

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE COMPLAINT</b>	)	
<b>OF ENERGY OF UTAH, LLC AND FALL</b>	)	<b>Staff's Response to Motion to</b>
<b>RIVER SOLAR, LLC AGAINST BLACK</b>	)	<b>Compel Discovery</b>
<b>HILLS POWER INC. DBA BLACK HILLS</b>	)	
<b>ENERGY FOR DETERMINATION OF</b>	)	<b>EL18-038</b>
<b>AVOIDED COST</b>	)	

COMES NOW, Staff (Staff) of the South Dakota Public Utilities Commission (Commission) and hereby files this Responses to Motion to Compel Discovery filed by Fall River Solar, LLC (Complainant) on May 30, 2019.

Staff receives responses to the discovery requests of all other parties. Therefore, Staff has a strong interest in the Motion. Staff supports the Motion.

**I. Discovery Requests**

The legal standard for discovery was well laid out in Complainant's brief attached to the Motion. SDCL 15-6-26(b) allows for the discovery of any information "relevant to the subject matter involved in the pending action." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 NW2d 17, 20 (Court holding that the proper standard for ruling on a discovery motion is whether the information sought is relevant to the subject matter involved in the pending action). The Court has stated that statute implies a broad construction of relevancy. *Id.*

As a preliminary matter, Staff disagrees with assertions that the number of discovery requests are burdensome. Unlike the rules of civil procedure in federal courts, discovery under the South Dakota Rules of Civil Procedure is not limited to any number of requests. Therefore, the mere fact that the requests are arguably large in number does not make the discovery request *per se* burdensome. In fact, the number of requests in this docket pales in comparison to those in

some dockets this Commission has seen in the past.<sup>1</sup> If the number of requests was burdensome, to Staff's knowledge there was no request for additional time to respond, an appropriate first step.

In addition, Section 210(b) of PURPA precludes utilities from discriminating against QFs. Therefore, it is at least arguable that any avoided cost calculation done by BHE has relevance with respect to whether Complainant has been subjected to discrimination. Discovery is a broad tool and does not guarantee ultimate admissibility. Therefore, BHE is free to argue at a later date that these other avoided cost calculations are not probative or are more prejudicial than probative. However, discovery is not the time for such arguments.

Based on a reading of the Motion and accompanying brief and affidavit, it appears Complainant seeks to compel answers to its Data Requests (DR) 5-99, 105-118, 122, 124, and 125. It appears that, subject to and without waiving its objections, BHE answered the following DRs, and therefore, the Motion to Compel should be denied with respect to those which were answered: 6, 11, 13, 14, 20, 32, 37, 39, 40, 41, 49, 63, 64, 68, 73, 76, 77, 88, 115, 116, and 117.

### **SD Sun I Avoided Cost**

The section of interrogatories titled as *SD Sun I Avoided Cost* requests various information regarding the avoided cost for SD Sun I and how that avoided cost was calculated. These are questions 5 through 19. The information on recent avoided cost calculations is relevant to determine whether BHE is discriminating against Complainant. For this reason, the

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<sup>1</sup> See example HP14-001.

Motion should be granted with respect to the following DRs: 5, 7, 8, 9, 10, 12, 16, 17, 18, and 19.

### **SD Sun I PPA**

The interrogatories in this section focus on the purchase power agreement (PPA) for SD Sun I, rather than the avoided cost. These are questions 20 through 29. While the questions appear nearly identical to those in the previous section, it is necessary to obtain information on both the avoided cost calculation and the ultimate PPA in order to determine whether any changes were made between the two. Information regarding the SD Sun I PPA is relevant to determine the issue of discrimination and is, therefore, discoverable. For this reason, the Motion should be granted with respect to DRs 21, 22, 23, 24, 25, 26, 27, 28, and 29.

### **SD Sun II Avoided Cost**

Data Requests 30 through 48 request the same information for SD Sun II as was requested for SD Sun I with respect to the avoided cost. As for SD Sun I, this information is necessary to evaluate the issue of discrimination. The Motion should be granted based upon relevance for DRs 30, 31, 33, 34, 35, 36, 38, 42, 43, 44, 45, 46, 47, and 48.

### **SD Sun II PPA**

Data Requests 49 through 62 deal with the PPA for SD Sun II. For the same relevancy reasons as the SD Sun I PPA, the Motion should be granted with respect to the following DRs: 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, and 62.

### **SD Sun III Avoided Cost**

The next section of interrogatories, questions 63 through 87, seek information on the avoided costs for SD Sun III. SD Sun III is a solar project that, to Staff's knowledge, was contemplated but ultimately did not result in a PPA since BHE ended up purchasing all three SD Sun projects. However, if an avoided cost was calculated for SD Sun III, as BHE's response to question 63 appears to indicate, the calculation is relevant to the issue of discrimination. As discussed previously, if the fact that the project did not result in a PPA or an error in the calculation causes the information to lack probative value or to be so confusing as to be prejudicial, that is a matter that goes to admissibility not discoverability. Therefore, the Motion should be granted with respect to DRs 65, 66, 67, 69, 70, 71, 72, 74, 75, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87.

### **SD Sun III PPA**

Data Requests 88 through 100 relate to the PPA for SD Sun III. BHE stated in response to DR 88 that it did not enter into a PPA for SD Sun III. Therefore, the remainder of the questions in this section are moot. The Motion should be denied with respect to DRs 88 through 100.

### **Purchase of SD Sun I, II, and III**

Data Requests 101 through 119 relate to the purchase of the SD Sun projects. It appears from the Motion that Complainant only seeks to compel responses to DRs 105 through 117 in this section. In its Brief in Support of Fall River Solar's Motion to Compel Discovery (Brief), Complainant alleges that the information is relevant and necessary to calculate capacity values and determine how BHE models for the acquisition of utility-owned resources. The information

sought may be relevant to discrimination if BHE models one way for purchase decisions and a second way for avoided costs paid to QFs. Depending on Complainant's method of calculating capacity values, this information could be necessary.

Until we know how Complainant intends to use this information, Staff does not take a position on the DRs in this section.

### **Construction of SD Sun I, II, and III**

The next section of DRs deals with the construction of the SD Sun projects. These are DRs 120 through 126. The Motion appears to seek to compel responses to DRs 122, 124, and 125. For the same reasons as expressed in the previous section, Staff does not take a position on these requests.

## **II. Request for Terms and Expenses**

In its Motion, Complainant requests reasonable terms and expenses for the making, preparation for, and prosecution of the Motion.<sup>2</sup> SDCL 15-6-37(a)(4)(A) provides

If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

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<sup>2</sup> Motion at ¶ 4.

ARSD 20:10:01:01.02 mandates that the rules of civil procedure as used in the circuit courts of this state shall apply. To Staff’s knowledge, this Commission has not previously imposed the discovery sanction of assessing expenses. However, another administrative tribunal, the South Dakota Department of Labor, has discussed sanctions and fines on several occasions.

If the Commission desires to hear the issue of ordering fees and expenses, this would require a separate hearing pursuant to SDCL 15-6-34(a)(4)(A). Therefore, the Commission need not rule on this issue at this time. If the Commission decides to entertain awarding expenses, Staff merely requests that it do so with the condition that the fees not be passed on to ratepayers in any form.

**Conclusion**

Discrimination is a material issue in PURPA dockets. Information relevant to evaluating discrimination is discoverable. Staff recommends the Commission issue an order compelling BHE to respond within two weeks to the discovery requests as set forth below. Noting that all parties have informally agreed to delay all remaining dates in the procedural schedule by two months, two weeks should provide enough time for the parties to receive and evaluate the responses prior to depositions or the submittal of additional testimony.

Motion to Compel <b>Granted</b> for:	Motion to Compel <b>Denied</b> for:	Staff does not take a position at this time:
5, 7 - 10, 12, 16, 17, 18, 19, 21 - 36, 38, 42 - 48, 50 - 62, 65, 66, 67, 69, 70, 71, 72, 74, 75, 78, 79, 80, and 81 - 87	6, 11, 13, 14, 20, 32, 37, 39, 40, 41, 49, 63, 64, 68, 73, 76, 77, 88 – 100, 115, 116, and 117	105-114 and 120-126

Dated this 5th day of June 2019.

A handwritten signature in blue ink that reads "Kristen Edwards". The signature is written in a cursive style and is positioned above a solid black horizontal line.

Kristen N. Edwards

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