

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

**IN THE MATTER OF THE PETITION OF
BLACK HILLS POWER INC. DBA
BLACK HILLS ENERGY FOR
APPROVAL OF DEFERRED
ACCOUNTING TREATMENT FOR SD
SUN PROJECT TRANSACTION AND
DEVELOPMENT COSTS**

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EL19-028

**STAFF'S MEMORANDUM IN
RESPONSE TO PETITION TO
INTERVENE**

Staff of the Public Utilities Commission (Commission) hereby files this response to Fall River Solar, LLC's (Fall River) Petition to Intervene (Petition) and Black Hill's Power Inc. dba Black Hills Energy, Inc's (BHE) Objection to Petition to Intervene (Objection).

The relevant facts were laid out in both the Petition and Objection, and Staff will not repeat them here.

Legal Analysis

ARSD 20:10:15.02 provides

A person who is not an original party to a proceeding before the commission and who claims an interest in a pending proceeding may petition the commission for leave to intervene. The petition to intervene shall be filed with the commission within the time specified in the commission's weekly filings, public notice, or by applicable statute, rule, or order. The petition shall show service upon all parties to the proceeding. A petition to intervene which is not timely filed with the commission may be granted by the commission if granting the intervention will not unduly prejudice the rights of other parties to the proceeding or if denial of the petition is shown to be detrimental to the public interest.

Fall river filed its Petition on August 14, 2019. BHE filed its Objection on September 24, 2019. ARSD 20:10:15.04 provides that "[a] party to a proceeding may, unless otherwise

ordered by the commission, file an answer to a petition to intervene on or before the hearing date or within 15 days after service of the petition, whichever is earlier. The answer shall show service upon all parties to the proceeding.”

Pursuant to this Administrative Rule, the Objection could be viewed as late, because it was well past the fifteen-day deadline. However, there may be facts to which Staff is not privy that would constitute a waiver of the timeline. Staff will assume, *arguendo*, that the answer is timely for the purposes of this response, as even if the Objection were late, the Commission nonetheless must consider the applicable standards when ruling on intervention.

ARSD 20:10:01:15.05 provides in relevant part

A petition to intervene shall be granted by the commission if the petitioner shows that the petitioner is specifically deemed by statute to be interested in the matter involved, that the petitioner is specifically declared by statute to be an interested party to the proceeding, or that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general.

Thus, regardless of an answer or objection that may have been filed, the standard remains the same. Fall River is not an intervenor as a matter of right or statute. In order to be granted intervention, Fall River has the burden to show that it would be bound and affected by the outcome in a way unique to Fall River.

The outcome to which an intervenor would be bound is 1) an approval or denial of deferred accounting for the SD Sun Project transaction and development costs and 2) approval or denial of amortization of the costs, as that is the relief requested in this docket. So, the first question is whether those two requests are binding on Fall River.

Fall River claims in its Petition that it is an affected party because it will take power from BHE during construction and operation of its project. BHE argues in its Objection that Fall River's project will be located outside of BHE's service territory, therefore, BHE will be a customer of the cooperative. This argument is persuasive but not dispositive.

18 CFR 292.305(b) provides

(b)Additional services to be provided to qualifying facilities.

(1) Upon request of a qualifying facility, each electric utility shall provide:

- (i) Supplementary power;
- (ii) Back-up power;
- (iii) Maintenance power; and
- (iv) Interruptible power.

As the Commission is aware, Fall River has filed a complaint docketed with the Commission as EL18-038 in which it demands to sell power to BHE under the Public Utility Regulatory Policies Act (PURPA). Pursuant to 18 CFR 292.305(b), BHE would have to provide power to Fall River. However, the rule provides that such power must be provided upon request. To Staff's knowledge Fall River has not made such a request at this time. This makes the assertion that Fall River will be a customer all the more speculative.

As proposed, this docket will not have a base rate effect since BHE is asking to conclude the amortization by the time they would need to file a rate case after the moratorium period concludes on July 1, 2023. However, in Staff's opinion there is still an impact to ratepayers that could be considered a rate impact, because the amortization will affect the calculation of BHE's earnings during the moratorium period. The amortization will reduce BHE's earnings each year during the amortization period, thus impacting the amount customers would be credited back

through the performance based rates established in dockets EL17-006 and EL17-008. Therefore, there is a plausible argument that existing BHE ratepayers have standing to intervene.

In its Petition, aside from the future customer claims, Fall River asserts that BHE purchased the SD Sun projects to avoid having to purchase energy and capacity from a Qualified Facility (QF), and that BHE's practices are discriminatory toward QFs, therefore, the relief request in this docket should be denied.¹ Even if those assertions were true, that does not demonstrate an effect on Fall River in the outcome of this docket. It demonstrates an effect on Fall River in 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. dba Black Hills Energy for Determination of Avoided Cost*. That docket is the appropriate place for Fall River to argue discrimination against its QF project.

The primary question in this docket is one of prudence, i.e. whether it made sense for BHE to purchase the projects and whether it made sense for BHE to not build the projects. It is not a question of discrimination. Fall River attempts to make this docket about PURPA or alleged abuses of PURPA. While the notion of a utility purchasing QF projects simply to kill them raises concerns, the concerns go to prudence of the purchase, which Fall River lacks standing to challenge. Even if there were a tenuous concern that the outcome of this docket would create a precedent whereby utilities could buy QF projects simply to kill them, there is nothing in PURPA that would require Fall River to sell its project rights to BHE if Fall River chooses not to.

¹ See Petition at ¶¶ 11 and 12.

CONCLUSION

The question of whether Fall River has an interest in this docket is not as simple as determining Fall River's physical location, although that is arguably an important factor. It is Fall River's burden to show that it has an interest pursuant to ARSD 20:10:01:15.05. At this time, it is questionable whether Fall River has established that interest. However, Staff looks forward to an explanation in Fall River's reply to shed light on the service territory issue.

Pending a reply from Fall River, Staff will not take a position on the question of intervention at this time. However, if the ultimate goal is to argue discrimination and obtain discovery, those issues are appropriate for EL18-038 and can adequately be addressed only in that docket, and intervention in this docket should not be granted. Additionally, if Fall River feels that the purchase of the SD Sun projects was imprudent, it is only appropriate for Fall River to be granted intervention if Fall River is directly affected by the alleged imprudence. If Fall River is simply a bystander, the appropriate mechanism for Fall River is to submit comments to the docket.

Dated this 25th day of September 2019.



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