

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

**IN THE MATTER OF THE PETITION)
FOR A DECLARATORY RULING) PETITION FOR
REGARDING THE SOUTH DAKOTA) DECLARATORY RULING
SCIENCE AND TECHNOLOGY)
AUTHORITY) File # EL20-_____**

Pursuant to ARSD 20:10:01:34, the South Dakota Science and Technology Authority (hereinafter “the Authority”), a body corporate and politic created by SDCL Ch. 1-16H, petitions the Commission to issue a declaratory ruling determining whether a proposed pass through of the cost of electricity and electric service to a subcontractor of a lessee of space at the former Homestake Mine in Lead, South Dakota subjects the Authority to regulation as an electric utility.

In support of its Petition, the Authority submits the following information as required by ARSD 20:10:01:34.

1. Statutes in Question

SDCL 49-34A-1(7) defines an electric utility as:

any person operating, maintaining, or controlling in this state, equipment or facilities for providing electric service to or for the public including facilities owned by a municipality.

SDCL 49-34A-1(12) defines a public utility as:

Any person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part, in this state. However, the term does not apply to an electric or gas utility owned by a municipality, political subdivision, or agency of the state of South Dakota or any other state or rural electric cooperative as defined in § 47-21-1 for the purposes of §§ 49-34A-2 to 49-34A-4, inclusive, §§ 49-34A-6 to 49-34A-41, inclusive, and

§ 49-34A-62. The term, public utility, does apply to a rural electric cooperative which provides gas service.

The Authority seeks a declaratory ruling to determine and verify that the Authority may pass through, on a dollar-for-dollar basis, the cost of electricity purchased from Black Hills Energy to Fermi Research Alliance, LLC (“FRA”), a contractor of the United States Department of Energy (“DOE”), for use by FRA’s subcontractors for the purpose of constructing laboratory space at the former Homestake Mine without being deemed a “utility” and thus subject to regulation by the Commission. In addition to the dollar-for-dollar pass through of the cost of electricity, the Authority will recover from FRA the actual cost of administering the electricity pass-through contract.

2. Facts and Circumstances which Give Rise to the Issue

In 2006, after deciding to discontinue mining operations in Lead, Homestake Mining Company of California donated the former Homestake Mine in and near Lead, South Dakota, to the Authority. The Authority was created by the Legislature (see SDCL Ch. 1-16H) for the purpose of converting the former Mine into an underground science, technology, and engineering laboratory. Today, the Authority operates the former Mine as the Sanford Underground Research Facility (hereinafter “SURF”). SURF houses world-leading physics experiments that seek to provide a better understanding of the universe. SURF provides significant depth and rock stability which equates to a near perfect environment for experiments that need to escape cosmic radiation that can interfere with the detection of rare physics events. Currently, SURF hosts multiple experiments including LUX, Majorana Demonstrator, and CASPAR, and is cooperating with FRA for the construction of the Long-Baseline Neutrino Facility (“LBNF”) and associated Deep Underground Neutrino Experiment (“DUNE”).

DOE, acting through its Office of Science, has contracted with FRA, operator of Fermilab in Batavia, Illinois, to construct and operate LBNF/DUNE in underground space at SURF which is leased by DOE from the Authority.

The construction of the components of the LBNF to be housed at SURF will require the excavation and removal to the surface of up to 800,000 tons of rock from approximately one mile underground. FRA has contracted and will contract with private construction contractors to undertake the construction and outfitting of the LBNF space at SURF.

In order for FRA's contractors to do their work, they will require a supply of electrical power. The Authority currently purchases electrical power from Black Hills Energy ("BHE") a public utility as defined under SDCL 49-34A-1(12). The Authority and FRA desire to enter into a contract whereby the Authority would allow FRA's contractors to use electrical power supplied by BHE to the Authority, and whereby the Authority would recover the cost of the electrical power on a dollar-for-dollar basis. In addition, the contract would also provide for the Authority to recover from FRA the Authority's actual cost of administering the contract, including reading of meters, other monitoring of usage, and general administration and billing.

BHE supplies electrical power to the Authority with a point of delivery at the Kirk Switch, located in the Kirk Canyon on the outskirts of Lead. The electrical power then passes through lines owned by the Authority. The bulk of the power to be used by FRA's contractors passes through a substation owned by the Authority, and will then pass through a transformer and other electrical infrastructure located at SURF but operated and controlled by FRA (acting on behalf of DOE) and FRA's contractors. A small part of the electrical power to be used by

FRA's contractors will pass through infrastructure entirely owned and controlled by the Authority.

With respect to the recovery of the costs of administering the proposed contract with FRA, the contract will on an annual basis establish an "indirect" rate which the Authority may charge to cover the actual cost of administering the contract. For the first year of the proposed contract, the indirect rate will be 55.2% of the first \$500,000.00 of electrical power costs passed through to FRA. During the course of the year, the Authority will maintain detailed time records concerning all of its administrative costs sitewide, including the costs of meter reading, billing, and other costs associated with administering the contract, as well as administrative and other costs related to other work and services (not necessarily related to the electrical power contract) performed and provided by the Authority. After the end of each contract year, the sitewide indirect rate will be reviewed. If the previously-agreed upon indirect rate results in the payment of administrative costs to the Authority that exceed the Authority's sitewide, overall actual costs, the indirect rate will be adjusted for the following year as to more closely align with the Authority's actual cost and to recapture any excessive reimbursement provided to the Authority during the prior contract year¹. The converse will occur if the indirect rate results in the Authority recovering less than its actual costs. Although this calculation will not be completed specific to the electrical power contract, over the life of the contract, this methodology should result in the Authority recovering nothing more than its actual cost of purchasing the electrical power and its actual cost of contract administration.

¹ Applicable federal law prohibits a contracting party like the Authority from recovering more than its actual cost of administration. 48 CFR § 52.215-23 (Limitation on Pass-Through Charges).

The Authority is a body corporate and politic created by the South Dakota Legislature. It operates SURF for scientific, technological, and engineering research and development purposes on a not-for-profit basis. The Authority does not and will not provide electrical power to the public at large, nor does it allow the public at large to access or use the facilities at SURF (except in the case of occasional tours and the provision of educational services).

The ruling sought from the Commission is necessary to confirm for the Authority, DOE, and FRA that the Authority is not subject to regulation by the Commission.

3. The Precise Issue to be Answered

The Authority respectfully requests the Commission determine and verify that the Authority is not acting as an electric or public utility pursuant to SDCL § 49-34A-1(7) or (12) and, therefore, is not subject to Commission jurisdiction in the continued provision of electrical service in the manner described within this Petition for Declaratory Ruling and is compliant with current South Dakota Codified Law and Administrative Rules.

The Authority maintains that its acts do not fall within the definition of either an electric utility or public utility under SDCL § 49-34A-1(7) or (12) as the Authority does not provide or offer electric service to “the public”. The Authority seeks only to adequately distribute operational expenses incurred at SURF to DOE, FRA and their various subcontractors and agents. SDCL § 49-34A-1 does not define “the public”. In the absence of a statutory definition, the plain meaning of a term is regularly determined by the common usage as identified in a dictionary definition. *See Ass Kickin’ Ranch, LLC v. North Star Mutual Insurance Co.*, 2012 S.D. 73, ¶ 12. Miriam Webster’s online dictionary most relevant definition for “public” is “of,

relating to, or affecting all the people or the whole area of a nation or state”.

(<https://www.merriam-webster.com/dictionary/public> accessed April 24, 2020 at 9:00 am).

Pursuant to the authority and definitions contained with SDCL title 49, chapter 34A, and the common usage of undefined terms, the Authority respectfully requests the Commission affirm the practices of the Authority do not fall within the definitions of electric utility or public utility under SDCL § 49-34A-1(7) or (12).

Dated this 8th day of May, 2020.



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