132 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Black Hills Power, Inc. Docket No. ER10-1464-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATES AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued August 13, 2010)

1. In this order, we accept for filing Black Hills Power, Inc's (Black Hills) proposed rates for Reactive Supply and Voltage Control from Generation or Other Sources Service (reactive power) under the Joint Open Access Transmission Tariff of the Common Use System (Joint Tariff), and suspend them for a five-month period, to become effective January 16, 2011, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. On June 16, 2010, Black Hills submitted for filing, under section 205 of the Federal Power Act (FPA),[1] proposed rates for reactive power under Schedule 2 of the Joint Tariff on file with the Commission.[2] Under Schedule 2, the Transmission Providers provide reactive power to transmission service customers taking service on the Common Use System. Black Hills and third-party generators interconnected with the Common Use System supply the reactive power that the Transmission Providers use to provide service under Schedule 2 to their transmission service customers. Schedule 2 of the Joint

[1] 16 U.S.C. § 824d (2006).

[2] Under the Joint Tariff, Black Hills, Basin Electric Power Cooperative, and Powder River Energy Cooperative (collectively, Transmission Providers) provide open access transmission service on their combined transmission systems located in the Western Interconnection (Common Use System). Black Hills serves as the tariff administrator for the Joint Tariff. Transmittal Letter at 1 n.1.

Tariff includes both a fixed-charged component that recovers Black Hills' costs of supplying reactive power and a formula rate component that recovers the cost of the reactive power supplied by third-party generators.

3. On April 1, 2010, Black Hills placed a new generating facility (Wygen III) into service and began providing reactive power to the Common Use System from that facility. Wygen III is a 110 MW coal-fired generating facility located at Gillette, Wyoming. To recover the costs of the reactive power that Black Hills supplies to the Common Use System from Wygen III, Black Hills proposes to revise the fixed-charge rate component of Schedule 2. The current fixed-charge rate component for service under Schedule 2 of the Joint Tariff was established in 2004 on the basis of Black Hills' revenue requirement to provide Schedule 2 service to transmission service customers.[3]

4. Black Hills proposes to revise the fixed-charge rate component in Schedule 2 of the Joint Tariff to reflect Black Hills' placement of Wygen III into service to supply reactive power to the Common Use System. Black Hills states that it calculated the fixed-charge rate component according to the methodology set forth in *American Electric Power Service Corp*.[4] Black Hills' proposed annual reactive power revenue requirement ($2,310,752) reflects its portion of generating facilities that are attributable to the reactive power production capability, with the addition of Wygen III. Rates for service under Schedule 2 were derived using 2009 load data on the Common Use System as the rate calculation denominator.[5]

5. Black Hills requests waiver of the Commission's notice and filing requirements[6] to allow the proposed rates to be effective April 1, 2010, which is the date that Wygen III began providing reactive power service.

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[3] *Black Hills Power, Inc.*, 106 FERC ¶ 61,119 (2004).

[4] 88 FERC ¶ 61,141 (1999).

[5] Black Hills states that the Wygen II and Wygen III plants are both mine-mouth generating facilities that share a common control room and coal handling facilities. In addition, Black Hills states that since Wygen II and Wygen III are almost identical in systems and design and share similar cost characteristics, Wygen II serves as an appropriate proxy for Wygen III for purposes of determining Black Hills' costs of providing reactive power service and calculating its annual reactive power revenue requirement. Kilpatrick Test at 5.

[6] 18 C.F.R. § 35.3(a) (2010).

II. Notice of Filing and Responsive Pleadings

6. Notice of Black Hills' filing was published in the *Federal Register*, 75 Fed. Reg. 36,648 (2010), with interventions and protests due on or before July 7, 2010.

7. Basin Electric Power Cooperative, the Municipal Energy Agency of Nebraska, and the City of Gillette, Wyoming filed timely motions to intervene. The Municipal Energy Agency of Nebraska and the City of Gillette, Wyoming (collectively, Municipals) filed a joint protest and request for suspension, mediation, and deferred evidentiary hearing and settlement judge procedures. Black Hills filed an answer to the protests.

8. Municipals request that the Commission convene settlement judge mediation and a deferred evidentiary hearing to address the proposed rate divisor. They state that the requested rate increase is premised on an inappropriate mismatch of a prospective revenue requirement with a retrospective rate divisor. The mismatch, according to Municipals, substantially overstates Black Hills' unit cost of service and is both unduly discriminatory and unjust and unreasonable.

9. Municipals also argue that it is unduly discriminatory for Black Hills to use a stated rate divisor for one particular reactive generator when all other reactive generators have their revenue requirements divided by actual, automatically updated load.[7] In addition, Municipals state that Commission policy makes clear that it is unjust and unreasonable to pair a rate numerator that reflects recently-increased costs with a rate divisor that reflects only past loads.[8] Moreover, they assert that if the rate divisor is based on a past period and does not fairly predict loads during the application of the proposed rate, the resulting rate will collect more than the approved revenue requirement.

10. Municipals state that Black Hills' use of the Common Use System's 2009 transmission load (806 MW) instead of the projected 2010 transmission load (960 MW) results in a proposed rate increase that is at least 32.2 percent excessive. Municipals request that the Commission suspend the filing for five months following the statutory notice period and apply a rate divisor that automatically reflects actual loads or, if static, is at least 960 MW.[9]

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[7] Municipals Protest at 3.

[8] *Id*. at 4 (citing *Delmarva Power & Light Co.*, 38 FERC ¶ 61,098, at 61,256 (1987)).

[9] *Id*. at 5-6.

11. With regard to Black Hills' requested effective date and waiver of the Commission's prior notice requirement, Municipals state that Black Hills' requested waiver to permit a retroactive effective date of April 1, 2010, should be denied, and the earliest effective date for Black Hills' rate increase should be 60 days from the date of filing. They argue that there is no statutory basis for the Commission to deprive customers of their statutory right to prior notice.[10] Moreover, they state that most of the proposed rate relates to facilities other than Wygen III.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Black Hills' answer and will, therefore, reject it.

B. Hearing and Settlement Judge Procedures

13. Black Hills' proposed rates raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

14. Our preliminary analysis indicates that Black Hills' proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. In *West Texas Utilities Company*,[11] the Commission explained that when its preliminary examination indicates that the proposed rates may be unjust and unreasonable, and may be substantially excessive, as defined in *West Texas*, the Commission would generally impose a five-month suspension. In this proceeding, we find that the proposed rates may be substantially excessive. Therefore, we will accept Black Hills' proposed rates for filing, suspend them for a five-month period, make them effective January 16, 2011,[12] subject to refund, and set this case for hearing and settlement judge procedures.

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[10] *Id*. at 2 (citing *City of Girard v. FERC*, 790 F.2d 919 (D.C. Cir. 1986)).

[11] 18 FERC ¶ 61,189, at 61,374 (1982) (*West Texas*).

[12] Black Hills has provided no justification that would warrant granting its request for a retroactive effective date of April 1, 2010. *See Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

15. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[13] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[14] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Black Hills' proposed rates are hereby accepted for filing and suspended for a five-month period, to become effective January 16, 2011, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Black Hills' proposed rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

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[13] 18 C.F.R. § 385.603 (2010).

[14] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.