

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Black Hills/                    ) Application No. NG-0061  
Nebraska Gas Utility Company, LLC,            )  
d/b/a Black Hills Energy, Omaha,            )  
seeking a General Rate Increase for        ) HEARING OFFICER ORDER DENYING  
Black Hills Energy's Rate Areas            ) MOTIONS  
One, Two and Three (Consolidated).        )  
  ) Entered: May 20, 2010

BY THE HEARING OFFICER:

Pursuant to the Planning Conference Order entered on January 20, 2010, all parties to the above-captioned matter were to file any prehearing motions on or before May 14, 2010. On May 14, 2010, Black Hills/Nebraska Gas Utility Company, LLC, d/b/a Black Hills Energy (Black Hills) filed Motion for Leave to Conduct Voir Dire; a Motion to Exclude Evidence and Recommendations in Support of a Rate Decrease; and a Motion to Strike Testimony of Michael L. Arndt. Also, the Public Advocate filed Objections to and Motion to Strike Testimony and Exhibits of Black Hills/Nebraska Gas Utility Company, LLC.

Motion for Leave to Conduct Voir Dire

Black Hills moves for leave to conduct voir dire of Ellen Blumenthal of GDS Associates, a consultant retained by the Commission to advise it regarding rate case issues. The motion makes several statements regarding Ms. Blumenthal's participation in cases involving the setting of electric rates in other states, in which witnesses employed by the Public Advocate also participated. Further, Black Hills relies upon standards established for judges, arbitrators, and administrative hearing officers. Ms. Blumenthal is not a decision-maker and only advises the Commission, who is the ultimate decision-maker. Even assuming all statements regarding Ms. Blumenthal's involvement in these prior cases are true, no conflict exists.

The Hearing Officer agrees with Black Hills that the Commission strives to avoid even an appearance of impropriety. To that end, the Commission has gone to great lengths to revise the rate case process so as to provide transparency to the analysis conducted by its consultants. Since Aquila's 2006 rate case, the consultants' report is made available after post-hearing briefs are filed by the parties, and parties are permitted to file written comments for the Commission to review and consider in advance of making a decision.<sup>1</sup>

Therefore, the Hearing Officer finds that this motion should be denied.

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<sup>1</sup> See *In the Matter of SourceGas Distribution LLC, Lakewood, Colorado, seeking approval of a general rate increase*, Docket No. NG-0060, Planning Conference Order and Hearing Notice, (Aug. 25, 2009).

## Motions to Strike or Exclude Testimony or Exhibits

The Commission is not bound by the formal rules of evidence but instead "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent person in the conduct of their affairs and exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence."<sup>2</sup>

The Commission can best serve its function in determining just and reasonable rates and balancing the interests of ratepayers and utilities by having as much information available as is possible. In that context, I find that the motions should be denied and have addressed each below individually.

I. Motion to Exclude Evidence and Recommendations in Support of a Rate Decrease

Black Hills moves to exclude the Public Advocate's evidence and recommendations in support of a rate decrease arguing that the issue is not properly before the Commission and constitutes a collateral attack on the Commission's prior approval of the rates currently in effect.

The question of whether the Public Advocate may request a rate decrease in the context of an application filed by the utility for a rate increase is better addressed in the substantive order resolving the rate application rather than a motion to strike. The evidence provided by the Public Advocate in support of his recommendation that rates decrease, may also be relevant to the determination of just and reasonable rates generally. Therefore, I find that the motion is denied. This determination is not intended to resolve the questions raised by Black Hills regarding the appropriateness of seeking a decrease in rates in response to an application for an increase filed by the company or whether a separate application must be filed.

II. Motion to Strike Testimony of Michael L. Arndt

Black Hills moves to strike certain testimony from Mr. Arndt on the bases that it constitutes legal conclusions inconsistent with Commission's rules and regulations and prior orders. Additionally, Black Hills requests that Mr. Arndt's statements that he does not have a recommendation at this time regarding various issues be stricken.

It is not unusual in the context of a general rate case for consultants or expert witnesses to make recommendations as to how a particular issue should be treated under current law. Ultimately, the Commission will make the determination. Each of Black Hills' objections, whether based upon legal conclusions or the lack of recommendations, goes to the weight of the testimony.

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<sup>2</sup> Neb. Rev. Stat. § 84-914(1).

Similarly, Mr. Arndt's statements, that he does not have a recommendation at this time, go to the weight of his testimony on those issues.

Therefore, the Hearing Officer finds that the Motion to Strike should be denied.

### III. Public Advocate's Objections to and Motion to Strike Testimony and Exhibits of Black Hills/Nebraska Gas Utility Company, LLC

The Public Advocate moves to strike various testimony and exhibits of Black Hills. First the Public Advocate argues certain testimony should be stricken as improper rebuttal as it should have been presented in Black Hills' direct case, including the testimony of Richard Kinzley and Laura Patterson.

Secondly, the Public Advocate seeks to strike all testimony and exhibits related to the recovery of any rate case expenses incurred during Aquila, Inc.'s prior rate case in Docket No. NG-0041.

The Public Advocate also moves to strike portions of the direct and rebuttal testimony of Daniel Mechtenberg on the grounds that the testimony is irrelevant as it reflects only his personal concerns or feelings; mischaracterizes the Public Advocate or his witness' position or motivations; is scandalous or argumentative; or finally lacks foundation. In addition to the objections related to matters related to Aquila, Inc.'s prior rate case in Docket No. NG-0041, the Public Advocate seeks to strike portions of the testimony of Glenn Dee, Richard Peterson, Robert Hollibaugh, and Thomas Sullivan on the basis that the testimony lacks foundation; is argumentative or irrelevant.

The majority of the Public Advocates' objections go to the weight of the evidence and therefore the Motion is denied. Some objections are specifically addressed below.

#### a. Striking Testimony from Rebuttal

The Public Advocate contends that certain rebuttal testimony is improper as it should have been included in the utility's direct case. The testimony does not present new issues, but instead constitutes supplemental information provided in response to questions raised in discovery or by the Public Advocate's filings. Therefore, the motion with respect to this testimony is denied.

#### b. Matters Related to Aquila's Prior Rate Case

The question of whether rate case expenses related to the prior Aquila, Inc. general rate case are recoverable is not properly resolved by an evidentiary objection to exclude the testimony, but rather should be addressed in the Commission's order determining the substantive issues raised by Black Hills' application. Therefore, I find that the motion is denied with respect to this evidence.

c. Legal Conclusions

Further, as stated above, it is not uncommon for individuals to cite to and rely on statutes, Commission orders, and rules and regulations in offering their opinions with respect to the treatment of issues in a general rate case. The ultimate decision regarding the application of the law and precedent will be made by the Commission. Therefore, I find that the motion is denied with respect to this evidence.

d. Objections to Testimony Reflecting Personal Comment

The objections related to those portions of testimony that the Public Advocate considers to be mischaracterizations, expressions of personal feelings, scandalous, or argumentative, are questions of weight and reflect on the credibility of the witness providing the testimony. Therefore, I find that the motion is denied with respect to this evidence.

O R D E R

IT IS THEREFORE ORDERED by the Hearing Officer that the Motions set forth herein are denied.

MADE AND ENTERED at Lincoln, Nebraska this 20th day of May, 2010.

NEBRASKA PUBLIC SERVICE COMMISSION

BY:

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Hearing Officer

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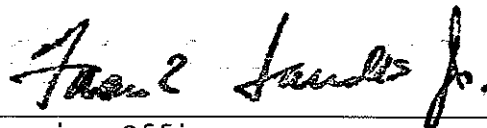
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NEBRASKA PUBLIC SERVICE COMMISSION

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