

128 FERC ¶ 61,285
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Black Hills Wyoming, LLC and
Cheyenne Light, Fuel and Power Company

Docket No. ER09-1524-000

ORDER APPROVING SALE OF CAPACITY AND ENERGY AND
ACCEPTING POWER PURCHASE AGREEMENT

(Issued September 29, 2009)

1. On July 30, 2009, pursuant to section 205 of the Federal Power Act (FPA),¹ Black Hills Wyoming, LLC (Black Hills Wyoming) and Cheyenne Light, Fuel and Power Company (Cheyenne) (together, the Parties) submitted for filing an executed power purchase agreement (PPA) under which Black Hills Wyoming, a market-regulated power sales entity, would sell electric capacity and energy to Cheyenne, its franchised public utility affiliate, on a long-term basis.² The Commission finds that the submitted PPA satisfies the Commission's rules governing the wholesale sale of electric power between a regulated public utility and its market-regulated power sales affiliate and that the PPA's rates, terms, and conditions of service are just and reasonable. Accordingly, this order approves the sale of capacity and energy and accepts for filing the PPA between Black Hills Wyoming and Cheyenne, effective October 1, 2009, as requested.

I. Background

2. The Parties state that each is a wholly-owned subsidiary of Black Hills Corporation (Black Hills), a diversified energy company engaged in two principal lines of business: (a) traditional electric and gas utility service in several states, and (b) wholesale energy production and marketing in the western United States

¹ 16 U.S.C. § 824d (2006).

² Black Hills Wyoming has designated this PPA as Electric Rate Schedule FERC No. 1.

and western Canada. The Parties assert that Black Hills conducts its electric utility business through its wholly-owned operating subsidiaries, Cheyenne, Black Hills Power Inc. (Black Hills Power) and Black Hills/Colorado Electric Company, L.P.. Each of these subsidiaries is a traditional public utility that serves captive customers in franchised retail utility service areas. Cheyenne serves approximately 40,000 retail electric customers and approximately 33,000 retail natural gas customers in and around Cheyenne, Wyoming.

3. The Parties state that Black Hills conducts its wholesale energy production and marketing business through its wholly-owned direct subsidiary, Black Hills Non-Regulated Holdings, of which Black Hills Wyoming is a wholly-owned subsidiary.

4. The Parties assert that in 2001, before becoming affiliates in 2004, Black Hills Wyoming and Cheyenne entered into two power purchase contracts, under which Cheyenne purchases 100 megawatts (MWs) of capacity and energy from Black Hills Wyoming.³ The Parties contend that these power purchase contracts were negotiated at arms-length between non-affiliates at the time of their formation, and that their rates, terms and conditions have not changed since then. Further, the Parties state that one of these power purchase contracts expires in 2011, while the second contract expires in 2013. The Parties intend to replace the second of these two contracts upon its expiration with the submitted PPA.

5. The Parties state that Black Hills Power recently entered into an arms-length negotiated contract with the Municipal Energy Agency of Nebraska (MEAN), a non-affiliate, for the sale of 20 MW of unit-contingent capacity and associated energy from Black Hills Power's Neil Simpson II and Wygen III generating facilities (Black Hills Power-MEAN contract).

II. The Parties' Filing

6. The Parties state that under the submitted PPA, Black Hills Wyoming will continue to serve Cheyenne with up to 60 MW of capacity and associated energy from Black Hills Wyoming's Wygen I generating facility through a term that will extend through December 31, 2022. The Parties state that Black Hills Wyoming will provide service to Cheyenne through March 2013 under the terms of the Parties' existing power sales agreement on file with the Commission and that, commencing in April 2013, Black Hills Wyoming will supply Wygen I unit-

³ These power purchase contracts were accepted by the Commission. *Black Hills Generation, Inc.*, Docket No. ER01-2576-001 (Aug. 22, 2001) (unpublished letter order).

contingent capacity and energy to Cheyenne at the same rates, terms and conditions that were established through the Black Hills Power-MEAN contract.⁴

7. The Parties acknowledge that the submitted PPA involves power sales between a traditional public utility that serves captive customers and its market-regulated power sales affiliate and is thus subject to the Commission's affiliate power sale rules.

8. The Parties attest that the instant PPA fully satisfies the requirements established in *Boston Edison Co. Re: Edgar Electric Energy Co.*⁵ because its rates, terms and conditions were established with reference to objective market information involving the arms-length sale of capacity and energy with a non-affiliate under the Black Hills Power-MEAN contract. The Parties claim that the arms-length negotiated rates, terms, and conditions under the Black Hills Power-MEAN contract were adopted without change in the instant PPA.⁶

9. Finally, the Parties assert that the services under both contracts, and the prices for those services, will be the same. According to the Parties, the cost of power produced by the generating facilities in the Black Hills Power-MEAN contract represents a very close proxy for the cost of power produced by Black Hills Wyoming's Wygen I facility.⁷ The Parties then state that the instant PPA

⁴ The Parties state that in addition to the rates, terms and conditions for Black Hills Wyoming's sale of capacity and energy to Cheyenne, the PPA also grants Cheyenne an option to purchase Black Hills Wyoming's ownership interest in the Wygen I facility during the term of the PPA.

⁵ 55 FERC ¶ 61,382, at 62,167 (1991) (*Edgar*).

⁶ The Parties state that the initial price for renewal-term capacity and energy beginning April 2013 will be approximately \$49 per megawatt-hour, of which \$15 will be fixed for the term of the PPA, while the balance will escalate at the greater of three percent per year or by the rate of actual annual percentage increase in costs of fuel and variable expenses for operating and maintaining the Wygen I generating facility. According to the Parties, these price terms were adopted without change from the Black Hills Power-Mean contract. Additionally, the Parties attest that the instant PPA will govern sales from 2009 through 2022, while the Black Hills Power-MEAN contract will govern sales from 2010 to 2023. Parties' filing, transmittal letter at 5, 7.

⁷ The Parties contend that Black Hills Power's Neil Simpson II and Wygen III plants, and Black Hills Wyoming's Wygen I plant are all mine mouth coal-fired generating facilities that are located at the same site adjacent to the WRDC coal mine at Gillette, Wyoming. Further, these generating facilities use the same

satisfies the *Edgar* requirements and provides for service at just and reasonable rates, terms and conditions, and should therefore be accepted for filing as of October 1, 2009.⁸

III. Notices and Interventions

10. Notice of the Parties' filing was published in the *Federal Register*, 74 Fed. Reg. 39,685 (2009), with interventions and protests due on or before August 20, 2009. None was filed.

IV. Discussion

11. Under the Commission's regulations, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the FPA.⁹ The Commission must ensure that the rates, terms and conditions of jurisdictional service are just, reasonable and not unduly discriminatory or preferential. As part of the Commission's obligation in administering this FPA standard, it ensures that wholesale customers' rates do not reflect costs that are the result of undue preferences granted to affiliates or that are imprudent or unreasonable as a result of affiliate transactions.¹⁰ The Commission traditionally places limits on wholesale power sales by wholesale generators and marketers to affiliated utilities with captive customers out of concern for affiliate abuse.¹¹ In cases where

design and technology, share coal handling facilities and other infrastructure, and have very similar cost characteristics. Parties' filing, transmittal letter at 5.

⁸ *Id.* at 6.

⁹ 18 C.F.R. § 35.44 (2009).

¹⁰ *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 3 (Order No. 707), *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

¹¹ *See Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 492 (Order No. 697), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. 31,291 (2009); Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 4-7.

affiliates are entering into sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.¹²

12. In *Edgar*, the Commission provides that there are several ways to demonstrate that a buyer has chosen the lowest cost supplier and thus that it has not preferred an affiliate without justification.¹³ *Edgar* describes three examples of ways to make this showing.¹⁴ First, the utility may submit evidence of direct head-to-head competition between affiliated and non-affiliated suppliers either in a formal solicitation or in an informal negotiation process.¹⁵

13. Second, the utility may present evidence of the prices that non-affiliated buyers were willing to pay for similar services from that project. The Commission states that this second type of evidence is credible only to the extent that the nonaffiliated buyers are in the relevant market as the purchaser and are not subject to market power by the seller or its affiliates.¹⁶

14. Finally, the utility may provide “benchmark” evidence of the prices, terms and conditions of sales by non-affiliated sellers, which could include purchases made by the utility itself or by other buyers in the relevant market. The Commission states that two major considerations with respect to the credibility of the benchmark evidence is whether the benchmark sales are contemporaneous and whether they are for similar services when compared to the original transaction.¹⁷

15. Of the three types of evidentiary showings described in *Edgar*, the evidence provided lends support to the second showing. The Black Hills Power-MEAN

¹² *Edgar*, 55 FERC at 62,167.

¹³ In Order No. 697, the Commission states that it will continue its approach for determining the types of affiliate transactions that are permissible and the criteria that should be used to make those decisions, including evaluation of the *Edgar* criteria. Order No. 697, FERC Stats. & Regs. ¶31,252 at P 540.

¹⁴ The Commission has indicated that the three examples did not necessarily constitute an all-inclusive list. *Edgar*, 55 FERC at 62,168. *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

¹⁵ *Edgar*, 55 FERC at 62,168.

¹⁶ *Id.* at 62,168-69.

¹⁷ *Id.* at 62,169.

contract provides evidence of prices that a non-affiliated buyer (i.e., MEAN) was willing to pay for similar services. The submitted PPA also has the same terms, conditions, and duration as the Black Hills Power-MEAN contract. Although the Black Hills Power-MEAN contract did not involve sales from the identical project or generating plant as under the submitted PPA, the Parties submit that the relevant generating plants are all mine mouth coal-fired generating facilities located at the same site. We understand from the Parties that these facilities also use the same design and technology, share coal handling facilities and other infrastructure, and have very similar cost characteristics. Accordingly, the Parties have demonstrated that similar services were contracted for in the Black Hills Power-MEAN contract and the submitted PPA.

16. In addition, MEAN, as the non-affiliated buyer, is in the same relevant market as Cheyenne, the purchaser under the PPA. Further, based on the evidence submitted, we understand that MEAN entered into the arms-length negotiated contract with Black Hills Power in a market where Black Hills Power is authorized to make sales at market-based rates. As such, this Commission determined that Black Hills Power lacks market power (or had adequately mitigated its market power).¹⁸ Thus, absent evidence to the contrary, the record evidence supports concluding that the Black Hills Power-MEAN contract was negotiated at arms-length and without influence of market power by Black Hills Power.¹⁹

17. We have reviewed the submitted evidence and agree that it is sufficient to reasonably assure us that no abuse of the affiliate relationship was involved in the transactions. Based on the submitted evidence before us that: (1) the Parties are using the same rate for electric energy, and (2) the PPA's other terms, conditions, and duration are nearly identical to those contained in a contract entered into by competitive, non-affiliated entities in the relevant market, we find the Parties' PPA to be just and reasonable. Thus, we approve the sale of electric capacity and

¹⁸ *Black Hills Colorado, LLC*, 111 FERC ¶ 61,170 (2005) (“[t]he Commission has reviewed the Black Hills Utilities’ generation market power screens and has determined that the Black Hills Utilities pass both the pivotal supplier and wholesale market share screens. Accordingly, the Commission finds that the Black Hills Utilities satisfy the Commission’s generation market power standard for the grant of market-based rate authority”).

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 963 (“[w]hen the Commission determines that a seller lacks market power, it is therefore making a determination that the resulting rates will be established through competition, not the exercise of market power”).

energy between Black Hills Wyoming and Cheyenne, and we accept the PPA for filing, effective October 1, 2009, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.