

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF	:	Docket No. EL19-028
BLACK HILLS POWER, INC. DBA BLACK		
HILLS ENERGY FOR APPROVAL OF	:	
DEFERRED ACCOUNTING TREATMENT FOR	:	FALL RIVER'S RESPONSE BRIEF
SD SUN PROJECT TRANSACTION AND	:	
DEVELOPMENT COSTS	:	

Fall River Solar, LLC (hereafter "Fall River"), makes the following response to Black Hills Power Inc.'s objection to its Petition to Intervene.

Black Hills filed its objection to Fall River's Petition to Intervene on Tuesday, September 24, 2019, 41 days following Fall River's filing and service of its petition. PUC regulation ARSD 20:10:15.04 directs that a response to a petition to intervene in a matter before the Commission must be filed within 15 days after service of the petition. Black Hills filing was 26 days late.

Black Hills contends that Fall River is not now and that it never will be a Black Hills customer because it's project will be within the service territory of Black Hills Electric Cooperative and therefore its pecuniary interests are not affected by Black Hills' petition. As the PUC staff properly pointed out in its brief, 18 CFR § 292.305(b), a FERC regulation supporting the Public Utility Regulatory Policies Act (PURPA), requires Black Hills to supply station, supplementary, backup, and maintenance power to Fall River, on request. Fall River has yet to begin construction of its facility pending conclusion of a pending avoided cost case (PUC Docket EL-18-038), so as of the date of the petition to intervene, no such request had been made.¹ Under the circumstances, Black Hills' contention that Fall River will never be a customer is incorrect. Interconnection between the Fall River facility and Black Hills' transmission lines

¹ Fall River made a formal request to Black Hills to supply station power yesterday.

will be through a substation located either on the project's leasehold or nearby. It only stands to reason that the station and supplemental power will come from the nearby Black Hills transmission line rather than from the local co-op, and accordingly Fall River has a pecuniary interest in the outcome of this proceeding.

Black Hills argues that Fall River's future interest is insufficient to establish standing per SDCL 1-26-17.1. The only authority Black Hills cites is a 16-year-old PUC decision, ignoring that South Dakota law has long held that the decisions of administrative agencies are not *stare decisis* and are not precedent for the decisions of future commissions. In *In re West River Elec. Ass'n, Inc.*, 675 N.W.2d 222, 2004 S.D. 11, the South Dakota Supreme Court ruled an administrative agency ". . . is not bound by *stare decisis* and therefore it can redefine its views to reflect its current view of public policy. . ." ² In *Yellow Robe v. Board of Trustees of South Dakota*, 664 N.W.2d 517, 2003 S.D. 67, the Supreme Court noted

In the judicial setting, previously decided questions of law involving similar fact situations often provide precedential value, embodying the concept of *stare decisis*. Both federal and state courts have repeatedly noted, however, that administrative agencies are not bound by *stare decisis as it applies to previous agency decisions*. The U.S. Supreme Court has stated that, "An agency's view of what is in the public interest may change, either with or without a change in circumstances."

Black Hills contention that a 16 year old unpublished PUC order on facts not meaningfully analogous to this case is of no import and should be ignored.

Resisting a motion to intervene is strictly procedural in nature. *Application of Union Carbide Corp.*, 308 N.W.2d 753, 759 (1981). The court must accept the facts alleged in the petition to intervene as true. The decision on whether to allow intervention is made on the face

² Black Hills was a party to *In re West River Elec. Ass'n*. Linden Evans, its then associate general counsel and currently its president and CEO, successfully argued the case before the Supreme Court. It's difficult to understand how Black Hills can claim the case doesn't apply here.

of the petition. SDCL 15-6-24(c); *In re Estate of Olson*, 2008 S.D. 126, 759 N.W.2d 315. In layman's terms, that means that the Commission must make its decision on intervention based on the allegations contained in the pleadings, treating them as if they are true, and that no facts are in issue.

Fall River alleged in its petition to intervene that Black Hills' acquisition of the SD Sun projects, the subject of this accounting docket, may well have been accomplished for anti-competitive and discriminatory purposes. Given that circumstance, if Black Hills' behavior was anti-competitive, it was inherently imprudent. As a regulated utility, the commission must decide that the rates the utilities are allowed to charge are just and reasonable. SDCL 49-34A-6. Anti-competitive behavior is illegal under South Dakota law. SDCL 37-1-3.2 and 53-9-8. If Black Hills' conduct in acquiring SD Sun I projects was inherently unlawful, it is equally unlawful to allow regulatory amortization of the costs, which will affect Black Hills' return on its investment and accordingly will be reflected in its next rate case.

Fall River further alleges that the purpose of Black Hills' acquisition is to avoid having to deal with a PURPA-style Qualified Facility. If so, the behavior is inherently discriminatory toward QFs, which is barred by PURPA regulations. 18 § CFR 292.304. Fall River is a QF, actively developing a solar generating facility that will deliver energy and capacity to BH. Accordingly, discriminatory behavior towards QFs directly affects the pecuniary interests of Fall River.

It is no secret that Fall River is engaged in another docket with Black Hills pertaining to calculation of avoided cost for Fall River's proposed facility. Evidence gathered in that docket demonstrates that Black Hills entered into power purchase agreements relative to the SD Sun I and II facilities with rates for electricity generated and capacity well above \$40 per megawatt

hour. Black Hills proposed substantially lower rates in Fall River's case and has at every turn resisted any explanation of the significant disparity in rates. Black Hills' resistance to intervention in this case is consistent with its efforts to prevent discussion of its practices and activities relative to the SD Sun facilities, the acquisition of which are the sole focus of this docket. BH doesn't want the SD Sun onion unpeeled in the Fall River avoided cost docket, and it is resisting Fall River's intervention in this docket for the very same reason.³

SDCL 1-26-17.1 sets the standard for intervention in an agency hearing. In *Application of Union Carbide Corporation, supra.* at 759, the South Dakota Supreme Court observed that intervention criteria applicable in judicial proceedings are applicable in administrative proceedings. The rules of civil procedure addresses intervention at SDCL 15-6-24(b). Construing the statute, in *In re Estate of Olson, supra.*, our Supreme Court observed that intervention standards are flexible and should be tailored to the facts of each case. Here Fall River has made allegations that its interest as a taker of station power will be affected by the outcome of this proceeding, that there are issues to be resolved in whether Black Hills acquisition of the South Dakota Sun projects was for discriminatory and anti-competitive purposes, in which case some or all of the purchase price paid for the projects would be inappropriate to amortize. The question is unique to this case, and per the teachings of the Supreme Court, Fall River should be allowed to intervene and make its case.

Fall River respectfully requests the Commission rule accordingly.

³ More than 120 years ago our Supreme Court said in *Taylor v Bank of Volga*, 9 S.D. 572, 70 N.W. 834 (1897) that a party should not be denied intervention even though he has chosen to advance his interests in another matter, and to deny intervention for that reason would be an abuse of discretion. Accordingly, any argument that Fall River already has protected its interests is specious and inappropriate.

Dated this 27th day of September 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September 2019, I served Fall River Solar LLC's

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