136 FERC ¶ 61,088
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. IN11-5-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued August 5, 2011)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Black Hills Power, Inc. (BH Power). This order is in the public interest because it resolves the investigation of BH Power regarding its tariff compliance and related matters. BH Power has agreed to pay a civil penalty of $200,000.

Background

2. BH Power is a South Dakota corporation and a wholly owned subsidiary of Black Hills Corporation (BH Corporation). BH Power is a public utility engaged in the generation, transmission, distribution, and sale of electricity to approximately 69,000 customers in western South Dakota, eastern Wyoming, and southeastern Montana. BH Power shares an ownership interest with Basin Electric Power Cooperative (Basin Electric) in a 200-MW capacity AC/DC/AC converter tie facility (DC tie) located in Rapid City, South Dakota, which interconnects the Western and Eastern interconnections.

3. Enforcement's investigation arose after an audit of BH Power by the Commission's Division of Audits (DA).[1] Enforcement obtained further information from BH Power and received the full cooperation of the company.

[1] *See* Docket No. PA08-38-000. DA initiated the audit of BH Power to evaluate (1) the company's compliance with the requirements contained in its Open Access Transmission Tariff (OATT); (2) the waiver that the Commission granted to BH Power from the Standards of Conduct requirements, currently codified at 18 C.F.R. Part 358 (2011); (3) Codes of Conduct applicable from July 1, 2006, to September 18, 2007; and (4) the Commission's Affiliate Restrictions regulations at 18 C.F.R. § 35.39, applicable from September 18, 2007, to September 1, 2009.

Violations

A. BH Power Failed to Post Non-Firm ATC (Available Transmission Capacity) Available on the DC Tie.

4. Section 37.6(b) of the Commission's regulations[2] requires a transmission provider to post on its OASIS the ATC for each posted path for which transmission service is available.[3] The Commission has explained that "[o]pen access non-discriminatory transmission service requires that information about the transmission system must be made available to all transmission customers at the same time."[4] The Commission granted BH Power a waiver of the OASIS requirements of Order No. 889 on June 1, 1999.[5] Upon the expiration of the waiver on June 1, 2006, BH Power became obligated to post non-firm ATC across the DC Tie under 18 C.F.R. §§ 37.6(b)(3)(i)(B) and 37.6(b)(3)(ii). BH Power did not begin doing so until December 5, 2008. BH Power's failure to calculate and post non-firm capacity on the DC Tie between June 1, 2006, when its waiver expired, and December 5, 2008, violated 18 C.F.R. §§ 37.6(b)(3)(i)(B) and 37.6(b)(3)(ii).

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[2] 18 C.F.R. § 37.6(b) (2011).

[3] Section 37.6(b)(2)(i) requires that information used to calculate any posting of ATC and Total Transfer Capability (TTC) be dated and time-stamped and that all calculations shall be performed according to consistently applied methodologies referenced in the Transmission Provider's transmission tariff and shall be based on Commission-approved Reliability Standards as well as current industry practices, standards, and criteria. Section 37.6(b)(3)(i)(B) requires the posting of non-firm ATC and TTC for constrained posted paths. The posting is to show ATC, TTC, Capacity Benefit Margin (CBM), and Transmission Reliability Margin (TRM) for a 30-day period by the hour and days prescribed under paragraph (b)(3)(i)(A)(1) and, if so requested, by the month and year as prescribed under paragraph (b)(3)(i)(A)(2) and (3). Section 37.6(b)(3)(ii) requires the posting of non-firm ATC and TTC for unconstrained posted paths. ATC, TTC, CBM, and TRM are to be posted separately by the day, showing capabilities and margins for the current day and the six days following, and thereafter, by the month for the 12 months following. If the Transmission Provider charges separately for on-peak and off-peak periods in its tariff, ATC, TTC, CBM, and TRM are to be posted separately for the current day and the six days following for each period.

[4] *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,588 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

[5] *Black Hills Corp.*, 87 FERC ¶ 61,261 (1999).

B. BH Power Did Not Charge Its Customers the Appropriate On-Peak and Off-Peak Transmission Rates for Non-Firm Transmission Service Over the DC Tie.

5. The Commission's authority under the filed rate doctrine holds that the only rate that a regulated public utility may legally charge for its services is the one properly submitted to and made effective by the appropriate regulatory authority.[6] The rates listed under Schedule 10 in the OATT govern the rates that BH Power, as the transmission provider, may charge for hourly delivery service. Under the OATT, BH Power can charge $4.70 per megawatt hour (MWH) for on-peak transmission service and $2.70 per MWH for off-peak transmission service. BH Power violated Schedule 10 of its OATT by charging on-peak and off-peak rates for non-firm transmission service over the DC Tie in excess of the rates listed in the OATT for such service. BH Power financially benefited by $7,262.88 when it charged non-affiliates the improper rates. BH Power has refunded the overcharges.

C. BH Power Improperly Provided Firm Transmission Service to Its Affiliate, Black Hills Colorado, and Provided a Discount That It Did Not Provide to Non-Affiliated Customers.

6. BH Power failed to comply with its OATT in the manner that it offered firm transmission service to its affiliate, Black Hills Colorado (BH Colorado). BH Power also subsequently charged a discounted transmission rate to BH Colorado that was not offered to independent third parties.

7. BH Power acquired transmission rights for the benefit of its affiliate, BH Colorado, pursuant to an energy management agreement. From July 14, 2008, through December 31, 2008, BH Power did not charge BH Colorado the costs for using BH Power's firm transmission rights on the DC Tie. When BH Power purchased and sold energy on behalf of BH Colorado, BH Power used its firm transmission service rights on the DC Tie. It did not procure additional transmission service on the DC Tie to provide this service to BH Colorado. To correct this practice, BH Power retroactively charged BH Colorado a rate lower than the BH Power tariff rate for hourly non-firm point-to-point transmission service across the DC Tie. In effect, the retroactive charge constituted a discount that BH Power did not make available to all eligible customers. These practices violated Section 23 of BH Power's OATT, which requires that all sales or assignments of capacity be posted on the OASIS, and Schedule 10 of its OATT, which

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[6] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *see also Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951).

requires BH Power to offer the same discount to all eligible customers. In consequence of these violations, BH Power issued refunds totaling $18,827.30 to non-affiliates.

D. BH Power Provided Brokering Services Without Charge For Its Affiliate, Black Hills Wyoming, and Did Not Disclose the Services on its OASIS.

8. The Commission's regulations require separation between the employees of a power marketer and the employees of an affiliated public utility with captive customers.[7] The purpose of this requirement is to protect captive customers from the potential for affiliate abuse in a relationship between a franchised public utility and its affiliates whose power sales are not regulated under the Federal Power Act (FPA).[8] BH Power is a franchised public utility with captive customers and BH Wyoming is an affiliate whose power sales are not regulated under the FPA.

9. BH Power began providing brokering services to its affiliate, BH Wyoming, on September 1, 2007. From this date to April 30, 2009, BH Power sold power on behalf of BH Wyoming but did not charge BH Wyoming for the cost of providing these brokering services in violation of section 35.39(f)(2)(i) of the Commission's regulations.[9] BH Power also did not make a formal distinction between marketing its own power first versus brokering power for BH Wyoming, which violated section 35.39(f)(2)(ii) of the Commission's regulations.[10] Further, BH Power did not post on the OASIS the zero charge for its brokering services, in violation of section 35.39(f)(2)(iii).[11] BH Wyoming subsequently paid BH Power $25,504.05 for brokering services it received from BH Power in the noted period.

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[7] 18 C.F.R. § 35.39(c) (2011).

[8] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, P 544 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008); *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008); *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009).

[9] 18 C.F.R. § 35.39(f)(2)(i) (2011).

[10] 18 C.F.R. § 35.39(f)(2)(ii) (2011). This regulation requires the public utility to market its own power first and simultaneously make public (on the Internet) any market information shared with its affiliate during the brokering.

[11] 18 C.F.R. § 35.39(f)(2)(iii) (2011).

E. BH Power Failed to Post an Accurate List of Designated Network Resources (DNR).

10. Section 37.6(e) of the Commission's regulations[12] requires that all requests by customers for transmission service that the Transmission Provider offers under its tariff must be made on the OASIS. More specifically, section 37.6(e)(1)(vi) of the Commission's regulations[13] requires transmission providers to post on its OASIS a list of all current designated network resources and all network customers' current DNRs. Between May 1, 2007 and March 4, 2008, BH Power failed to post the use of the Neil Simpson station as a DNR in the list of DNRs that was being used in BH Power's provision of network transmission service. This failure violated 18 C.F.R. § 37.6(e)(1)(vi) (2011).

Stipulation and Consent Agreement

11. Enforcement and BH Power resolved the Enforcement investigation by means of the attached agreement. BH Power admits that it committed the violations referenced above.

12. BH Power agrees to pay a civil penalty in the amount of $200,000 to the United States Treasury. The payment is due within ten days of the effective date of the Agreement.

13. BH Power shall also take the following prospective compliance measures:

- Continue implementation of a comprehensive compliance program.
- Provide a written report to Enforcement no later than one year after the effective date of the Agreement that sets forth the measures BH Power has taken to implement its compliance program with respect to specific requirements set forth in its OATT.
- Conduct a comprehensive audit to review the effectiveness of BH Power's compliance program.
- Make two semi-annual compliance monitoring reports to document progress and events in its compliance efforts, as further specified in the Agreement.

[12] 18 C.F.R. § 37.6(e) (2011).

[13] 18 C.F.R. § 37.6(e)(1)(vi) (2011).

Determination of the Appropriate Civil Penalty

14. Pursuant to section 316A(b) of the Federal Power Act (FPA), the Commission may assess a civil penalty up to $1,000,000 for each day that the violation continues.[14] In approving the Agreement and the $200,000 civil penalty, Enforcement considered the factors set forth in section 316A(b) of the FPA and the Penalty Guidelines.[15] The Commission notes that BH Power began developing in the year it was audited a centralized compliance plan that applies to each of BH Corporation's electric utility subsidiaries. The plan has features, including mandatory training of its personnel in specific, relevant subject matter areas, and retention of a FERC compliance manager, that are designed to reduce the incidence of future violations. BH Power has also refunded overcharges that occurred as a consequence of its violations. Lastly, the civil penalty reflects BH Power's strong cooperation during the course of the investigation.

15. We conclude that the civil penalty and the compliance monitoring measures specified in the Agreement are fair and equitable, and in the public interest.[16]

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[14] 16 U.S.C. § 825o-1(b) (2006).

[15] *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010). The Penalty Guidelines applied to the instant matter because settlement negotiations commenced after issuance of the Guidelines. *See id.* at n.2.

[16] The civil penalty falls within a range consistent with the Penalty Guidelines. Application of the Penalty Guidelines in this case furthers the goal of "add[ing] greater fairness, consistency, and transparency to our enforcement program." Id. at P 2. We have considered the factors set forth in the Revised Policy Statement on Penalty Guidelines and have concluded that the penalty in this case is appropriate.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Hills Power, Inc.	)	Docket No. IN11-5-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

1. The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Black Hills Power, Inc. (BH Power) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2011), into whether BH Power violated its Open Access Transmission Tariff (OATT), the Federal Power Act (FPA), and the Commission's regulations.

II. STIPULATED FACTS

Enforcement and BH Power hereby stipulate and agree to the following:

A. Background

2. BH Power is a South Dakota corporation and a wholly owned subsidiary of Black Hills Corporation (BH Corporation). BH Power is a public utility engaged in the generation, transmission, distribution, and sale of electricity to approximately 69,000 customers in western South Dakota, eastern Wyoming, and southeastern Montana. BH Power shares an ownership interest with Basin Electric Power Cooperative (Basin Electric) in a 200-MW capacity AC/DC/AC converter tie facility (DC Tie) located in Rapid City, South Dakota, which interconnects the Western and Eastern interconnections. The DC Tie is one of only six East-West interconnection points in the country. Basin Electric Power Marketing and the merchant function within BH Power have reserved the firm capacity on the DC Tie beginning October 15, 2003, and extending through January 1, 2050.

3. Enforcement's investigation of BH Power commenced following the identification of certain issues by the Division of Audits (DA) during an audit in Docket No. PA08-38-000. DA initiated the audit of BH Power to evaluate the company's compliance with (1) the requirements contained in its OATT; (2) the waiver that the Commission granted to BH Power from the Standards of Conduct requirements, currently codified at 18 C.F.R. Part 358 (2011); (3) Codes of Conduct applicable from July 1, 2006, to September 18, 2007; and (4) the Commission's Affiliate Restrictions regulations at 18 C.F.R. § 35.39 (2011), applicable from September 18, 2007, to September 1, 2009.

B. Summary of Violations

1. BH Power Failed To Make Non-Firm ATC Available on the DC Tie in Violation of 18 C.F.R. § 37.6(b).

4. Section 37.6(b) of the Commission's regulations requires a transmission provider to post on its OASIS the Available Transfer Capability (ATC) for each posted path for which transmission service is available. Section 37.6(b)(2)(i) requires that information used to calculate any posting of ATC and Total Transfer Capability (TTC) be dated and time-stamped and all calculations shall be performed according to consistently applied methodologies referenced in the Transmission Provider's transmission tariff and shall be based on Commission-approved Reliability Standards as well as current industry practices, standards, and criteria. Section 37.6(b)(3)(i)(B) requires the posting of non-firm ATC and TTC for constrained posted paths. The posting is to show ATC, TTC, Capacity Benefit Margin (CBM), and Transmission Reliability Margin (TRM) for a 30-day period by the hour and days prescribed under subparagraph (b)(3)(i)(A)(1) and by the month and year as prescribed under subparagraph (b)(3)(i)(A)(2) and (3). Section 37.6(b)(3)(ii) requires the posting of non-firm ATC and TTC for unconstrained posted paths. ATC, TTC, CBM, and TRM are to be posted separately by the day, showing capabilities and margins for the current day and the six days following, and thereafter, by the month for the 12 months following. If the Transmission Provider charges separately for on-peak and off-peak periods in its tariff, ATC, TTC, CBM, and TRM are to be posted separately for the current day and the six days following for each period.

5. The Commission granted BH Power a waiver of the OASIS requirements of Order No. 889 on June 1, 1999. BH Power's waiver for compliance with the Commission's OASIS requirements expired on June 1, 2006. Upon the expiration of the waiver, BH Power became obligated to post non-firm ATC across the DC Tie under 18 C.F.R. §§ 37.6(b)(3)(i)(B) and 37.6(b)(3)(ii). During the period from October 1, 2004, through late 2008, BH Power posted notice on its OASIS offering to resell firm DC Tie capacity to any eligible customers. From the time BH Power's waiver expired until DA raised the issue during the audit in late 2008, however, BH Power did not calculate and post non-firm ATC on the DC Tie. BH Power began posting non-firm ATC on the DC Tie on December 5, 2008. BH Power's failure to calculate and post non-firm capacity on the DC Tie between June 1, 2006, when its waiver expired, and December 5, 2008, violated 18 C.F.R. §§ 37.6(b)(3)(i)(B) and 37.6(b)(3)(ii). There is no evidence that BH Power received any benefit from the violation.

6. BH Power did not receive requests from potential customers for non-firm transmission service on the DC Tie before non-firm ATC was posted on December 5, 2008. Within days after BH Power began to post this information, however, Powerex Corporation and Cargill Power Markets, LLC, became eligible customers and began purchasing hourly non-firm point-to-point transmission service across the DC Tie. Therefore, a demand for third-party access to the DC Tie existed once BH Power

calculated and posted non-firm ATC on OASIS.

2. BH Power Did Not Charge Its Customers the Appropriate On-Peak and Off-Peak Transmission Rates for Non-Firm Transmission Service Over the DC Tie.

7. The Commission's authority under the filed rate doctrine holds that the only rate that a regulated public utility may legally charge for its services is the one properly submitted to and made effective by the appropriate regulatory authority. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *see also, Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951). The rates listed under Schedule 10 in the OATT govern the rates that BH Power, as the transmission provider, may charge for hourly delivery service. Under the OATT, Black Hills Power, Inc., FERC Electric Tariff, First Revised Volume No. 4, Schedule 10, BH Power can charge $4.70 per megawatt hour (MWh) for on-peak transmission service and $2.70 per MWh for off-peak transmission service.

a. Charging Customers Incorrect Rates

8. From December 5, 2008, to March 2, 2009, BH Power overcharged its customers for both on-peak and off-peak non-firm transmission service over the DC Tie. During on-peak periods, BH Power charged all customers the same transmission rate of $5.12 per MWh, even though it was allowed to charge customers no more than $4.70 per MWh. During off-peak periods, BH Power charged all customers, including its own merchant function, the same transmission rate of $2.99 per MWh, even though it was allowed to charge customers no more than $2.70 per MWh. BH Power attributed the overcharge as follows: the billing system of BH Power's OASIS services provider automatically added ancillary services charges to the invoices of customers taking service on the DC Tie and BH Power did not notice the resulting billing errors.

9. On March 2, 2009, BH Power corrected the pricing errors for non-firm transmission service over the DC Tie and now charges customers the rates consistent with its OATT. Moreover, BH Power refunded $4,667.58, including interest, to non-affiliates for charging them for ancillary services in connection with their non-firm transmission service. BH Power also implemented a manual review process to check invoices to prevent customers from being charged for ancillary services in connection with non-firm transmission over the DC Tie.

b. Charging Customers On-Peak Rates for Off-Peak Transmission Service

10. BH Power incorrectly charged some of its customers on-peak rates for off-peak transmission service. BH Power attributed this overcharging issue to an OASIS software feature that allowed customers to self-select their transmission service options but did not require them to differentiate between on-peak and off-peak service, causing

customers to select an on-peak option for service that spanned on-peak and off-peak hours. This aspect of the system was flawed and resulted in incorrect charges. BH Power worked with its OASIS services provider and the software vendor to modify the system and prevent recurrences of the problem. BH Power also refunded $2,595.30, including interest, to non-affiliates for charging them on-peak rates for off-peak transmission service.

11. Based on the facts stated above, BH Power violated Schedule 10 of its OATT by failing to charge the on-peak and off-peak transmission rates listed in the OATT for non-firm transmission service over the DC Tie. BH Power financially benefited when it charged non-affiliates the improper rates, but BH Power refunded the overcharges with interest.

3. BH Power Improperly Provided Firm Transmission Service to Its Affiliate, Black Hills Colorado, and Provided a Discount, That It Did Not Provide to Non-Affiliate Customers.

12. Section 17 of BH Power's OATT sets forth the procedures for arranging firm point-to-point transmission service. Section 23 of its OATT states that "all sales or assignments of capacity must be conducted through or otherwise posted on the Transmission Provider's OASIS on or before the date the reassigned service commences," and "[r]esellers may also use the Transmission Provider's OASIS to post transmission capacity available for resale." According to Schedule 10 of BH Power's OATT, BH Power must offer the same discounted transmission service rate for the same time period to all eligible customers on all unconstrained transmission paths that go to the same point(s) of delivery on the transmission system. This requirement is contained in Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,274 (1997), which requires that whenever a transmission provider offers a discount to an affiliate, or attributes a discount to its own transaction, it must offer a comparable discount to all similarly situated transmission customers.

13. BH Power utilized transmission rights it holds on the DC Tie for the benefit of its affiliate, Black Hills Colorado (BH Colorado). BH Power did so pursuant to the Generation Dispatch and Energy Management Agreement (GDEMA) between BH Power and BH Colorado. *Black Hills Power, Inc., et al.*, Letter Order in Docket No. ER07-943 (December 28, 2007); *Black Hills Power, Inc., and BH Colorado Electric Utility Company, L.P.*, Letter Order in Docket No. ER08-1247-000 (August 29, 2008). Under the GDEMA, BH Power (1) managed the dispatch of BH Colorado's generating facilities; (2) provided marketing services to BH Colorado to facilitate the sales of surplus capacity and energy; and (3) arranged for transmission service on BH Colorado's behalf. When BH Power purchased and sold energy on behalf of BH Colorado, BH Power used its firm transmission service rights on the DC Tie as part of its provision of a delivered energy product to BH Colorado or as part of the arrangement for a sale of BH

Colorado surplus on a firm delivered basis. BH Power did not procure additional transmission service on the DC Tie when providing this service to BH Colorado. From July 14, 2008, through December 31, 2008, BH Power used the DC Tie on behalf of BH Colorado to move 525 MW from east to west and 2,684 MW from west to east.

14. The costs incurred by BH Power while arranging for the delivery of energy to BH Colorado as needed to meet BH Colorado's load, which costs BH Power was authorized to recover from BH Colorado, are outlined in the GDEMA. The GDEMA required BH Colorado to reimburse BH Power its actual cost and applicable taxes for any transmission service that BH Power procured in connection with a purchase of capacity or energy on BH Colorado's behalf. During this time period, however, BH Power did not charge BH Colorado the costs for using BH Power's firm transmission rights on the DC Tie. BH Power was required to follow the requirements established in Section 23 of the OATT for sales and assignment of the transmission service it utilized on BH Colorado's behalf, but BH Power did not follow these requirements when using its firm transmission service over the DC Tie on BH Colorado's behalf.

15. After DA expressed concerns about this practice, BH Power decided to charge BH Colorado for the use of BH Power's DC Tie firm transmission service rights on behalf of BH Colorado. BH Power retroactively charged BH Colorado $2.69/MWh, the amount that BH Power stated reflected its actual cost, for the period of July 14, 2008, through December 31, 2008. Unlike BH Colorado, non-affiliates had access only to BH Power's non-firm transmission service over the DC Tie. Had BH Colorado purchased non-firm transmission service across the DC Tie in its own name, however, it would have paid a rate higher than $2.69 MWh, regardless of whether it moved power during on-peak or off-peak periods, because the rate listed in BH Power's tariff for hourly non-firm point-to-point transmission service across the DC Tie was $4.70/MWH during on-peak periods and $2.70/MWH during off-peak periods. Of BH Colorado's transactions occurring between July 14, 2008, and December 31, 2008, 90.5 percent occurred during on-peak periods. The $2.69/MWh retroactive charge reflected a discount for transmission service over the DC Tie that was not similarly being offered to non-affiliates.

16. By initially not charging BH Colorado for BH Power's use of the DC Tie on BH Colorado's behalf, BH Power violated Section 23 and Schedule 10 of its OATT and Order No. 888-A. Pursuant to these authorities, BH Power should have offered the same discounted transmission service rate for the same time period to all eligible customers on all unconstrained transmission paths that go to the same point(s) of delivery on the transmission system. BH Power's proposal to charge a rate to BH Colorado that was lower than the rate charged to non-affiliates did not fully correct its violation. The failure to offer a comparable discount to non-affiliates financially benefited BH Power. On September 30, 2009, consistent with DA's audit report recommendation, BH Power issued refunds, including interest, totaling $18,827.30 to non-affiliates, which paid above the retroactive rate charged to BH Colorado, for non-firm transmission service over the

DC Tie since December 5, 2008 (the date when BH Power first posted available non-firm ATC on OASIS). BH Colorado now has a transmission service agreement in place with BH Power and pays the OATT rate for such service when it uses the DC Tie.

4. BH Power Provided Brokering Services Without Charge for Its Affiliate, Black Hills Wyoming, and Did Not Disclose the Services on Its OASIS.

17. Section 35.39(c) of the Commission's regulations requires separation between the employees of a power marketer and the employees of an affiliated public utility with captive customers. Section 35.39(f)(2) sets forth the requirements for a franchised public utility with captive customers to broker power for a market-regulated power sales affiliate. Specifically, section 35.39(f)(2)(i) requires the public utility to charge the higher of its costs for the brokering service or the market price for such brokering services. Section 35.39(f)(2)(ii) requires the public utility to market its own power first, and simultaneously make public, on the Internet, any market information shared with its affiliate during the brokering. Finally, section 35.39(f)(2)(iii) requires the public utility to post actual brokering charges on the Internet.

18. BH Power sells excess energy on behalf of BH Wyoming on an "as-available" basis, as most of BH Wyoming's capacity and energy is committed for sale under long-term contracts. When BH Wyoming has surplus energy available for sale, BH Power sells it on behalf of BH Wyoming. BH Wyoming does not have its own merchant function and cannot market its own power. This arrangement dates back to at least May 2001. Prior to November 19, 2009, BH Power provided brokering services to BH Wyoming pursuant to an oral agreement, not a written contract.

19. During the period from September 1, 2007, to April 30, 2009, BH Power sold, on behalf of BH Wyoming, 59,671 MW with a total sales price of $2,657,283. These sales averaged out to slightly over 5 MW per hour during this period. BH Power, however, did not charge BH Wyoming for its cost of providing these brokering services, nor did BH Power perform any cost evaluation or market price analysis to determine how much an independent third party would charge for such brokering services. Therefore, BH Power violated 18 C.F.R. § 35.39(f)(2)(i). BH Power also did not make a formal distinction between marketing its own power first versus brokering power for BH Wyoming. Therefore, BH Power violated 18 C.F.R. § 35.39(f)(2)(ii). Finally, BH Power provided actual brokering services but did not post the zero charge for these services on its OASIS, in violation of 18 C.F.R. § 35.39(f)(2)(iii). There is no evidence that BH Power benefitted from this violation.

20. On September 28, 2009, consistent with DA's audit report recommendation, BH Power sent an invoice for its brokering services to BH Wyoming totaling $25,504.05, which BH Wyoming paid. BH Power also filed a Generation Dispatch and Energy Management Agreement to provide brokering services to BH Wyoming with the Commission in Docket No. ER10-301-000, which the Commission

accepted on March 3, 2010 in a Letter Order from Steve P. Rodgers, Director, Electric Power Regulation-West, Office of Energy Market Regulation, to Michael C. Griffen, Esquire, Attorney for Black Hills Power, Inc.

5. BH Power Failed To Post an Accurate List of Designated Network Resources (DNR).

21. Section 37.6(e)(1)(vi) of the Commission's regulations requires, among other things, that transmission providers post a list of all current DNRs and all network customers' current DNRs on OASIS.

22. Basin Electric began using the Neil Simpson station as a DNR effective on May 1, 2007. Between May 1, 2007 and March 4, 2008, however, BH Power failed to list Basin Electric's use of the Neil Simpson station as a DNR in the list of DNRs that were being used in BH Power's provision of network transmission service. By failing to accurately post a list of all of the DNRs that were being used in the provision of network service, BH Power violated the requirements of 18 C.F.R. § 37.6(e)(1)(vi). Notwithstanding the violation, the Neil Simpson station was properly used as a DNR, *i.e.*, it was used to support native load and was not used to support off-system sales. BH Power's violations caused no harm because the Neil Simpson station is both a source and sink point for Basin Electric, which means there were no transmission priority concerns or operational issues related to inaccurate postings. Consistent with DA's audit report recommendation, BH Power developed and implemented standardized procedures that customers must follow when designating new DNRs, including completion of a standard attestation regarding their DNRs.

C. Subsequent Corrective Actions and Additional Factors Regarding BH Power's Violations

23. It appears that BH Power's violations occurred as a result of a lack of attention to the Commission's regulatory requirements and BH Power's OATT. BH Power has refunded the quantifiable harm relating to its violations.

24. Prior to the adoption of the current corporate compliance structure of BH Corporation and BH Power in early 2008, the entities utilized a decentralized approach to their corporate compliance program. Accordingly, the business units of each company were primarily responsible for day-to-day compliance monitoring.

25. In 2008, BH Corporation and BH Power began developing and adopting a centralized compliance program. BH Corporation adopted a Corporate Compliance Program to assist the company in preventing, detecting, investigating, and responding to unethical or illegal conduct. BH Corporation and BH Power also adopted the FERC Electric Compliance Program. The program materials and documentation of BH Corporation's FERC Electric Compliance Program represent the integration of the elements of the program into a more comprehensive compliance plan. It applies to each

of BH Corporation's electric utility subsidiaries. BH Power's integrated compliance program includes the following features:

- BH Corporation created a corporate compliance team that includes a FERC Compliance Manager – a new position filled by an attorney with full-time responsibility for FERC compliance oversight and facilitation of the FERC Electric Compliance Program. The FERC Compliance Manager reports directly to the Director of Corporate Compliance. The corporate compliance team also includes FERC Compliance Leads – compliance subject-matter experts who have direct access to the FERC Compliance Manager with respect to regulatory compliance matters and have compliance oversight responsibilities with respect to the business activities of BH Power's Transmission Services Department and Generation Dispatch and Power Marketing Department.

- All employees must maintain awareness of compliance requirements. Elements of the FERC Electric Compliance Program include (a) training; (b) company policies and procedures; (c) certifications; and (d) on-going communication. Each BH Corporation public utility subsidiary must design, implement, and maintain a pro-active regulatory monitoring program.

- All employees who engage in functions subject to FERC regulatory requirements receive training with respect to the regulatory requirements applicable to their areas of responsibility, including OATT and OASIS administration, transaction tagging and reporting, Standards of Conduct for transmission providers, code of conduct and affiliate transaction restrictions, and market transactions/rules against market manipulation.

26. BH Power's Transmission Services Department has increased its training activities in order to strengthen its ability to administer the OATT, comply with its OASIS administration obligations, and comply with applicable regulatory requirements. Among other things, the Transmission Services Department created and staffed two dedicated operations level compliance positions with responsibilities for oversight of regulatory compliance: (a) FERC Tariff and Compliance Manager; and (b) NERC Compliance Manager. The Transmission Services Department also made additional investments in software and training.

III. REMEDIES AND SANCTIONS

27. For purposes of settling any and all civil and administrative disputes arising

from Enforcement's investigation, BH Power agrees with the facts as stipulated in Section II of this Agreement and admits to the violations described therein. BH Power further agrees to take the follow actions.

A. Civil Penalty

28. BH Power shall pay a civil penalty of $200,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below. BH Power shall not pass through the civil penalty, directly or indirectly, to any present or future BH Power customers or ratepayers or any customers or ratepayers of its affiliates.

B. Compliance Program

29. Building upon the compliance measures identified above, BH Power shall (a) continue to implement a comprehensive compliance program that includes training for transmission and wholesale merchant personnel in regulatory requirements and procedures for ensuring that the requirements of the OATT are followed; (b) provide a written report to staff no later than one year after the Effective Date of this Agreement that sets forth the measures BH Power has taken to implement its compliance program with respect to specific requirements set forth in its OATT; (c) conduct a comprehensive audit to review the effectiveness of BH Power's compliance program and, in particular, compliance with its OATT requirements and the Commission regulations that BH Power violated. Within one year of the Effective Date of this Agreement, the auditor shall provide its written report simultaneously to Enforcement and BH Power. The written report shall contain an overall assessment of BH Power's compliance with its OATT and related Commission regulations, detailed discussion of BH Power's compliance or noncompliance with specific requirements of its OATT, specification of areas in which BH Power could improve, and any additional recommendations.

C. Compliance Monitoring

30. BH Power shall make two semi-annual compliance monitoring reports to Enforcement for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than six months after the Effective Date of this Agreement and the second report shall be submitted no later than one year after the Effective Date of this Agreement. Each compliance report shall: (a) provide an update of compliance program implementation and training administered during the preceding six-month period; (b) set forth any new measures taken to ensure compliance; (c) specify any OATT violations that have occurred, and if any have occurred, the report shall describe the violations, how and why they occurred, the resulting harm, measures taken to alleviate the harm, and corrective measures designed to deter future similar violations; and (d) describe any significant issues pertaining to compliance of which BH Power becomes aware.

Upon receipt of the second semi-annual report, Enforcement may, at its sole discretion, require BH Power to submit semi-annual compliance monitoring reports for one additional year.

IV. TERMS

31. The Effective Date of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification and that order becomes no longer subject to appeal. When effective, this Agreement shall resolve the matters specifically addressed herein as to BH Power and any affiliated entity, and their agents, officers, directors and employees, both past and present.

32. Commission approval of this Agreement in its entirety and without material modification shall release BH Power and forever bar the Commission from holding BH Power, its affiliates, agents, officers, directors and employees, both past and present, liable for any and all administrative or civil claims arising out of, related to, or connected with the investigation addressed in this Agreement.

33. BH Power's failure to (a) make a timely Civil Penalty payment, (b) comply with the Compliance Program requirements specified herein, (c) comply with the Compliance Monitoring requirements specified herein, and (d) comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the FPA, and may subject BH Power to additional action under the enforcement and penalty provisions of the FPA.

34. If BH Power does not timely make the civil penalty payment, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(a)(2)(iii)(A) (2011) from the date those payments are due, in addition to any other enforcement action and penalty that the Commission may take or impose.

35. The Agreement binds BH Power and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on BH Power, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

36. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or representative of Enforcement or BH Power has been made to induce the signatories or any other party to enter into the Agreement.

37. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor BH Power shall be bound by any

provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and BH Power.

38. In connection with the payment of the civil penalty provided for herein, BH Power agrees that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 316(a) of the FPA, 16 U.S.C. § 825o(a). BH Power waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

39. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.

40. The undersigned representative of BH Power affirms that he has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his knowledge, information and belief, and that he understands that the Agreement is entered into by Enforcement in express reliance on those representations.

41. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:

Norman C. Bay, Director
Office of Enforcement
Federal Energy Regulatory Commission

7.1.11
Date

Steven J. Helmers
Senior Vice President and General Counsel
Black Hills Power, Inc.

6.22.11
Date