When, through discovery, Black Hills anticipated costs for bringing SD 1 to completion become available, Mr. Klein's rate calculations may require adjustment. It is inefficient to prepare and file testimony prior to discovery only to withdraw and refile or amend the testimony later when relevant information becomes available.

Accordingly, Fall River respectfully requests the Commission set a procedural schedule that provides for filing written testimony after discovery is completed rather than before it is undertaken.

Proposed Schedule:

Fall River proposes the following schedule:

1. Expert Report:

Fall River will deliver its expert's preliminary avoided cost report to Staff and Black Hills on entry of the scheduling order. Black Hills will deliver the data, calculations and supporting information for its August 29, 2018, avoided cost calculation to Staff at the same time.

2. LEO stipulation:

Parties will file a stipulation establishing September 6, 2018 as the LEO date forthwith.

3. Interrogatories, data requests and requests for production of documents:

Parties will submit discovery requests to each other on or before Friday, February 8, 2019. Responses will be due twenty days following the date the discovery request is served but in no event later than March 6, 2019.

4. Staff expert:

If the Staff retains an expert, the expert will submit a written report to the parties on or before March 6, 2019.

5. Depositions:

Depositions will be conducted the week of April 22, 2019, location and persons deposed to be determined by the parties. All parties will make a good faith effort to have their experts come to South Dakota for depositions.

6. Written testimony:

Written testimony will be filed May 22, 2019. Rebuttal testimony will not be filed but will be offered live at the hearing.

7. Hearing:

Hearing will be conducted June 12-13, 2019.

8. Motion practice:

Motions may be filed at any time prior to June 1, 2019. Motions will be accompanied by a brief addressing the issues raised by the motion. Responsive briefs shall be due ten days following filing the motion. Argument on motions shall be set by the Commission as required.

Conclusion

Fall River respectfully requests the Commission hear the arguments of the parties and enter a scheduling order materially similar to that proposed above.

Dated this 3rd day of January 2019.

TAYLOR LAW FIRM, LLC

By William Taylor

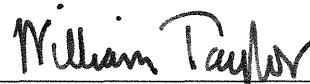
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2019, I served the foregoing response to staff scheduling motion by email to the following:

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