

123 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Black Hills Power, Inc.

Docket No. OA07-55-000

ORDER ACCEPTING COMPLIANCE FILING, AS MODIFIED

(Issued April 4, 2008)

1. On July 13, 2007, pursuant to section 206 of the Federal Power Act (FPA),¹ Black Hills Power, Inc. (Black Hills), on behalf of itself, Basin Electric Power Cooperative (Basin Electric), and Powder River Energy Corporation (collectively, the Transmission Providers),² submitted a revised version of the Transmission Providers' joint open access transmission tariff (Joint OATT) as required by Order No. 890.³ In this order, we will accept Black Hills' filing, as modified, as in compliance with Order No. 890, as discussed below.

I. Background

2. In Order No. 890, the Commission reformed the *pro forma* Open Access Transmission Tariff (OATT) to clarify and expand the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. Among other things, Order No. 890 amended the *pro forma* OATT to require greater consistency and transparency in the calculation of available transfer capability, open and coordinated planning of transmission systems and standardization of charges for

¹ 16 U.S.C. § 824e (2000 & Supp. V 2005).

² The Transmission Providers provide open access transmission service on their combined transmission systems located in the Western Interconnection and on an AC/DC/AC tie facility at Rapid City, South Dakota, that is owned by Black Hills and Basin Electric.

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

generator and energy imbalance services. The Commission also revised various policies governing network resources, rollover rights and reassignments of transmission capacity.

3. The Commission established a series of compliance deadlines to implement the reforms adopted in Order No. 890. Transmission providers that have not been approved as independent system operators (ISO) or regional transmission organizations (RTO), and whose transmission facilities are not under the control of an ISO or RTO, were directed to submit, within 120 days from publication of Order No. 890 in the *Federal Register* (i.e., July 13, 2007), section 206 compliance filings that conform the non-rate terms and conditions of their OATTs to those of the *pro forma* OATT, as reformed in Order No. 890.⁴

4. In Order No. 890, the Commission required transmission providers to file redesigned transmission charges that reflect the Capacity Benefit Margin (CBM)⁵ set-aside to ensure that customers not benefiting from the CBM set-aside (i.e., point-to-point customers) do not pay for CBM. We directed transmission providers to submit redesigned transmission charges through a limited issue FPA section 205 rate filing within 120 days after the publication of the final rule in the *Federal Register*.⁶

II. Black Hills' Compliance Filing

5. Black Hills states that its compliance filing adopts Order No. 890's revised non-rate terms and conditions largely in their entirety and has retained without change the Joint OATT's rate and non-rate provisions not affected by Order No. 890.⁷ Black Hills notes that Order No. 890 gives it discretion to make the following modifications to the Joint OATT: (1) assessment of unauthorized use penalties equal to twice the standard

⁴ The original 60-day compliance deadline provided in Order No. 890 was extended by the Commission in a subsequent order. *See Preventing Undue Discrimination and Preference in Transmission Service*, 119 FERC ¶ 61,037 (2007).

⁵ CBM is the amount of total transfer capability preserved by the transmission provider for load-serving entities, whose loads are located on the transmission provider's system, to enable access by the load-serving entities to generation from interconnected systems to meet generation reliability requirements, or such definition as contained in Commission-approved reliability standards.

⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 263.

⁷ As accepted by the Commission, Black Hills has retained its previously-approved version of Schedule 4 and has not adopted the Order No. 890 *pro forma* OATT Schedule 4 here. *See Black Hills Power, Inc.*, Docket No. OA07-16-000 (July 11, 2007) (unpublished letter order).

rate for service in sections 13.7 and 14.5; (2) addition of Attachment O, to describe Black Hills' processes and rules of performing clustered transmission studies; (3) modification of existing creditworthiness procedures to conform with those in Order No. 890 and moving them from Section 11 to Attachment L; (4) adoption of the Western Electric Coordinating Council's (WECC) Unscheduled Flow Mitigation Procedures in the Joint OATT Attachment J to address parallel energy flows on the Transmission Providers' system; and (5) a statement noting that it does not have or use a CBM set-aside in its control area.

6. Black Hills requests that the revised version of the Joint Tariff be accepted effective July 13, 2007, consistent with Order No. 890.

III. Notice of Filing and Responsive Pleadings

7. Notice of Transmission Providers' filing was published in the *Federal Register*, 72 Fed. Reg. 41,727 (2007), with interventions and protests due on or before August 3, 2007. The Municipal Energy Agency of Nebraska (MEAN) filed a timely motion to intervene and protest.

8. MEAN states several objections to Black Hills' proposed revisions. Generally, MEAN asserts that Black Hills' proposed revisions: (1) contain too narrow requirements for a customer to qualify for unsecured credit; and (2) are contrary to Order No. 890's concept of customer-initiated, voluntary cluster studies. In addition, MEAN states that the proposed revisions are incomplete because they: (1) violate Commission policy by retaining the Joint OATT's penalty provisions for unreserved use; (2) fail to specify penalties for misuse of the network service; and (3) fail to include a proposed mechanism for the distribution of penalty revenues.

IV. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), MEAN's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

10. For the reasons stated below, we will accept Black Hills' compliance filing, as modified, and require a further compliance filing.

1. Schedules 4 and 13 – Energy and Generator Imbalance Service

11. On April 16, 2007, Black Hills submitted an FPA section 205 filing in Docket No. OA07-16-000 to retain the Joint OATT's previously accepted variation of Joint

OATT Schedule 4, Energy Imbalance Service, as consistent with or superior to the revised Order No. 890 *pro forma* OATT. In addition, concurrent with the compliance filing submitted in this proceeding, Black Hills submitted an FPA section 205 filing in Docket No. ER07-1173-000 to revise the Joint OATT's Generator Imbalance Service schedule⁸ to conform it with the Joint OATT's previously-approved variation of Schedule 13. Black Hills stated that if the Commission accepted its request to approve a variation from the Order No. 890 *pro forma* OATT's Generator Imbalance Service provisions, the pages of the Joint OATT Schedule 13 filed in Docket No. ER07-1173-000 would supersede the pages of the Joint OATT Schedule 13 submitted in this proceeding. The Commission approved Black Hills' requests to retain its previously accepted variation of the Joint OATT Schedules 4 and 13 by delegated letter orders issued July 11, 2007,⁹ and September 10, 2007,¹⁰ respectively.

12. However, we note that in Docket Nos. OA07-16-000 and ER07-1173-000, Black Hills did not address the new *pro forma* requirement imposed in Order No. 890 that a transmission customer has the option to make alternative comparable arrangements for imbalance service provided by non-generation resources.¹¹ Because Black Hills failed to include this *pro forma* language in the Joint OATT Schedules 4 and 13 and did not address why its existing language is consistent with or superior to the new language, we direct Black Hills to file revised Schedules 4 and 13 in a compliance filing within 30 days of the date of this order adopting the non-generating resources language of the *pro forma* OATT. Specifically, Black Hills is to include the following language in its Schedule 4 and similar language substituting the phrase "Generator Imbalance Service" in Black Hills Schedule 13 – "The Transmission Customer must either purchase this service from the Transmission Provider or make alternative comparable arrangements, which may include use of non-generation resources capable of providing this service, to satisfy its Energy Imbalance Service obligation."

⁸ The Joint OATT's Generator Imbalance Service schedule is Schedule 13. The numbering of the schedules under the Joint OATT does not conform with the numbering of the schedules under the Order No. 890 *pro forma* tariff because the Joint OATT includes schedules for rates for service over the Rapid City Tie.

⁹ *Black Hills Power, Inc.*, Docket No. OA07-16-000 (July 11, 2007) (unpublished letter order).

¹⁰ *Black Hills Power, Inc.*, Docket No. ER07-1173-000 (Sept. 10, 2007) (unpublished letter order).

¹¹ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 888.

13. In this proceeding, we also accept Black Hills' proposed Joint OATT Schedule 13, but note that it has been superseded by the Joint OATT Schedule 13, as modified, in Docket No. ER07-1173-000.

2. CBM

14. In Order No. 890, the Commission required transmission providers to file redesigned transmission charges that reflect the CBM set-aside to ensure that customers not benefiting from the CBM set-aside (i.e., point-to-point customers) do not pay for CBM. In its response to that compliance requirement, Black Hills indicates that it does not reserve CBM for native load or any other customer and, thus, no changes are needed to its rate design. We conclude that Black Hills' submittal complies with Order No. 890 and, accordingly, we will accept it.¹²

3. Attachment J (Procedures for Addressing Parallel Flows)

15. The *pro forma* OATT adopted in Order No. 890 includes a blank Attachment J entitled "Procedures for Addressing Parallel Flows" that is to be "filed by the Transmission Provider." Black Hills proposes language in the Joint OATT Attachment J to use WECC's Unscheduled Flow Mitigation Procedures to address parallel energy flows on the Transmission Providers' system. We conclude that Black Hills' submittal complies with Order No. 890 and, accordingly, we will accept it.

4. Creditworthiness

a. Black Hills Compliance Filing and MEAN Protest

16. Under Black Hills' Attachment L (Creditworthiness Procedures), a Transmission Customer will not be required to provide any form of credit security if (1) the Transmission Customer is not in default of its payment obligation under provisions of the Joint OATT, and (2) it meets one of the following criteria:

- a. The Transmission Customer has been in business at least one year and has a senior secured credit rating of at least Baa1 (Moody's) or BBB+ (Standard & Poors).
- b. The Transmission Customer's parent company meets the criteria set out in (i) above, and the parent company provides written guarantee that the parent

¹² We note that to the extent the Transmission Providers use CBM in the future or provide a CBM set-aside at the request of a customer, they must revise their transmission charges consistent with the requirements of Order No. 890. Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 263.

company will be unconditionally responsible for all financial obligations associated with the Transmission Customer's receipt of transmission service.

17. In addition, Black Hills proposes to accept the following forms of collateral: (1) an unconditional and irrevocable letter of credit from a financial institution reasonably acceptable to the Transmission Provider or an alternative form of security proposed by the Transmission Customer and acceptable to the Transmission Provider and consistent with commercial practices established by the Uniform Commercial Code that is equal to the lesser of the total charge for service or the charge for 90 days of service; (2) for service for one month or less, prepayment of the total charge for service; and (3) for service of greater than one month, prepayment of the charge for each month of service. Additionally, Black Hills proposes procedures for providing an explanation of changes in a transmission customer's creditworthiness status, a procedure for contesting credit determinations, a procedure for posting additional collateral, and circumstances for suspending service.

18. MEAN argues that Black Hills' requirements to qualify for unsecured credit proposed in Attachment L are too narrow, asserting that it is possible for a public power entity to have excellent credit, but not have rated bonds to meet Black Hills' criteria. Furthermore, MEAN notes, an entity such as a municipal utility does not have a corporate parent to provide a guarantee. Accordingly, MEAN states that Black Hills should be required to provide a credit review process by which creditworthy customers without an underlying credit rating can demonstrate that they are entitled to unsecured credit.

b. Commission Determination

19. In Order No. 890, the Commission required transmission providers to amend their OATTs to include a new attachment that sets forth the basic credit standards the transmission provider uses to grant or deny transmission service. This attachment must specify both the qualitative and quantitative criteria that the transmission provider uses to determine the level of secured and unsecured credit required. In addition, the Commission required transmission providers to address six specific elements regarding the transmission provider's credit requirements.¹³

20. We agree with MEAN that Black Hills has not included any qualitative factors in its criteria to qualify for unsecured credit. The Commission has previously determined that transmission providers

should not automatically determine that an applicant is not creditworthy if it does not have a credit rating or that credit rating is below investment grade. For example, although municipalities and cooperatives may not be rated, they may still

¹³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1656-61.

have strong credit for transmission service due to the nature of their businesses and their ability to charge their customer base for service. Similarly, stand-alone merchants may not have a strong balance sheet but may have strong credit for transmission service if they have transmission to perform under the contract.^[14]

The Commission has further stated that qualitative factors to be considered include, among others: applicant's history; nature of organization and operating environment; management; contractual obligations; governance policies, financial and accounting policies, risk management and credit policies; market risk including price exposures, credit exposures, and operational exposures; event risk; and the state or local regulatory environment.¹⁵ Accordingly, we direct Black Hills to modify its Attachment L within 30 days of the date of this order to include qualitative as well as quantitative criteria to determine a customer's creditworthiness.

21. In section 1.2(i) of Attachment L, Black Hills provides that "the Transmission Customer shall provide an unconditional and irrevocable letter of credit from a financial institution reasonably acceptable to the Transmission Provider or an alternative form of security proposed by the Transmission Customer and acceptable to the Transmission Provider." We find that this provision creates uncertainty as to how Black Hills will determine if an alternative form of security proposed by a Transmission Customer is acceptable, or if a financial institution's letter of credit is reasonably acceptable. Accordingly, within 30 days of the date of this order, we direct Black Hills to provide greater clarity of the criteria it will apply to financial institutions and alternative forms of security in determining their acceptability.

5. Unreserved Use Penalties

a. Black Hills, Compliance Filing and MEAN Protests

22. Black Hills states that it has adopted language in sections 13.7 and 14.5 of the Joint OATT that permit it to assess unauthorized use penalties in any circumstance where it detects that a transmission customer has used transmission services that it has not reserved. Black Hills further states that such penalties provide that a Transmission Customer shall pay, in addition to the otherwise applicable firm point-to-point charge, a penalty equal to the product of two times the applicable charge and the amount of capacity used in excess of the Reserved Capacity. The penalties will be derived as follows:

¹⁴ *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 at P 14 (November 2004).

¹⁵ *Id.* n.13.

(1) for unreserved use within a single day, the penalty charge shall be based on the daily rate; (2) for unreserved use in two or more days in a calendar week, the penalty charge shall be based on the weekly rate; and (3) for multiple instances of unreserved use in more than one calendar week in a calendar month, the penalty charge shall be based on the monthly rate.^[16]

23. MEAN states that the Black Hills' penalty provisions for unreserved use in sections 13.7 and 14.5 of the Joint Tariff are excessive and require an offending transmission customer to "pay, in addition to the otherwise applicable charge, a penalty equal to the product of two times the applicable charge and the amount of capacity used in excess of the Reserve Capacity."¹⁷ MEAN asserts that these provisions clearly violate the Commission's policy established in *Allegheny Power*,¹⁸ clarified in *Midwest ISO*,¹⁹ and expressly retained in Order No. 890 that:

the penalty charges accepted in *Allegheny Power*, subject to a cap of 200 percent of the standard rate were intended to constitute the total charge for unauthorized use. Midwest ISO apparently misinterprets our reference to the total charge as being 200 percent of the standard rate as a "penalty." Therefore, the Commission clarifies that this "penalty" charge for unauthorized use is actually the standard rate that would otherwise apply if sufficient capacity had been reserved, plus a penalty of 100 percent of the standard rate to discourage unauthorized use of the transmission service.^[20]

MEAN contends that the Commission should require Black Hills to modify its proposed penalty provisions to ensure that the penalties do not exceed the 200 percent limit.

24. MEAN also states that sections 28.6 and 34.0 of the Joint OATT provide that Black Hills "shall specify" applicable penalties and charges for misuse of network service; however, Black Hills has failed to provide any actual specification for these

¹⁶ Black Hills Joint OATT, First Revised Vol. No. 4 at P 49 and 52-53.

¹⁷ MEAN Protest at 4.

¹⁸ *Allegheny Power System, Inc.*, 80 FERC ¶ 61,143, at 61,545-46 (1997) (*Allegheny Power*).

¹⁹ *Midwest Independent System Operator, Inc.*, 103 FERC ¶ 61,282, at P 22-24, *reh'g denied*, 105 FERC ¶ 61,111 (2003) (*Midwest ISO*).

²⁰ *Id.* P 23.

penalties and charges.²¹ MEAN argues that these penalties and charges should be explicitly stated in the Joint OATT.

b. Commission Determination

25. In Order No. 890, the Commission determined that transmission customers would be subject to unreserved use penalties in any circumstance where the transmission customer uses transmission service that it has not reserved and the transmission provider has a Commission approved unreserved use penalty rate explicitly stated in its OATT.²² Order No. 890 gives transmission providers discretion in setting their unreserved use penalty rates, as consistent with the current policy established in *Allegheny* that the unreserved use penalty may not be greater than twice the firm point-to-point rate for the period of unreserved use.

26. As clarified in *Midwest ISO*, the Commission's 200 percent penalty charge cap for unreserved use includes the "penalty" and the firm point-to-point service rate. We agree with MEAN that as proposed, Black Hills' unreserved use penalty provisions, which provide for a 200 percent applicable penalty charge, in addition to the otherwise applicable charge, result in a total charge of 300 percent. We note, however, that to the extent a transmission provider believes additional penalties are necessary to prevent pervasive unauthorized use, it may make a filing under FPA section 205 to propose such additional penalties.²³ Accordingly, within 30 days of the date of this order, we direct Black Hills to modify its penalty provisions consistent with the Commission's rebuttable presumption that unreserved use penalties no greater than twice the firm point-to-point rate for the penalty period are just and reasonable. Alternatively, Black Hills may submit an FPA section 205 filing justifying a higher penalty rate as necessary to combat pervasive unreserved use of transmission.

27. In sections 28.6 and 30.4 of its Joint OATT, Black Hills merely adopted the *pro forma* OATT language providing that the Transmission Provider shall specify the penalties for unreserved use of network service and for using network service to facilitate a wholesale sale that does not serve a network load. MEAN states that these penalty rates must be explicitly stated in Black Hill's Joint OATT. However, section 13.4 of the *pro forma* OATT provides that the customer using unreserved service shall be deemed to have executed a service agreement to govern that service. This means that all unreserved uses of the transmission provider's system, including inappropriate use of network

²¹ MEAN Protest at 4-5.

²² Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 834, 848.

²³ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at 462, citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 849.

transmission service to support off-system (third party) sales, are to be considered uses of firm point-to-point transmission service, even if the customer is taking network service or non-firm point-to-point service for the reserved portion of its service.²⁴ Accordingly, it is not necessary for Black Hills to also specify its unreserved use penalty rates in sections 28.6 and 30.4.

6. Late Study and Unreserved Use Penalty Revenue Distribution Mechanism

28. In Order No. 890, the Commission required transmission providers to make a compliance filing, proposing a mechanism to identify non-offending transmission customers and a method for distributing the unreserved use penalties revenue received to the identified transmission customers, as well as late study penalties to unaffiliated transmission customers.²⁵ Moreover, the transmission provider is required to make an annual filing with the Commission, which provides information regarding the penalty revenue the transmission provider has received and distributed. Transmission providers must provide: (1) a summary of penalty revenue credits by transmission customer; (2) total penalty revenues collected from affiliates; (3) total penalty revenues collected from non-affiliates; (4) a description of the costs incurred as a result of the offending behavior; and (5) a summary of the portion of the unreserved penalty revenue retained by the transmission provider.²⁶

29. Black Hills did not file a methodology to distribute penalty revenues in the instant compliance filing.²⁷ In Order No. 890-A, the Commission acknowledged that the discussion of the process for distributing operational penalties in Order No. 890 is somewhat unclear. Accordingly, the Commission required that “all operational penalty revenues [to] be distributed, with no exception. In the case of unreserved use penalties, we require penalty revenues to be distributed to non-offending customers and, in the case of late study penalties, we require penalty revenues to be distributed to all non-affiliates of the transmission provider.”²⁸ The Commission also clarified that “each transmission provider must submit a one-time compliance filing under FPA section 206 proposing the transmission provider’s methodology for distributing revenues from late study penalties

²⁴ See *Arizona Public Service Co.*, 121 FERC ¶ 61,246 (2007), and Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 454.

²⁵ *Id.* P 861.

²⁶ *Id.* P 864.

²⁷ MEAN Protest at 6.

²⁸ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 475.

and, if applicable, unreserved use penalties.”²⁹ The Commission stated that the one-time compliance filing can be submitted at any time prior to the first distribution of operational penalties. The Commission also explained that transmission providers should request an effective date for this distribution mechanism as of the date of the filing and may begin implementing the methodology immediately, subject to refund if altered on Commission review. Accordingly, as required in Order No. 890-A, Black Hills must submit a one-time section 206 compliance filing to propose its methodology for distributing unreserved use penalty revenues.

30. In addition, under Order No. 890, Black Hills is required to make annual filings providing a summary of penalty revenue credits by transmission customer, total penalty revenues collected from affiliates, total penalty revenues collected from non-affiliates, a description of the costs incurred as a result of the offending behavior, and a summary of the portion of the unreserved penalty revenue retained by the transmission provider.³⁰ The Commission explained in Order No. 890-A that the annual compliance report must be submitted on or before the deadline for submitting FERC Form-1, as established by the Commission’s Office of Enforcement each year.³¹

7. Clustering

a. Compliance Filing and Protests

31. Black Hills submitted a proposal for clustering transmission studies designated as Attachment O to the Joint OATT. Black Hills explains that it will notify applicable customers if it decides, either on its own initiative or in response to a request from an Eligible Customer, to perform a System Impact Study and/or a Facilities Study for a specified cluster for service requests. Black Hills states that it will conduct a System Impact Study of redispatch options and conditional curtailment options separately for each service request, and further explains that if an Eligible Customer chooses not to have its request for service studied as part of the cluster, its request for service will be deemed to be withdrawn, unless the Eligible Customer informs the Transmission Provider that it wants the Transmission Provider to evaluate redispatch options and/or conditional options, but not Network Upgrades in connection with its request for service. Also as part of the proposal, Black Hills provides that Eligible Customers whose requests for service are studied as part of a cluster will pay for the costs of the studies in proportion to the number of MWs of service each customer requests. In addition, the costs of the Network Upgrades constructed to accommodate requests for service that are studied as part of a cluster will be allocated to each Eligible Customer in the cluster based

²⁹ *Id.* P 472.

³⁰ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 864.

³¹ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 472.

on its share of the total MW of service requested. Black Hills also states that these costs will be paid for in accord with Commission policy.

32. MEAN states that under Black Hills' proposed Attachment O, Black Hills would have the right to cluster requests for study purposes on its own initiative, but provides that "if an Eligible Customer chooses not to have its request for service studies as part of the cluster, its request for service will be deemed to be withdrawn." MEAN asserts that there may be many reasons for a customer to not want to have its request included in a cluster study, and furthermore claims that this provision runs contrary to the basic concept of customer-initiated, voluntary clustering reflected in Order No. 890.³² MEAN requests that the Commission require Black Hills to modify its proposal so that a customer can opt out of a cluster study initiated by Black Hills without jeopardizing its underlying request for service.

b. Commission Determination

33. In Order No. 890, the Commission did not generally require transmission providers to study transmission requests in a cluster, although the Commission did encourage transmission providers to cluster studies when it is reasonable to do so. The Commission also explicitly required transmission providers to consider clustering studies if the customers involved request a cluster and the transmission provider can reasonably accommodate the request. As a result, the Commission directed transmission providers to include tariff language in their Order No. 890 compliance filings that describes how the transmission provider will process a request to cluster studies and how it will structure transmission customers' obligations in a cluster.³³ In Order No. 890, the Commission gave transmission providers "discretion to determine whether a transmission customer can opt out of a cluster and request an individual study," because the transmission provider is in the best position to develop clustering procedures that prevent a customer from strategically participating in clusters to avoid costs for needed transmission system upgrades.³⁴ Furthermore, Black Hills' protested Attachment O provision is consistent with Progress Energy's Commission-approved clustering proposal, providing that any customer can avoid being included in a Cluster Study, which may be initiated by the Transmission Provider, by refusing to execute a System Impact Study Agreement or a Facilities Study Agreement, which results in its request for service

³² MEAN Protest at 7-8 (citing Order No. 890 at P 1371, requiring each transmission provider to "include tariff language in its compliance filing that describes how it will process a request to cluster request studies and how it will structure the transmission customers' obligations when they have joined a cluster").

³³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1370-71.

³⁴ *Id.* P 1371.

being deemed to have been withdrawn.³⁵ Therefore, we disagree with MEAN's assertion that this provision runs contrary to any voluntary concepts expressed in Order No. 890, and we reject MEAN's request to require Black Hills to modify its proposal so that a customer can opt out of a cluster study initiated by Black Hills without jeopardizing its underlying request for service.

8. Simultaneous Submission Window

34. In Order No. 890, the Commission decided to retain its first-come, first-served policy regarding transmission service requests. However, the Commission required those transmission providers who set a "no earlier than" time limit for transmission service requests to treat all such requests received within a specified period of time, or window, as having been received simultaneously. Although the Commission left it to the transmission providers to propose the amount of time the window would be open, the Commission stated that the window should be open for at least five minutes unless the transmission provider presents a compelling rationale for a shorter window. The Commission also required each transmission provider that is required to, or decides to, deem all requests submitted within a specified period as having been submitted simultaneously to propose a method for allocating transmission capacity if sufficient capacity is not available to meet all requests submitted within that time period.³⁶

35. Black Hills has not addressed whether or not it has adopted the use of a simultaneous submission window. If Black Hills has adopted the use of a "no earlier than" time limit for the submission of transmission service requests, we direct Black Hills to file, within 30 days of the date of this order, a further compliance filing that clearly indicates that Black Hills has satisfied the remaining compliance requirements of Order No. 890 for adoption of a simultaneous submission window.³⁷

9. Rollover Rights Effective Date

36. In Order No. 890, the Commission adopted a five-year minimum contract term in order for a customer to be eligible for a rollover right and adopted a one-year notice period. The Commission determined that this rollover reform should be made effective at the time of acceptance by the Commission of a transmission provider's coordinated and regional planning process. The Commission explained that rollover reform and transmission planning are closely related, because transmission service eligible for a

³⁵ *Progress Energy, Inc.*, 122 FERC ¶ 61,078, at P 9 and 17 (2008).

³⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1418-22.

³⁷ *Id.*

rollover right must be set aside for rollover customers and included in transmission planning.³⁸

37. Black Hills has not yet modified section 2.2 of the Joint OATT to reflect the new *pro forma* language revising the standards for rollover. We agree with MEAN that it is not logical, necessary, or appropriate to reflect these changes prior to Commission acceptance of Black Hills' Attachment K, which sets forth its transmission planning process. We note that within 30 days after acceptance of Black Hill's Attachment K, which was filed December 7, 2007, in Docket No. OA08-43-000, Black Hills should file the rollover reform language established in Order No. 890, requesting an effective date commensurate with the date of that filing.

38. Accordingly, we will accept Black Hills' compliance filing, as modified, to be effective July 13, 2007. We also direct Black Hills to file, within 30 days of the date of this order, a further compliance filing as required above.

The Commission orders:

(A) Black Hills' compliance filing is hereby accepted, as modified, effective July 13, 2007, as discussed in the body of this order.

(B) Black Hills is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁸ *Id.* P 1231, 1265.