BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

IN THE MATTER OF THE COMPLAINT OF ENERGY OF UTAH, LLC AND FALL RIVER SOLAR, LLC AGAINST BLACK HILLS POWER, INC.	:	Docket No. EL18-038 FALL RIVER SOLAR'S OBJECTIONS AND MOTIONS TO STRIKE CERTAIN TESTIMONY

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

INTRODUCTORY STATEMENT

SDCL 49-1-11 allows the Public Utilities Commission to adopt rules that govern the procedures for acting on complaints within its jurisdiction, including the conduct of hearings in matters before it.

The Public Utilities Commission is an administrative agency by definition. SDCL 1-26-1 (1) defines an "Agency" as each state commission vested with the authority to exercise any portion of the state's sovereignty. The Public Utilities Commission is assigned to duty of exercising regulatory elements of the state's sovereignty by statute.

SDCL 1-26-1 (2) defines a "contested case" as a proceeding, including rate-making, in which the legal rights of a party are required by law to be determined by an agency. This matter is a contested case in the sense of the statute.

The rules governing the conduct of administrative contested case hearings in South Dakota commence at SDCL 1-26-18. SDCL 1-26-19 directs that hearings in administrative contested cases are governed by the rules of evidence. The statute provides "The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts

of this state. . . shall be followed." The South Dakota Rules of Evidence applicable to the circuit courts are embodied in SDCL Chap. 19-19.

SDCL 1-26-19 and PUC regulation ARSD 20:10:01:22.06 allows the Commission to require that testimony in contested cases be filed in written form in advance of the hearing. "Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. . ." SDCL 1-26-19. Here, the Commission entered an order requiring pre-filed testimony. Petitioner Fall River, Respondent Black Hills Power, Inc. and the Commission staff pre-filed witness testimony.

SDCL 1-26-19 provides "Objections to evidentiary offers may be made and shall be noted in the record. . .". In a case in which testimony is not pre-filed, a litigant would typically make a motion *in limine* to restrict or limit evidence to be offered at the hearing, or would pursue the more familiar objection process, question by question. Typically, failure to object waives a litigant's right to later argue that evidence is inadmissible. SDCL 9-19-103; *Bakker v Irvine*, 519 N.W.2d 41 (S.D. 1994).

OBJECTIONS AND MOTIONS TO STRIKE

Petitioner Fall River Solar LLC ("Fall River") objects to the following questions and makes the following motions to strike the noted portions of the Direct Testimony of Kyle D. White, filed on May 7, 2019.[1]

[1] The objections are laid out by page and line from Mr. White's testimony, followed by a short description of the objectionable material, the grounds for the objection, and an argument.

1. **Page 3 lines 10-11**. The question solicits and the answer summarizes and characterizes a portion of the testimony of Black Hills witness Jim McMahon.

Objection: The question and answer are irrelevant to any issue in the case. The answer summarizes another witness's testimony, which invades the province of the Commission as trier of fact, expresses an opinion as to the strength and nature of the other witness's testimony, and is without foundation.

Argument: Mr. White summarizes and characterizes the testimony of Jim McMahon and concludes with the opinion that Mr. McMahon's testimony rebuts the testimony of Fall River's expert Mark Klein. What one witness thinks about the credibility of another witness, the weight that should be given to another witness's testimony, or the effect of testimony is simply irrelevant to any matter in issue in the case. SDCL 19-19-401 provides "Evidence is relevant if . . . [I]t has any tendency to make a fact more or less probable than it would be without the evidence.". Mr. White's view of Mr. McMahon's testimony is simply not relevant as it offers no proof as to the probability of accuracy of the McMahon testimony.

The credibility of a witness and the weight the testimony is given is solely within the province of the trier of fact, which in this case is the Commission. *Surat Farms LLC v Brule Cty. Bd. Of Comm'rs.*, 2017 SD 52, ¶18, 901 N.W.2d 365. One witness may not testify about the credibility of another witness. The issue of the credibility of witness testimony is strictly within the province of the trier of fact. *State v Larson*, 512 N.W.2d 732 (1994). Mr. White's opinion about the strength of the McMahon testimony is little more than a statement that Mr. McMahon is a credible witness and is not admissible.

Mr. White's testimony expresses his opinion regarding Mr. McMahon's testimony. Mr. White's testimony is not technical, specialized or scientific. It simply is Mr. White's impression

of what McMahon said and his opinion on the strength and credibility of McMahon's testimony. SDCL 19-19-701 and 702 govern the admissibility of opinion testimony. Rule 701 of the statute addresses lay opinion testimony and limits the testimony to those things that are ". . .rationally based on the witness's perception" or ". . .helpful. . .to determining a fact an issue". SDCL 19-19-701(b). Mr. White's testimony is lay opinion testimony. In order for a non-expert to give opinion testimony, it must be demonstrated that the opinion is helpful to understand a fact in issue. Mr. White's opinion on the content and strength of the McMahon testimony does nothing to clarify or help understand any fact in issue....it simply is an attempt to underline and emphasize certain things McMahon said.

Mr. White's opinion regarding Mr. McMahon's testimony is irrelevant and immaterial to any fact in issue in the case and accordingly is not admissible as evidence. SDCL 19-19-401 provides "Evidence is relevant if . . . [I]t has any tendency *to make a fact more or less probable* than it would be without the evidence." Mr. White's views on Mr. McMahon's testimony in no manner make anything Mr. McMahon testified to more or less probable.

Mr. White's opinion regarding the effect of Mr. McMahon's testimony invades the province of the Commission, it being up to the Commission to determine what testimony it wishes to believe, the weight to be given to the McMahon testimony, and whether or not the McMahon testimony rebuts any other testimony. It is solely within the province of the Commission to accept one expert's opinions over another's and to judge the credibility of the witnesses and the weight to be given to their testimony. *Hiller v Hiller,* 2018 S.D. 74, 919 N.W.2d 548; *Surat Farms LLC v Brule Cty. Bd. Of Comm'rs., supra.*

2. **Page 4 lines 12-21**. The question solicits an explanation of the meaning of statutory definition of *Qualified Facility* as used in the Public Utility Regulatory Policies Act (PURPA) and the legal import of the term.

Objection: Mr. White is not qualified to give an opinion on the meaning of PURPA or any other statutes and regulations, and even if he is qualified, his opinion as to what the statutes and regulations mean is irrelevant to any issue in the case.

Argument: The question asks Mr. White's opinion on what the phrase *qualified facility* means and its significance under PURPA. The question asks for the definition and application of a term of art in a federal statute. Only an expert can render an opinion on matters that require specialized knowledge, and then only after the witness's expertise has been demonstrated. SDCL 19-19-702 provides "A witness who is *qualified as an expert by knowledge, skill, experience, training, or education* may testify in the form of an opinion. . ." Before a witness can express an expert opinion, there must be a showing that the witness is qualified to render an expert opinion, either grounded in his education, his professional experience, or some circumstance that is unique to him. That showing of expertise is commonly called *foundation* for the witness's opinion. Failure to demonstrate the foundation for the opinion is fatal to the question.

There is no statement of foundation for Mr. White's opinion in his testimony. In fact, he admitted in his deposition testimony that he has not had any specialized training with respect to PURPA and its applications, that his exposure to PURPA and its applications has been limited, and that he has no basis on which to opine as to what PURPA, Commission regulations, and decisions stand for. In his December 11, 2019 deposition testimony, Mr. White was asked

Question: Do you consider yourself and expert on PURPA?

Answer: No.

Question: And certainly you're not an expert on what Congress intended by the enactment of the statute?

Answer: I was a senior in high school.

(White Depo. p. 45 lines 21-25; p. 50 lines 1-4.)

When asked if he'd had any specialized training on PURPA, Mr. White answered "No." (White Depo. p. 31 lines 19-21.) Obviously, Mr. White cannot be qualified as an expert on PURPA, or anything else covered in the answer to the question. Mr. White's testimony is nothing more than a lay opinion on the meaning of statutes, regulations, and certain decisions of the Commission, and per the requirements of SDCL 19-19-701 is inadmissible and should be stricken.

Even if Mr. White had been qualified as an expert on PURPA and its associated regulations, FERC orders, and South Dakota PUC decisions, his view of the meaning of PURPA is immaterial and irrelevant to any issue before the Commission. The meaning of statutes is gleaned from their plain language. *In re Famous Brands*, 347 N.W.2d 882 (S.D. 1984). Determining what a statute means is solely within the province of the court, in this case the Commission. *Orr v Kneip*, 287 N.W.2d 480 (1979). What Mr. White thinks about the meaning of PURPA, FERC decisions and Commission decisions simply doesn't matter, is irrelevant and invades the province and duties of the Commission.

If it is necessary to consult legislative history, the official legislative history of a statute of the United States is contained in the *U.S. Congressional and Administrative News,* the *United States Statutes at Large,* and *The Congressional Record Index, History of Bills and Resolutions.* Mr. White's view of the reasons why PURPA was enacted are irrelevant.

Mr. White is not qualified as nor does he profess to be an expert witness on any subject in this case. Further, even if he was offered as an expert witness, which he was not, there is no

foundation for the premise that he is qualified to speak to what Congress intended or sought to encourage through the enactment of PURPA or how PURPA is intended to operate. As noted above, SDCL 19-19-702 requires that it be demonstrated that he is qualified to speak on a technical subject by training or experience. No such showing has been made. Accordingly, Mr. White's opinions as to what Congress intended and the effect of certification of a generating facility as a Qualified Facility is without foundation and is irrelevant and immaterial to any matter before the Commission.

Second, no witness, expert or otherwise, may offer testimony on what the law means. Interpretation and application of the law is within the exclusive province of the Commission. *In re Famous Brands*, *Orr v Kneip*, supra. It may be appropriate for a lawyer for a party to argue what the law means, but testimony as to what *any* witness thinks the law means is entirely inappropriate.

3. **Page 4 line 22, concluding on page 10 at line 2.** This lengthy series of questions solicit an explanation of the history of the Federal Energy Regulatory Commission's (FERC) PURPA regulations, the history and meaning certain FERC and Commission orders, and a summary of and the import of the orders in the Commission's *Oak Tree* and *Consolidated Edison* avoided cost decisions.

Objection: The questions solicit and the testimony in response is incompetent, irrelevant, lacks foundation, invades the province of the Commission and is opinion testimony that Mr. White is not qualified to make.

Argument: Mr. White's testimony, commencing on page 4, line 22 and ending on page 10, line 2 is essentially a narrative on the history of PURPA, Mr. White's opinion on the meaning of FERC Order 69, whether FERC Order 69 is relevant to the issues before the

Commission, the meaning and effect of Commission's Order F-3365, and his summary of what happened in other avoided cost cases. As noted in the preceding objections, Mr. White's explanation of what he thinks PURPA, FERC Order 69, the Commission's orders and/or the Commissions decisions in other cases mean is irrelevant to any issue in the case.

Mr. White was not offered as an expert witness on any subject in this case, no testimony was offered qualifying him as an expert on any subject, and by his own admission he does not consider himself an expert on PURPA, all as noted in the preceding objection. The same is true with respect to Mr. White's views of what FERC Order 69 or the Commission rulings and orders mean and their application to this case. Accordingly, his opinions on the subject are inadmissible.

Commission Order F-3365 arose out of an early '80s Commission rule-making session. The only official history is in the 1982 Findings of Fact that are part of the Decision and Order itself. The decisions in *Oak Tree* and *Consolidated Edison* are embodied in the findings of fact, conclusions of law and order in each case. As expressed above, testimony on the meaning of statutes, regulations, Commission orders and decisions is irrelevant and invades the exclusive province of the Commission. The Commission is empowered by statute to be the decision maker in this case and to apply the law as it understands it to the facts presented. A witness's views on those subjects invade the province of the Commission.

In summary, Section V of Mr. White's testimony attempts to express the view of Congress, explain how Congress implemented PURPA, explain FERC regulations, explain this Commission's order F-3365, and explain what the Commission did in *Oak Tree* and *Consolidated Edison*, two prior avoided cost dockets. The testimony is more akin to a legal argument than it is to testimony, and, at best, is an expression of Mr. White's views of what the

law is, which is irrelevant and immaterial to what the Commission's view of the law may be. For the reasons stated above and the authorities noted, the challenged testimony is simply not admissible and must be stricken.

4. **Page 12 line 10, ending at page 13 line 8.** The question solicits Mr. White's explanation of the methodology used to determine avoided cost by Black Hills.

Objection: The question calls for hearsay, and the answer is without foundation.

Argument: The record demonstrates that Black Hills completed its avoided cost calculations by the end of August, 2018.[2] Mr. White testified in his December 2019 deposition that while he was aware that Fall River had asked for an avoided cost indication, he did not join the Black Hills team dealing with the Fall River matter until September of 2018.

Q: Were you on the team?

A: No. Not until the dispute.

(White Depo., p. 62, lines 8-9.)

Mr. White testified that he learned the history of the case by assembling and reading email and by talking to people involved in the case up to the point that litigation commenced.

Q: So if I ask you questions about what went on between February and September [2018], it's all secondhand?

A: It's my review of company documents.

(White Depo., p. 65, lines 24-25, p.66, lines 1-2.)

Q: So I should—if I wanted to know who discussed what and who decided what, I should talk to either Ms. Thames or Mr. Kilpatrick?

A: I think that would be accurate.

[2] One avoided cost calculation was performed in mid-2019. It is not addressed in this question.

Q: Because you weren't there?

A: I was not there.

(White Depo. P. 69, Lines 13-18.)

SDCL 19-19-801 defines *hearsay*. Per Rule 801, hearsay is a statement made by someone other than the witness out of court, and now offered for the truth of the matter asserted. Per SDCL 19-19-802, hearsay testimony is not admissible in evidence unless it is one of the twenty-three exceptions to the general rule set out in SDCL 19-19-803 or one of the specific exceptions in SDCL 19-19-804 through 806. Mr. White's compilation of email and conversations with co-employees does not qualify under any of the exceptions denominated in Rules 803-806.

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. He assembled the information and offers it for the truth of the matter asserted. His testimony is by definition hearsay. Hearsay testimony, the unsworn out of court statements of others, is not admissible. Accordingly the testimony should be stricken.

5. **Page 15 lines 11-23, page 16 lines 1-2**. The questions solicit an explanation of how certain contracts were used in avoided cost calculations that were performed in 2018, before Mr. White joined the team working on avoided cost.

Objection: The questions call for hearsay and the answers are without foundation.

Argument: As described in the preceding objection, the answers characterize Black Hills' conduct that Mr. White learned from others after the fact and now recites. The answers are hearsay, are inadmissible and should be stricken.

6. **Page 16 lines 3-20.** The questions solicit Mr. White's opinion of whether Black Hills avoided cost calculations comport with *Consolidated Edison* and when certain things occurred.

Objection: The question solicits a legal opinion which is irrelevant, and without foundation, which Mr. White is not qualified to give, his testimony invades the province of the Commission, and is grounded in hearsay.

Argument: For the reasons expressed in earlier objections, Mr. White's views on the meaning or application of the order in *Consolidated Edison* are irrelevant. Further, Mr. White was not and is not qualified to express an opinion on whether Black Hills' avoided cost computations comport with the decision in *Consolidated Edison.* Whether the decision in *Consolidated Edison* has precedential application to this case is a matter of law for the Commission to decide. Finally, as expressed above, Mr. White had no involvement in the avoided cost process until shortly before this case was filed in September of 2018. Mr. White developed any information he has regarding the details of the avoided cost calculations prior to that time from talking to other people and reading email. Accordingly his recitation of what happened is grounded in what he learned from others, and if offered for the truth of the matter asserted, is inadmissible hearsay and must be stricken.

For the foregoing reasons the questions and answers must be stricken.

7. **Page 17 lines 14-23, page 18 lines 1-5.** The questions solicit Mr. White's explanation of the history of Black Hills' avoided cost calculations and interactions with Fall River.

Objection: The questions call for and the answers are hearsay.

Argument: The questions ask for and the answers characterize Black Hills' conduct during the summer of 2018. The answers lack foundation because there is no explanation of how Mr. White might know the answer to the question asked. If foundation were laid, it would be evident that Mr. White's answer would be based not on his personal knowledge but what he learned from others after the fact. The testimony is offered for the truth of the matter asserted and accordingly, is inadmissible hearsay.

8. **Page 19 lines 19-21, page 20 lines 1-16**. The questions ask Mr. White to characterize certain Commission rules and certain FERC orders and rules.

Objection: The questions call for and the answers give unqualified opinion testimony that is irrelevant to any fact in issue and invade the province of the Commission.

Argument: As previously noted, Mr. White was not qualified as an expert witness, and even if he was, his interpretation the Commission's rules and FERC orders and rules is not relevant to any fact in issue. It is within the sole and exclusive province of the Commission to decide how its orders and rules should be applied with respect to a given set of facts. Simply stated, Mr. White's opinions as to what the orders mean have no application to this case, are irrelevant and should be stricken.

9. **Page 20 lines 17-20, page 21 lines 1-6.** The question asks Mr. White if he understands Fall River's capacity calculation.

Objection: The answer is not responsive to the question, explains the testimony of Fall River's expert witnesses which is irrelevant, expresses an opinion Mr. White is not qualified to give, and invades the province of the Commission.

Argument: The question is properly answered yes or no, but none the less Mr. White offers an inaccurate summary of Mr. Klein's testimony and an opinion as to its correctness. As

previously noted, Mr. White's views and opinions what witness testimony means and whether or not the Commission should accept the testimony is irrelevant to any matter in issue. Mr. White was not qualified to give opinion testimony. Mr. White's opinion regarding the effect of Mr. Klein's testimony invades the province of the Commission, it being up to the Commission to determine what testimony it wishes to believe, the weight to be given to the Klein testimony, and whether or not the Klein testimony rebuts any other testimony. It is solely within the province of the Commission to accept one expert's opinions over another's and to judge the credibility of the witnesses and the weight to be given to their testimony. *Hiller v Hiller,* 2018 S.D. 74, 919 N.W.2d 548; *Surat Farms LLC v Brule Cty. Bd. Of Comm'rs., supra.* Accordingly, the question and answer must be stricken.

10. **Page 21 lines 7-23, page 22 lines 1 and 2.** The question asks whether Mr. White thinks the Commission should adopt Mr. Klein's capacity calculation method.

Objection: The question solicits and the answer offers opinion testimony that Mr. White is not qualified to give, that invades the province of the Commission, assume facts not in evidence and misstates other testimony.

Argument: Mr. White's views of Fall River's approach to avoided cost are nothing more than his opinions. As noted above, Mr. White was not qualified as an expert on any subject and is accordingly not permitted to give opinion testimony. His views and opinions are and irrelevant to the matters before the Commission. Even if Mr. White was qualified as an expert, it is impermissible for an expert to tell the trier of fact what conclusion it must reach as it invades the province of the trier of fact. *State v Patterson,* 2017 S.D. 64, 904 N.W.2d 43; *State v Guthrie,* 2001 S.D. 61, 627 N.W.2d 401. Mr. White's comments on how the Commission should

decide the appropriateness of Fall River's proposed method of valuing capacity is nothing more than argument and is inadmissible and must be stricken.

11. **Page 22 lines 6-16**. Mr. White is asked to opine on the impact that the methodology for calculation of avoided cost used by Fall River would have on Black Hills' customers.

Objection: The question solicits and the answer offers information that is irrelevant.

Argument: The matter in issue before the Commission is the proper method of calculation of avoided cost. The impact on Black Hills customers is irrelevant. Congress decided that avoided cost was the measure by which a Qualified Facility should be paid for energy and capacity. The effect payment of avoided cost has on the customers of a utility is immaterial to the calculation of avoided cost as the decision on what to pay QFs is subsumed by PURPA. Congress enacted the statute and the effect of application of the statute on other customers of the utility is simply inconsequential to the outcome of the case. Finally, Mr. White offers no foundation for the opinion that he offers with respect to the impact of one method versus the other. The question and answer should be stricken.

12. **Page 23 lines 16-22**. Mr. White is asked to characterize Fall River's testimony and legal position on LEO dates.

Objection: The question solicits, and the answer expresses Mr. White's characterization of other witness's testimony which is irrelevant and invades the province of the Commission.

Argument: As noted above, interpreting Fall River's testimony is exclusively in the province of the Commission. Mr. White's opinion as to what Fall River's testimony entails is irrelevant to any issue before the Commission and accordingly should be stricken.

13. **Page 25 lines 1-19**. The series of questions solicit and the answers provide a summary of discussions and negotiations between the Black Hills and Fall River between February and September 2018 and then offer Mr. White's opinions on the application of *Consolidated Edison.*

Objection: The questions call for hearsay and opinion testimony that Mr. White is not qualified to give and, even if he was qualified, are immaterial.

Argument: Mr. White, as noted in earlier objections, did not participate in the discussions and negotiations between February and September 2018. He is simply regurgitating what he thinks occurred between the Black Hills and Fall River based on his review of correspondence and talking to Black Hills employees. His testimony is a summary of unsworn out-of-court conversations, offered for the truth of which is asserted, which is classic hearsay, as explained above. The questions solicit and the answers are based on inadmissible hearsay.

Further, Mr. White's views as to what the *Consolidated Edison* case means, how it should be interpreted, and the policy considerations one interpretation might have over another is nothing more than his opinion and is immaterial to any issue before the Board. As explained above, if *Consolidated Edison* is relevant to the issues in this case, its application is a matter of law and solely within the province of the Commission. Mr. White's views are immaterial and irrelevant to any issue in the case and should be stricken.

14. **Page 27 lines 21-22, page 28 lines 1-11**. The question solicits Mr. White's opinion with regard to relevance of matters presented by Mr. Vrba's testimony.

Objection: The question solicits and the answer characterizes Mr. Vrba's testimony, and offers Mr. White's opinion as to whether or not portions of Mr. Vrba's testimony is irrelevant invades the province of the Commission.

Argument: As explained above, as the trier-of-fact, the Commission is the sole judge of the relevancy of testimony offered in this proceeding. Mr. White's view as to whether or not an element of testimony is relevant is immaterial and irrelevant and accordingly should be stricken.

15. **Page 28 lines 12-19**. Mr. White is asked to characterize certain negotiations between Black Hills and Mr. Vrba that took place in 2015.

Objection: Mr. White's characterization of negotiations is irrelevant, it lacks foundation and is grounded on hearsay.

Argument: Mr. White attempts to explain the nature of certain discussions between SD Sun and Black Hills that took place in 2015. Mr. White's testimony, by his admission, is based on his review of correspondence from 2015, not his personal experience. The correspondence is the best evidence, not Mr. White's characterization of what is in the correspondence.

If the communications are relevant, the proper method is to lay proper foundation for the documents, introduce the communications into evidence and let the Commission judge their form and nature rather than to accept Mr. White's opinion. If Black Hills intends to offer the documents referenced in Mr. White's testimony, they lack proper foundation.

Finally, Mr. White's testimony is based on hearsay, which is apparently offered for the truth of the matters asserted and is inadmissible. Accordingly the question and answer should be stricken.

16. **Page 29 lines 9-19, page 30 lines 1-3**. The questions solicit and the answers provide Mr. White's opinion as to the meaning of an element of PURPA.

Objection: Mr. White's opinions, for all the reasons stated above, are irrelevant.

Argument: For all the reasons expressed above, Mr. White's views on what PURPA means and what Congress or FERC intended are nothing more than his opinions and are irrelevant to any matter in issue in this case. Accordingly, the questions and answers must be stricken.

Objections to and Motion to Strike Portions of the Rebuttal Testimony of Kyle D. White filed January 30, 2020.

Petitioner Fall River objects to the following questions and makes the following motions to strike the noted portions of the so-called Rebuttal Testimony of Kyle White, filed on January 30, 2020.

Preliminary Objection: Mr. White's Direct Testimony was filed on May 7, 2019, several months after Fall River filed Mr. Klein and Mr. Vrba's testimony. Article IX of Mr. White's Direct Testimony, commencing on page 23, is captioned *Response to Fall River's Testimony.* In that section of his direct testimony, Mr. White commented on and argued with Mr. Klein and Mr. Vrba's testimony, offering numerous opinions on what was wrong with Fall River's approach to avoided cost. By definition, that is rebuttal testimony. On January 30, 2020, Kyle White submitted what is characterized as *Rebuttal Testimony.* Much of his January 30, 202 testimony addresses subjects covered in his May 2019 testimony that he called *Response to Fall River's Testimony.* Accordingly, Fall River moves to strike the following portions of Mr. White's January 2020 *Rebuttal Testimony* as duplicative of his earlier testimony:

a. page 10, lines 14-19

b. page 11, lines 13-16

c. page 12, lines 1-20

d. page 13, lines 1-20

e. page 14, lines 1-20

f. page 15, lines 1-11

g. page 16, lines 12-16

h. page 17, lines 1-20

i. page 18, lines 1-20

j. page 19, lines 1-8

k. page 24, lines 15-20 and

l. page 25, lines 1-8.

In addition to the foregoing objection, certain questions and answers contained in Mr. White's January 30, 2020 *Rebuttal Testimony* are objectionable for other reasons and on other grounds, enumerated hereafter.

1. **Page 2 lines 3-16, page 3 lines 1-6**. The question solicits and the answer gives Mr. White's characterization of Darren Kearney's testimony.

Objection: Mr. White's summary of Mr. Kearney's testimony and his conclusions with respect thereto are irrelevant.

Argument: For all the reasons stated above in the preceding objections, Mr. White's characterizations of and opinions with respect to another witness's testimony are irrelevant and inadmissible. Further, Mr. White's views on whether portions of Mr. Kearny's testimony align with PURPA invades the province of the Commission. Accordingly, the question and answer must be stricken.

1. **Page 3 lines 18-20, page 4 lines 1-12.** Mr. White is asked whether or not he agrees with Mr. Kearney's testimony.

Objection: The question is repetitive of the preceding question and solicits opinions that are immaterial.

Argument: The question asks for and the answer gives a mix of opinion, analysis of Mr. Kearney's testimony, and an explanation of PURPA. As explained above, Mr. White is not and was not qualified as an expert. Accordingly his *opinions* are inadmissible. Much of his answer is a thinly veiled explanation of how the Commission should rule, which invades the province of the Commission and is accordingly inadmissible and must be stricken.

2. **Page 6 lines 12-20, page 7 lines 1-20.** The question asks for Mr. White's explanation of why a 20% premium applied to certain energy prices is appropriate for forecasting future energy prices.

Objection: The question is argumentative and calls for hearsay, there is no foundation for Mr. White's answer, and the answer offers an opinion which Mr. White is not qualified to make.

Argument: Mr. White starts his answer by explaining the experience of the company energy traders but doesn't explain how he knows what the energy traders have experienced. Presuming his summary is based on what the energy trading personnel told him, it is hearsay and not the best evidence. As noted above, hearsay is not admissible. The testimony should come from someone who knows first-hand about the company's energy trading experiences. It is simply not possible to meaningfully cross-examine Mr. White on company trading experience when he bases his observations on what someone else told him.

Mr. White then goes on to express an opinion that certain unidentified empirical data supports the conclusion, then explains why in his opinion the data supports the conclusion he

reaches. None of the data is offered in evidence. Mr. White's testimony doesn't reveal whether or not Mr. White had a hand in or personal knowledge of the validity of the data and therefore his testimony and the opinion he offers is without foundation. Relying on hearsay to support a non-expert opinion is improper and the opinion is inadmissible. *Olson v Aldren*, 84 SD 292, 170 N.W.2d 891 (1969).

Mr. White expresses a series of opinions and conclusions based on the data. He has not been qualified as an expert on any subject, much less statistical analysis of data that isn't offered in evidence. Accordingly, his opinions are without foundation and inadmissible and should be stricken.

3. **Page 8 lines 1-11**. The questions seek a comparison of Mr. Kearney's testimony to Black Hills' conclusions.

Objection: The question and answer are irrelevant and immaterial, and a mischaracterization of Mr. Kearney's testimony, argumentative, express opinions the Mr. White is not qualified to give, and invade the province of the Commission.

Argument: For all the reasons expressed in prior objections, Mr. White's opinions are irrelevant, his characterization of Mr. Kearney's feelings are irrelevant and immaterial and are purely speculation, and his testimony about what the Commission is or is not justified in doing is immaterial. Only the Commission has the authority to evaluate the evidence and make a decision on the law and evidence. Mr. White's answer invades the province of the Commission. Mr. White's answer is really closing argument. Accordingly, the question and answer should be stricken.

4. **Page 8 lines 12-20, page 9 lines 1-5**. Mr. White's opinion is solicited on adjustments to the ABB forecasts.

Objection: There is no foundation for the answer, and it solicits an expert opinion that the witness is not qualified to render.

Argument: For all the reasons expressed above, foundation must be laid for the opinion and the witness must be qualified to render an opinion, neither of which is the case in this question and answer. Mr. White's answer is speculative and not grounded in fact. Accordingly the objection should be sustained and the answer should be stricken.

5. **Page 9 lines 13-20.** The question solicits and the answer gives a characterization of Ros Vrba's deposition testimony.

Objection: The deposition testimony is not in evidence. Mr. White's characterization of the testimony is irrelevant and immaterial.

Argument: Deposition testimony is not evidence in this case and means nothing unless it is introduced, which it has not been. Mr. White's views with respect to the impact of the deposition testimony are irrelevant and immaterial and should be stricken.

6. **Page 10 lines 7-12**. Mr. White is asked for his opinion on the appropriate method of determining the capacity component of avoided cost.

Objection: There is no foundation for the question and Mr. White is not qualified to give the opinion solicited.

Argument: As explained above, there must be a foundation laid for a witness's qualifications before an expert opinion on a technical subject can be given. Mr. White has not been qualified as an expert so there is no foundation for Mr. White's opinion. Accordingly, it is inadmissible. Even so, Mr. White's views on the appropriate method of determining avoided cost is irrelevant and immaterial and invades the province of the Commission. The Commission

is vested with the legal responsibility of determining the proper method for calculating avoided cost, not Mr. White. For that reason his opinion is also inadmissible and should be stricken.

7. **Page 10 lines 14-19, page 11 lines 1-11.** The dissertation on lines 14-19 on page 10 and lines 1-2 on page 11 is an argument, not a question, as is the response.

Objection: The "question" is not a question but a speech, is argumentative, assumes facts not in evidence, is a mischaracterization of the testimony given in the case, and invades the province of the Commission.

Argument: The "question" is so poorly phrased that it is not a question at all. It is an argument that assumes facts not in evidence and expresses certain conclusions. The "answer" is an extension of the "question" and suffers from the same flaws.

If it is possible to respond to the question at all, the purported answer is not responsive. The response is a characterization of PURPA, a speculative analysis of other witnesses testimony, a characterization of Mr. White's analysis of FERC's view, and ultimately offers an opinion that Mr. White is not qualified to make, and is more akin to a closing argument. As such, it is not admissible as evidence and should be stricken.

8. **Page 12, lines 7-20.** The question solicits an explanation as to why the Mr. White does not agree with Mr. Vrba's testimony in certain respects.

Objection: The question solicits an answer that is irrelevant, immaterial and that invades the province of the Commission.

Argument: Whether or not one witness agrees with another witness and the basis for that agreement/disagreement is immaterial to any issue in the case and it invades the province of the Commission. As explained above, under South Dakota law the Commission is the sole judge of the credibility of a witness and the weight to be given to a witnesses' testimony. What one

witness thinks about another witnesses' testimony is not material to the facts in dispute, is not evidence, and simply doesn't matter. The Commission makes a decision based on the evidence presented, not on what one witness thinks about the others testimony. Accordingly, the question and answer should be stricken.

9. **Page 13 lines 1-11, page 14 lines 1-20, page 15 lines 1-11**. The questions solicit Mr. White's views on certain deposition testimony given by Mr. Vrba.

Objection: Deposition testimony is not part of the record and is not evidence in the case. Mr. White's view of the deposition testimony is irrelevant and immaterial. Mr. White's testimony about the March and July 2019 avoided cost rate calculations is grounded in hearsay, characterizes discovery information that is not in evidence, lacks foundation, constitutes an opinion, is not the best evidence.

Argument: Neither the deposition testimony nor the discovery responses are part of the evidence in the case. Mr. White's agreement or disagreement with the deposition testimony or the application of information contained in discovery responses is immaterial to any issue that is before the Commission and is irrelevant.

Mr. White has not been qualified as an expert witness and accordingly cannot give an opinion on what he perceives as an application of the facts. Further, the opinions he renders are not based on any fact in evidence or the testimony and thus lack foundation.

Mr. White offers a plethora of information about what went on within Black Hills in conjunction with avoided cost calculations, much of which is not responsive to the question, and which in large measure is based on hearsay, not Mr. White's personal knowledge.

If Mr. White's testimony is offered in an effort to impeach Mr. Vrba, the proper method of attempting impeachment is to cross-examine Mr. Vrba about his deposition testimony, not offer Mr. White's views on whether Mr. Vrba was right or wrong.

For all the foregoing reasons the testimony should be stricken.

10. **Page 16 lines 13-16, page 17 lines 1-19.** The questions solicit Mr. White's opinions regarding Mr. Vrba's deposition testimony on the Long 2 scenario.

Objection: Deposition testimony is not part of the record, has not been offered as and is not evidence in this case, accordingly Mr. White's view of the deposition testimony is irrelevant and immaterial.

Argument: Deposition testimony is not part of the evidence in the case. For all the reasons expressed above when asked about deposition testimony, Mr. White's agreement or disagreement with the deposition testimony is immaterial to any issue that is before the Commission and should be stricken.

11. **Page 18 lines 10-20, page 19 lines 1-8.** The question solicits and the answer gives Mr. White's opinion on market risk associated with Long 2 pricing.

Objection: Mr. White has not been qualified as an expert on any subject, much less the subject of the inquiry.

Argument: Mr. White's opinion of what he perceives as a possible outcome of the Long 2 scenario lacks foundation and is not a statement of fact. It is a closing argument. For all the reasons explained in earlier objections, it is irrelevant and invades the province of the Commission. Accordingly, it is inadmissible and should be stricken.

12. **Page 21 lines 8-17.** The question solicits Mr. White's views on Mr. Kearney's opinions.

Objection: The answer is irrelevant and invades the province of the Commission.

Argument: As repeatedly explained above, Mr. White's view of Mr. Kearney's opinions on LEO dates is irrelevant and invades the province of the Commission, for all the reasons and grounds previously stated. The answer is a thinly veiled closing argument and should be stricken.

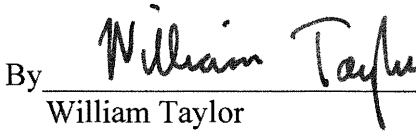
13. **Page 24 lines 15-20, page 25 lines 1-8**. Mr. White is asked to characterize the issues in dispute.

Objection: The question solicits and the answer is irrelvevant.

Argument: Mr. White makes, in effect, a closing argument as to why the Commission should make certain decisions that favor Black Hills view of the case. The answer is not factual in nature. It is opinion and argumentative and not admissible as testimony and accordingly should be stricken.

Dated this 8th day of May 2020.

TAYLOR LAW FIRM, P.C.

By 

William Taylor
John E. Taylor
Jeremy Duff
4820 E. 57th Street, Suite B
Sioux Falls, South Dakota 57108
Telephone: (605) 782-5304
bill.taylor@taylorlawsd.com
john.taylor@taylorlawsd.com
jeremy.duff@taylorlawsd.com
Attorneys for Energy of Utah, LLC and Fall River Solar, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May 2020, I served Fall River Solar's Objections and Motion to Strike by email to the following:

Ms. Cathy Sabers
cathy.sabers@blackhillscorp.com

Ms. Kristen Edwards
Kristen.edwards@state.sd.us

Ms. Patricia Van Gerpen
patty.vangerpen@state.sd.us

Mr. Todd Brink
todd.brink@blackhillscorp.com

Mr. Darren Kearney
darren.kearney@state.sd.us

Mr. Jon Thurber
jon.thurber@state.sd.us

William Taylor

One of the Attorneys for Fall River Solar