UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

DEER CREEK ELECTRIC, INC. and BLACK HILLS ELECTRIC, INC., alter egos **Respondent.** **and** **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 76, AFL-CIO, CLC** **Charging Party.**	**Case 19-CA-097260**

RESPONDENTS' REPLY TO GENERAL COUNSEL's ANSWERING BRIEF AND IN SUPPORT OF RESPONDENTS' LIMITED CROSS-EXCEPTIONS TO THE ALJ'S DECISION

Deer Creek Electric, Inc. ("Respondent DCE") and Black Hills Electric, Inc. ("Respondent BHE"), (collectively referred to as "Respondents") respectfully submit this *Reply to General Counsel's Answering Brief and in Support of Respondents' Limited Cross Exceptions* to Administrative Law Judge Mary Miller Cracraft's ("ALJ") Decision of May 1, 2014[1]. Counsel for the General Counsel ("General Counsel") submitted its *Answering Brief to Respondents' Limited Cross-Exceptions* on July 11, 2014. General Counsel asserts that the ALJ was correct in her finding of "substantially identical" general purpose and operations in her Decision. In making its arguments, General Counsel ignores specific findings by the ALJ,

[1] References to the Administrative Law Judge's Decision are indicated as *"ALJD ___."* References to the hearing transcript are cited as *"Tr. __:__-__"*, indicating page and line numbers. References to the General Counsel's Answering Brief to Respondent's Cross-Exceptions are cited as *"GC Ans. Brf., pg. ___."* References to Exhibits are cited as *"GC Ex."* or *"Resp. Ex."*, indicating General Counsel or Respondent exhibits.

misrepresents the record, and references prior Board decisions which do not support its arguments.

A. General Counsel Asserts Facts Contrary to the ALJD Findings and the Hearing Record

General Counsel asserts that Respondent BHE began its operation with gifted vehicles and equipment that were converted to purchases only after the Unfair Labor Practice charge was filed. *(GC Ans. Brf. pg. 3)*. The ALJ found that the vehicles were sold by Respondent DCE to Respondent BHE. *(ALJD 6:45-47; 7:1-3)*. A bill of sale dated three months prior to the filing of the ULP charge was put into evidence. *(Resp. Ex. 4)*. In the same paragraph, the General Counsel asserts that Rick Moloney was the primary manager and the face of Respondent BHE's operations. However, the ALJ specifically found that supervision and management at the two companies was substantially different. *(ALJ 11:17-23)*. The ALJ also found that Respondent BHE was managed by three individuals, Rick Moloney, Wes Hillman and Cheri Jackson. *(ALJD 6:6-18)*. . General Counsel also asserted that Respondent BHE Manager Hillman only worked for a total of 21 hours from February 2013 through July 29, 2013, citing *ALJD 6:16-17; Tr. 123:15-25; GC Exs. 59* and *60. (GC Ans. Brf. p. 3)* However, the ALJ specifically found that Hillman began working part time, about 15-20 per week, for Respondent BHE in February of 2013. *(ALJD 6:15-17)*. The transcript reference at page 123 had nothing to do with Hillman's work, but instead discussed BHE Owner Cheri Jackson's work for the Washington State Gambling Commission. *(Tr. 123:15-25)*. Finally, GC Exhibit 60 established that Wes Hillman worked for Respondent BHE for a total of 642.5 hours in 2013. GC Exhibit 59 is only a partial record showing some weeks of payroll for Respondent BHE. The General Counsel's assertions are therefore contrary to the record and the specific findings of the ALJ and must be rejected.

General Counsel also asserts that Respondent BHE contends it performed more residential jobs than DCE did. *(GC Ans. Brf. pg. 4).* It is more than a contention, it is an undisputed fact. The undisputed record evidence clearly established that Respondent BHE performed nearly eight times as many residential jobs in its first 15 months of operation compared to Respondent DCE in its last two years of operation. *(Resp. Ex. 2; Tr. 193:24-25, 194:1-2, 213:19-25).* General Counsel offered no contrary evidence at the hearing.

B. General Counsel's Arguments Ignore the Substantial Differences Between Respondents DCE and BHE.

The ALJ found that during Respondent BHE's first six months of operation, it had 80 customers with total sales of $1,235,000. *(ALJD 6:28-30).* The ALJ also determined that only 21 of the 82 customers (26%) were former customers of Respondent DCE. *(ALJD 6:29-31, 7:19-22).* The undisputed evidence at the hearing was that Respondent BHE did about $400,000 - $450,000 in design and build projects, a type of work that was not done by Respondent DCE. *(Tr. 224:2-14; 14-24).* The undisputed record at the hearing was that Respondent BHE performed approximately $300,000 in data networking projects, a type of work that Respondent DCE did not self-perform. *(ALJD 11:28-30).* Therefore, $700,000 - $750,000 of the work performed by Respondent BHE, or about 60% of the total revenue came from different types of work not performed by Respondent DCE. The ALJ also failed to take into account that Respondent BHE performed nearly eight times as many residential jobs as Respondent DCE in its first fifteen months of operations. *(Tr. 193:24-25, 194:1-2, 213:19-25).* The General Counsel seems to argue that electrical work is electrical work, whether it is residential, commercial, public or private, data networking or design/build. However, prior Board decisions make it clear that choosing to pursue different types of work in the electrical field does show a different business purpose. *See, Victor Valley Heating,* 267 NLRB 1292

(1983); *Marino Electric Co.*, 285 NLRB 344 (1987). There was a substantial difference in business purpose between Respondents DCE and BHE which the ALJ failed to take into account.

C. General Counsel's Case Citations Are Not Material.

Continental Radiation Corp. In its *Answering Brief,* the General Counsel cites *Continental Radiation Corp.,* 283 NLRB 234 (1987). *Continental Radiation Corp.* is not relevant because the Board in that case determined that all the other factors used in alter-ego status were substantially identical, including identical employees, identical equipment, identical customers, and identical management and supervision. Therefore, the issue of whether the new company provided different services or products was not particularly relevant. In the present case, ALJ Cracraft found that all the other factors were not substantially identical and therefore did not support an alter-ego finding.

Kodiak Electric. General Counsel also cites *Kodiak Electric,* 336 NLRB 1038 (2001) in support of its arguments. General Counsel asserts that *Kodiak Electric* stands for the broad proposition that two entities are alter-egos even if they perform different types of electrical work. The holding is simply not that broad, nor does it apply to the facts in the instant case. *Kodiak Electric* turned on the ALJ's reasoning that even though the two entities had different purposes and customers, they had held themselves out, to customers and suppliers, as a single entity and the new company had performed the interior electrical work obtained and started by the prior company. *Id.* at 1042. In other words, the ALJ and the Board found an alter-ego relationship in spite of the fact that the two entities performed different types of work because the new company had taken over all the customers, suppliers and work being formed by the predecessor company. None of those facts are present here; therefore *Kodiak Electric* is inapplicable.

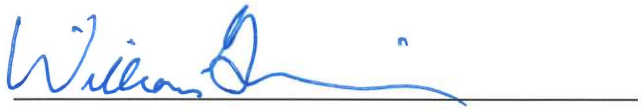
Victor Valley Heating. The General Counsel unsuccessfully attempts to distinguish a case cited by Respondents in its briefing, *Victor Valley Heating*, 267 NLRB 1292 (1983), even though the case was not discussed by the ALJ after it was cited. The ALJ erred in failing to apply the holding in *Victor Valley Heating.* *Victor Valley Heating* strongly supports a finding that Respondents DCE and BHE did not have substantially identical business purposes and operations. The General Counsel claims that *Victor Valley Heating* contains "almost no discussion of the differences in the scope of work." This is untrue. The ALJ in that case separated the percentage of residential and commercial work performed by the predecessor entity. *Id.* at 1293. The ALJ in that case detailed that "Victor Valley is out of the residential business, and Concord specializes in residential business; through referrals from Victor Valley, Concord has 'inherited' some residential business formerly done by Victor Valley, and on at least one occasion Adrian referred a commercial job." *Id.* at 1294. Thus, the case did discuss the specific differences in the type of electrical work performed by the two companies, and the ALJ determined that the companies had different business purposes.

Moreover, later Board decisions have cited *Victor Valley Heating* for the principle that when businesses perform different types of work, this weighs against a finding of alter ego status. These decisions include *Kenton Transfer Co.*, 298 NLRB 487 (1990); and *Polis Wallcovering, Inc.*, 323 NLRB 873 (1997). ALJ Cracraft erred in finding a substantially identical business purpose. The ALJ also entered in finding substantially identical operations, for the reasons set forth in *Respondents' Brief in Support of Cross-Exceptions.*

CONCLUSION

In conclusion, based upon the foregoing, the Board should find merit to the Respondents' Limited Cross-Exceptions and modify the ALJ's findings accordingly.

DATED at Seattle, Washington this 21st day of July, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2014 I caused to be filed with the Executive Secretary of the National Labor Relations Board via the NLRB E-Filing system the above and foregoing *"Reply to General Counsel's Answering Brief and in Support of Respondents' Limited Cross Exceptions to the ALJ's Decision."*

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I further certify that on July 21, 2014, true and correct copies of the same were served via electronic mail upon the following individuals at the email addresses specified for them as shown below:

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