

150 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Black Hills Power, Inc.

Docket Nos. ER14-2869-000
EL14-71-000

ORDER ON COMPLIANCE FILING

(Issued March 19, 2015)

1. On September 12, 2014, Black Hills Power, Inc. (Black Hills) submitted proposed revisions to Attachment H (Monthly Network Transmission Revenue Requirement for Transmission Service on the AC Transmission System) of the Joint Open Access Transmission Tariff (Joint Tariff) of Black Hills, Basin Electric Power Cooperative (Basin Electric), and Powder River Energy Corporation (Powder River) (collectively, Joint Tariff Companies)¹ to revise its formula rate protocols in response to the Commission's July 17, 2014 order.² In this order, we conditionally accept Black Hills' compliance filing, effective January 1, 2015, as requested, subject to further compliance.³

¹ Black Hills filed the Joint Tariff with the Commission on behalf of the Joint Tariff Companies because it acts as the administrator for the Joint Tariff. It also explains that the proposed tariff revisions will be implemented only by Black Hills because the formula rate protocols contained in Attachment H do not apply to the other transmission service providers under the Joint Tariff. Black Hills Transmittal at 1.

² *Black Hills Power, Inc.*, 148 FERC ¶ 61,035 (2014) (July 17 Order).

³ Under the Joint Tariff, the Joint Tariff Companies 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.

I. Background

A. MISO Protocols Proceedings

2. On May 17, 2012, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)⁴ as to the formula rate protocols of Midwest Independent Transmission System Operator, Inc.⁵ (MISO) finding that they may lead to unjust and unreasonable rates. The Commission specifically identified three areas of concern: (1) scope of participation (i.e., who can participate in the information exchange); (2) the transparency of the information exchange (i.e., what information is exchanged); and (3) the ability of customers to challenge transmission owners' implementation of the formula rate as a result of the information exchange (i.e., how the parties may resolve their potential disputes).⁶

3. After receiving comments from parties to the proceeding, on May 16, 2013, the Commission found that the formula rate protocols under MISO's tariff were insufficient to ensure just and reasonable rates, and therefore, directed MISO and its transmission owners to file revised formula rate protocols to address the Commission's concerns about the scope of participation, the transparency of the information exchange, and the ability of customers to challenge transmission owners' implementation of the formula rate as a result of the information exchange.⁷ On March 20, 2014, the Commission conditionally accepted, subject to further compliance, MISO's proposed tariff revisions made in compliance with the MISO Investigation Order.⁸ Among the requirements addressing the

⁴ 16 U.S.C. § 824e (2012).

⁵ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127, at P 8 (2012).

⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013) (MISO Investigation Order), *reh'g denied*, 146 FERC ¶ 61,209 (2014).

⁸ *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,212 (MISO Compliance Order) (2014). The Commission also separately evaluated the compliance filings of two MISO transmission owners. *See Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,210 (2014) (evaluating the compliance filing of Southern Indiana Electric & Gas Company (Southern Indiana)); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC

(continued ...)

transparency of the information exchange, in the MISO Investigation Order, the Commission required MISO to include a provision in the formula rate protocols that transmission owners make annual informational filings of their formula rate updates with the Commission.⁹ Further, on May 19, 2014, MISO submitted a compliance filing in response to the MISO Compliance Order. The Commission conditionally accepted that compliance filing on January 22, 2015.¹⁰

B. The Black Hills Protocols Order (July 17 Order)

4. In the July 17 Order, the Commission explained that it had undertaken a review of the transmission formula rates and formula rate protocols of jurisdictional public utilities to identify utilities that currently are not required to make annual informational filings with the Commission detailing their formula rate updates, and identified Black Hills as one such utility.¹¹ The Commission found that the then-effective Black Hills Joint Tariff was deficient in the three areas of concern identified in the MISO Investigation Order and the MISO Compliance Order, and thus appeared to be unjust and unreasonable. The Commission directed Black Hills to file proposed formula rate protocols to conform to the requirements of the MISO Investigation Order and MISO Compliance Order, or show cause why it should not be required to do so.¹²

¶ 61,211 (2014) (evaluating the compliance filing of Northern Indiana Public Service Company (NIPSCO)).

⁹ MISO Investigation Order, 143 FERC ¶ 61,149 at P 92.

¹⁰ *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,025 (2015); *see Midcontinent Indep. Sys. Operator, Inc. and Northern Indiana Public Service Company*, 150 FERC ¶ 61,022, at P 17 (2015) (NIPSCO Second Compliance Order) and *Midcontinent Indep. Sys. Operator, Inc. and Southern Indiana Gas & Electric Company*, 150 FERC ¶ 61,023, at P 18 (2015) (Southern Indiana Second Compliance Order).

¹¹ July 17 Order, 148 FERC ¶ 61,035 at P 7.

¹² *Id.*

II. Notice of Filing and Responsive Pleadings

5. Pursuant to the July 17 Order, interventions in Docket No. EL14-71-000 were due within 30 days of publication of notice in the *Federal Register* of the Commission's initiation of section 206 proceeding, i.e. due by August 12, 2014.¹³ None was filed.

6. Notice of Black Hills' compliance filing in Docket No. ER14-2869-000 (made in response to the July 17 Order) was published in the *Federal Register*, 79 Fed. Reg. 56,576 (2014), with interventions and protests due on or before October 3, 2014. On September 29, 2014, Basin Electric filed a motion to intervene.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motion to intervene serves to make Basin Electric a party to this proceeding.

B. Substantive Matters

1. Scope of Participation

a. July 17 Order

8. In the July 17 Order, the Commission found that Black Hills' formula rate protocols limit the ability of certain interested parties to participate in the review of the implementation of the formula rate and of the costs that would flow through the formula rates and, thus, appeared to be unjust and unreasonable.¹⁴ The Commission noted that the protocols gave customers, the South Dakota Public Utilities Commission, and the Wyoming Public Service Commission the opportunity to participate in the exchange of information; however, they were silent as to the rights of other potential interested parties who may want to participate in the information exchanges.¹⁵ The Commission also found that, to assist the Commission in performing its duty to ensure just and reasonable rates, it may be necessary for Black Hills to provide the Commission with all such information reasonably necessary to review and evaluate the implementation of the

¹³ 79 Fed. Reg. 42,786 (2014).

¹⁴ July 17 Order, 148 FERC ¶ 61,035 at PP 12-13.

¹⁵ *Id.* P 12.

formula rate and the costs that would flow through the formula rate. Therefore, to afford adequate opportunity for participation and access to information, the Commission directed Black Hills to propose formula rate protocols that provide all interested parties and the Commission with access to information about the annual updates as directed by the Commission in the MISO Investigation Order and the MISO Compliance Order, or show cause why it should not be required to do so.

b. Black Hills Compliance Filing

9. Black Hills states that the proposed formula rate protocols broadly define an interested party as including, but not limited to, customers under the Joint Tariff, state utility regulatory commissions, consumer advocacy agencies, and state attorneys general.¹⁶ Black Hills states that this definition adopts the same language that the Commission directed MISO and the MISO transmission owners to use in their formula rate protocols. In addition, Black Hills maintains, the broad definition of an interested party contained in the formula rate protocols would permit Commission staff, if it so desired, to participate in Black Hills' annual updates and true-up processes.

c. Commission Determination

10. We find that Black Hills' proposed definition of interested parties provides sufficient scope of participation for its protocols and we will, therefore, accept this proposed revision with no further modification.

2. Transparency

a. July 17 Order

11. In the July 17 Order, the Commission found that Black Hills' Joint Tariff did not provide interested parties with the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations or the reasonableness and prudence of the costs to be recovered in the formula rate, which would form the basis of any potential challenge.¹⁷ Therefore, the Commission directed Black Hills to propose formula rate protocols to provide interested parties the information necessary to understand and evaluate the implementation of the formula rate for both the correctness of inputs and calculations, and the reasonableness and prudence of the costs to be recovered in the formula rate, as directed by the Commission in the MISO

¹⁶ Black Hills Transmittal at 3 (citing proposed Attachment H § II.6).

¹⁷ July 17 Order, 148 FERC ¶ 61,035 at P 18.

Investigation Order and MISO Compliance Order,¹⁸ or show cause why it should not be required to do so.

b. Black Hills Compliance Filing

12. Black Hills maintains that, consistent with the Commission's directives in the MISO Investigation Order and MISO Compliance Order, the proposed protocols require Black Hills to annually post its Annual True-Up and projected net revenue requirement on Black Hills' website and Open Access Same-Time Information System (OASIS).¹⁹ Black Hills states that, to fulfill these posting requirements and to avoid possible mismatching information being posted on Black Hills' website and OASIS, Black Hills plans to post the required information, in its entirety, on its website while providing a direct link to this information on the OASIS.

13. Under the proposed protocols, Black Hills is to provide notice to interested parties via an email exploder list within 10 days of posting its Annual True-Up and projected net revenue requirement. Interested parties will be able to subscribe to the exploder list on the Black Hills website.²⁰

14. Black Hills states that the deadlines for posting Black Hills' Annual True-Up and projected net revenue requirement are extended to the next business day, if the date for posting falls on a weekend or a holiday recognized by the Commission. However, Black Hills adds, in accordance with the MISO Compliance Order, the proposed formula rate protocols provide that any delay in the publication dates will result in an equivalent extension of the deadline to submit information and document requests.²¹

15. Black Hills claims that, in accordance with the MISO Investigation Order, the proposed protocols set forth the contents of Black Hills' annual posts of its Annual True-Up and projected net revenue requirement, including disclosure of any accounting change

¹⁸ MISO Investigation Order, 143 FERC ¶ 61,149 at PP 81-92; MISO Compliance Order, 146 FERC ¶ 61,212 at PP 58-73.

¹⁹ Black Hills Transmittal at 4 (citing proposed Attachment H §§ II.1 and 11.2).

²⁰ *Id.* (citing proposed Attachment H §§ II.1 and II.2).

²¹ *Id.* (citing proposed Attachment H § II.3).

during the service year that affects inputs to the formula rate or the resulting charges billed under the formula rate, on its website and OASIS.²²

16. The proposed protocols require Black Hills to hold two open meetings with interested parties per year, one for the Annual True-Up, and the other for the projected net revenue requirement. Black Hills states that these annual open meetings will allow: (1) Black Hills an opportunity to explain and clarify its Annual True-Up and projected net revenue requirement posted on its website and OASIS; and (2) interested parties an opportunity to seek additional information and clarifications from Black Hills about its Annual True-Up and projected net revenue requirement posted on its website and OASIS. Under the proposed protocols, Black Hills must provide notice, via an email exploder list, of the annual open meetings to interested parties no less than seven days prior to holding such meetings.²³

17. Black Hills explains that, because it does not have any existing or proposed transmission projects that utilize a regional cost sharing mechanism, the proposed formula rate protocols do not include language requiring a joint informational meeting be held by transmission owners as the Commission directed in the MISO Compliance Order. Black Hills states that it is participating in WestConnect and will participate in the WestConnect cost allocation proposals. Black Hills commits that, in the event that Black Hills' participation in WestConnect, or any other regional cost sharing mechanism that may be developed, results in cost recovery of transmission projects under Attachment H to the Joint Tariff that utilize a regional cost sharing mechanism, Black Hills will amend the formula rate protocols in a future filing under FPA section 205.

18. Black Hills states that, consistent with the MISO Investigation Order, the proposed formula rate protocols provide interested parties with adequate time to review the information posted on Black Hills' website and OASIS and to serve reasonable information and document requests on Black Hills. Specifically, Black Hills states, the proposed protocols provide interested parties two months to review both the Annual True-Up and projected net revenue requirement posted on Black Hills' website and OASIS, and to serve reasonable information and document requests on Black Hills. Additionally, the protocols have been revised to adopt the same seven categorical limitations on the types of information and documents that can be requested under the information exchange procedures as approved in the MISO Compliance Order.²⁴

²² *Id.* at 5 (citing proposed Attachment H §§ II.4 and II.5).

²³ *Id.* (citing proposed Attachment H §§ II.6 and II.7).

²⁴ *Id.* n.26 (citing MISO Compliance Order, 146 FERC ¶ 61,212 at P 67).

19. Additionally, the proposed formula rate protocols require Black Hills to make a good faith effort to respond to information and document requests submitted by interested parties within 15 business days; however, Black Hills shall have no longer than September 1 and December 31 to respond to information and document requests submitted during the Annual True-Up review period and projected net revenue requirement review period, respectively.²⁵ According to Black Hills, the Commission accepted the same good faith effort to respond within 15 business days in the MISO Compliance Order.²⁶

20. Black Hills states that the proposed formula rate protocols require it to post all information and document requests, with Black Hills' responses to such requests, on its website and OASIS, provided that the responses do not include material deemed by Black Hills to be privileged and/or confidential. If Black Hills deems responsive material to be privileged and/or confidential, such information will not be publicly posted but Black Hills will provide confidential information to requesting parties provided that a confidentiality agreement is executed by Black Hills and the requesting party.²⁷ Further, Black Hills adds, the proposed protocols require that Black Hills post on its website and OASIS all informal challenges from interested parties and Black Hills' responses to any such informal challenges, subject to the aforementioned provisions regarding privileged and/or confidential information.²⁸

21. Black Hills asserts that, in accordance with the MISO Compliance Order, the proposed formula rate protocols preclude Black Hills from withholding responsive information to an information or document request under a claim of any settlement privilege in any subsequent Commission proceeding addressing Black Hills' Annual True-Up or projected net revenue requirement.²⁹

22. Black Hills states that the proposed formula rate protocols provide the procedures for annually calculating the True-Up Adjustment and calculating interest on any over or under recovery due to the difference between the actual versus projected net revenue

²⁵ *Id.* at 6 (citing proposed Attachment H § III.3).

²⁶ *Id.*

²⁷ *Id.* (citing Attachment H § III.4).

²⁸ *Id.* (citing Attachment H § IV.7).

²⁹ *Id.* at 6-7 (citing Attachment H § III.5).

requirement.³⁰ Black Hills adds that, consistent with Black Hills' formula rate template, under the proposed protocols, the True-Up Adjustment would be paid in full in July of each year.³¹

23. According to Black Hills, the proposed protocols address potential situations where Black Hills' projected net revenue requirement or Annual True-Up is changed or adjusted after the publication dates. The proposed protocols require Black Hills to post any changes or adjustments to the True-Up Adjustment or the projected net revenue requirement on its website and OASIS and, within 10 days of posting any such change or adjustment, provide notice to Interested Parties of such posting via an email exploder.³²

24. Black Hills states that, because its formula rate template does not carry forward the True-Up Adjustment into the next projected net revenue requirement, the proposed protocols require any resulting change in Black Hills' True-Up Adjustment to be paid in full within 30 calendar days of the date that any such change or adjustment is posted to Black Hills' website and OASIS, or in accordance with any Commission order.³³ Black Hills states that interest on the adjusted amount will be calculated in accordance with the same procedures set forth in section VI.3 for the True-Up Adjustment, or as the Commission may otherwise order.

25. Black Hills asserts that, to minimize the burden of changes to the projected net revenue requirement made after the Projected Rate Publication Date but before January 15, Black Hills plans to reflect those changes in the projected net revenue requirement invoiced to customers. Black Hills states that, for changes made to the projected net revenue requirement after January 15, Black Hills will reflect the changes in invoices to be delivered no later than 30 days from the date of posting any such change to the Black Hills' website and OASIS, or in accord with any Commission order. Black Hills will re-invoice customers on any invoices delivered to customers that did not reflect any such changes or adjustments to the projected net revenue requirement made after January 15, which will include an interest calculation outlined in section VI.3 of the proposed

³⁰ *Id.* at 7 (citing Attachment H §§ VI.1 and VI.3).

³¹ *Id.* (citing Attachment H § VI.2).

³² *Id.* (citing Attachment H § VII.2).

³³ *Id.* (citing Attachment H § VII.1).

protocols and with billing in accordance with section VI.2 of the proposed protocols or as the Commission may otherwise order.³⁴

26. Black Hills' proposed formula rate protocols require Black Hills to file, by March 1 of each year, an informational filing of its projected net revenue requirement and Annual True-Up in connection with the prior year's postings performed in accordance with section II of the proposed formula rate protocols during the prior year. Black Hills maintains that the deadline for filing the informational filing with the Commission provides a reasonable amount of time, after all informal challenges are due,³⁵ in which Black Hills and a challenging party can seek to resolve any dispute that may arise regarding Black Hills' formula rate updates. Black Hills states that the proposed protocols require that Black Hills provide notice of its informational filing to interested parties via an email exploder list and by posting the docket number assigned to Black Hills' informational filing on its website and OASIS within five days of such filing.³⁶

27. Black Hills maintains that the proposed protocols require Black Hills to include the information that is reasonably necessary to determine: (1) that input data under the formula rate are properly recorded in any underlying workpapers; (2) that Black Hills has properly applied the formula rate and these procedures; (3) the accuracy of data and the consistency with the formula rate of the net revenue requirement and rates under review; (4) the extent of accounting changes that affect formula rate inputs; and (5) the reasonableness of projected costs. Further, the proposed protocols require Black Hills to include the formula rate template and underlying workpapers in native format fully populated and with formulas intact when submitting its annual informational filing with the Commission. Black Hills will describe any corrections or adjustments made to the Annual True-Up or projected net revenue requirement made during the period between the publication dates and the filing date of the informational filing with the Commission.³⁷

³⁴ *Id.* at 7-8 (citing Attachment H § VII.2).

³⁵ Black Hills states that the deadline for filing the informational filing is approximately six weeks after informal challenges are due. Informal challenge procedures are discussed further below.

³⁶ Black Hills Transmittal at 8 (citing Attachment H § V.1, MISO Investigative Order, 143 FERC ¶ 61,149 at P 92, and MISO Compliance Order, 146 FERC 61,212 at P 62).

³⁷ Black Hills Transmittal at 8.

c. **Commission Determination**

28. We find that the provisions in Black Hills' proposed protocols relating to transparency generally comply with the Commission's directives in the July 17 Order. We therefore will conditionally accept them, subject to further compliance, as discussed below.

29. We find that Black Hills should include tariff language regarding joint meetings with other transmission owners using formula rates to establish the revenue requirements for recovery of the costs of projects subject to the same regional cost allocation. Despite not being a member of an RTO, Black Hills recognizes that, as a member of the WestConnect regional planning group, it may at some point develop regional transmission projects whose costs may be recovered through its formula rate. A joint meeting with other transmission owners using formula rates to establish the revenue requirements for recovery of the costs of projects that they develop that are subject to the same regional cost allocation would be an efficient way for such transmission owners to conduct annual meetings to discuss their annual updates, so that parties interested in the annual updates of multiple transmission owners with projects subject to the same regional cost allocation do not have to separately participate in each transmission owner's annual meeting.³⁸ This could ease the burden of both transmission customers and owners by limiting the number of annual meetings necessary.³⁹ Accordingly, we will direct Black Hills to include a requirement, in the compliance filing ordered below, that it endeavor to coordinate with other transmission owners using formula rates to establish revenue requirements for recovery of the costs of transmission projects that utilize the same regional cost sharing mechanism and hold joint meetings to enable all interested parties to understand how those transmission owners are implementing their formula rates for recovering the costs of such projects.⁴⁰

30. We also will require that Black Hills' formula rate protocols include language to provide remote access to its annual update meetings. We find it reasonable to allow for

³⁸ MISO Compliance Order, 146 FERC ¶ 61,212 at P 59.

³⁹ *Id.* While we recognize that the formula rate protocols under Black Hills' Tariff only govern Black Hills' annual updates, we expect other public utility transmission owners using formula rates to establish revenue requirements for recovery of the costs of transmission projects that utilize the same regional cost sharing mechanism to cooperate in coordinating to hold joint meetings.

⁴⁰ Black Hills would not need to coordinate with transmission owners that do not use formula rates and thus do not update their rates each year.

remote access to ease burdens (e.g., travel costs) to ensure all interested parties have the opportunity to participate in the meetings. We will therefore direct Black Hills to modify its formula rate protocols to explicitly require remote access for participation at annual update meetings.

31. In addition, we find that Black Hills' proposed protocols do not include a provision that allows interested parties to obtain upon request information on procurement methods and cost control methodologies used by Black Hills in order to facilitate interested parties' analysis of whether Black Hills' costs were prudently incurred.⁴¹ Accordingly, we will direct Black Hills, in a compliance filing due within 60 days of the issuance of this order, to propose revisions to its protocols to respond to this directive.

32. We find that Black Hills has complied with the Commission's directives in the July 17 Order to file an annual information filing. We remind Black Hills, consistent with the directives in the Southern Indiana and NIPSCO Second Compliance Orders,⁴² that Black Hills is required to file its annual informational filing in a new docket each year.

3. Challenge Procedures

a. July 17 Order

33. The Commission found that the Joint Tariff contained no challenge provisions to allow interested parties to informally resolve disputes related to implementation of the formula rates or, in the event disputes are not resolved informally, to bring formal challenges to the Commission without needing to file a formal complaint with the Commission. The Commission has stated that interested parties must be afforded the ability to challenge a transmission owner's annual update and resolve related disputes through straightforward and defined procedures. Accordingly, the Commission found that Black Hills' formula rate appeared to be unjust and unreasonable and directed

⁴¹ *Black Hills Power, Inc.*, 148 FERC ¶ 61,035 (2014) (citing MISO Investigation Order, 143 FERC ¶ 61,149 at PP 89-90).

⁴² See NIPSCO Second Compliance Order, 150 FERC ¶ 61,022 at P 17, and Southern Indiana Second Compliance Order, 150 FERC ¶ 61,023 at P 18.

Black Hills to revise its formula rate protocols to provide specific procedures for informal and formal challenges, or show cause why it should not be required to do so.⁴³

b. Black Hills Compliance Filing

34. Black Hills states that, in accordance with the July 17 Order, the MISO Investigation Order, and the MISO Compliance Order, it proposes to include straightforward and well-defined challenge procedures to afford interested parties the opportunity to raise informal challenges for a reasonable period of time after Black Hills posts its Annual True-Up and projected net revenue requirement, and to raise formal challenges with the Commission in the event that parties are unable to resolve any potential dispute raised by interested parties under the informal challenge procedures.⁴⁴

35. Black Hills' proposed deadlines to receive notification of any informal challenge to the Annual True-Up and the projected net revenue requirement are September 15 and January 15, respectively, and follow Black Hills' deadlines to provide responses to information and document requests by approximately 15 days. Further, Black Hills states, the proposed formula rate protocols extend the review periods to the next business day if a deadline for submitting informal, written challenges falls on a weekend or a holiday recognized by the Commission.⁴⁵

36. Black Hills states that the proposed formula rate protocols adopt the seven-factor limitation governing the range of issues that interested parties may raise through informal and formal challenges that the Commission directed in the MISO Compliance Order. Black Hills maintains that this seven factor limitation proposed by Black Hills balances the ability of interested parties to participate in Black Hills' update or true-up process with the need to avoid exposing Black Hills to challenges regarding irrelevant issues.⁴⁶

37. Black Hills asserts that, in accordance with the MISO Investigation Order, the proposed protocols require Black Hills to appoint a senior representative to work with the party, or its representative, submitting the informal challenge toward a resolution of the

⁴³ July 17 Order, 148 FERC ¶ 61,035 at PP 27-28 (citing MISO Investigation Order, 143 FERC ¶ 61,149 at PP 118, 103-123; MISO Compliance Order, 146 FERC ¶ 61,212 at PP 103-117).

⁴⁴ Black Hills Transmittal at 9.

⁴⁵ *Id.* (citing Attachment H §§ IV.1 and IV.2).

⁴⁶ *Id.* (citing Attachment H § IV.6).

dispute.⁴⁷ Furthermore, the proposed protocols permit Black Hills to request the appointment of a Commission Administrative Law Judge that is mutually acceptable to the challenging party to facilitate discussions in order to attempt to resolve the dispute.⁴⁸ Black Hills states that, consistent with the MISO Compliance Order, the proposed protocols require Black Hills to make a good faith effort to respond to any informal challenge within 20 business days, but also require that Black Hills respond to informal challenges by October 15 for the Annual True-Up, and by February 15 for the projected net revenue requirement.⁴⁹ Black Hills comments that the proposed response deadlines to informal challenges afford interested parties a reasonable time to prepare and file formal challenges with the Commission on March 15, which is two weeks after Black Hills' informational filing discussed above.⁵⁰ Black Hills states that, under the proposed protocols, interested parties that choose to file a formal challenge with the Commission regarding Black Hills' formula rate implementation shall file such challenges in the same docket as Black Hills' informational filing.⁵¹

38. Black Hills maintains that the proposed formula rate protocols governing the requirements for filing a formal challenge at the Commission are in accordance with the Commission's guidance that formula rate protocols must: (1) make clear that formal challenges are filed pursuant to the proposed protocols, rather than Rule 206; and (2) detail specifically the filing requirements that an interested party must satisfy in submitting a formal challenge to the Commission.⁵²

39. Black Hills states that the proposed formula rate protocols provide that failure to pursue an issue through an informal challenge or to lodge a formal challenge within the timelines provided in these protocols regarding any issue as to a given Annual True-Up or projected net revenue requirement shall bar pursuit of such issue with respect to that Annual True-Up or projected net revenue requirement.⁵³ In addition, the proposed

⁴⁷ *Id.* at 9-10 (citing Attachment H § IV.4).

⁴⁸ *Id.* at 10 (citing Attachment H § IV.6).

⁴⁹ *Id.* (citing Attachment H § IV.4).

⁵⁰ *Id.* (citing Attachment H § IV.8).

⁵¹ *Id.* (citing Attachment H § IV.8).

⁵² *Id.* (citing Attachment H § IV.5).

⁵³ *Id.* (citing Attachment H § IV.3).

formula rate protocols state that a party may not pursue a formal challenge if that party did not submit an informal challenge during the applicable True-Up Review Period or Projected Rate Review Period.⁵⁴ Black Hills states that the language in these sections is consistent with the Commission's finding in the MISO Compliance Order wherein the Commission stated that, "while we are rejecting the proposal to prohibit interested parties from raising any issue in a formal challenge that was not previously raised in the course of that party's informal challenge, we retain the requirement that an interested party submit an informal challenge in order to be able to raise *any* issue in a formal challenge, as this will encourage interested parties to actively engage throughout the process."⁵⁵ However, Black Hills adds, the informal and formal challenge process does not deny interested parties their statutory right to file a separate complaint pursuant to section 206 of the FPA.

40. Finally, Black Hills' proposed protocols clarify that no party shall seek to modify the formula rate under the challenge procedures, and that the Annual True-Up and projected net revenue requirement shall not be subject to challenge by anyone for the purpose of modifying the formula rate. Black Hills states that any modification to the formula rate itself will require, as applicable, a filing under section 205 or section 206 of the FPA. Black Hills proposes protocols also provide that any interested party seeking changes to the application of the formula rate due to a change in the Uniform System of Accounts or FERC Form No. 1, shall first raise the matter with Black Hills in accordance with the challenge procedures set forth in the proposed formula rate protocols.⁵⁶

c. Commission Determination

41. We find that the provisions in Black Hills' proposed formula rate protocols relating to challenge procedures generally comply with the requirements of the July 17 Order. We therefore will conditionally accept them, subject to further compliance.

42. We believe that section IV.3 appears to bar challenges to the implementation of the formula for a rate year if the issue is not raised in an informal or formal challenge. In the MISO Compliance Order, the Commission found that such a finality provision contravenes Commission precedent and the filed-rate doctrine.⁵⁷ The Commission stated

⁵⁴ *Id.* (citing Attachment H § IV.8).

⁵⁵ *Id.* at 10-11 (citing MISO Compliance Order, 146 FERC ¶ 61,212 at P 109 (emphasis in original)).

⁵⁶ *Id.* at 11 (citing Attachment H §§ IV.11 and IV.12).

⁵⁷ MISO Compliance Order, 146 FERC ¶ 61,212 at P 110.

that it has long held that a transmission owner's formula rate protocols must not impede the statutory rights of the Commission or other interested parties to initiate complaint proceedings pursuant to section 206 of the FPA.⁵⁸ The Commission found that MISO's proposed finality provision would deem a transmission owner's annual update or true-up final, and therefore "no longer subject to challenge pursuant to the [] protocols or by any other means by [the Commission] or any other entity..."⁵⁹ Importantly, the Commission stated, this provision of the MISO transmission owners' proposal would preclude the Commission and interested entities from exercising their rights under section 206 of the FPA. The Commission also stated that a savings provision does not cure the provision's deficiency. Similarly, we find the same with Black Hills' proposed section IV.3. Consequently, we will direct the Black Hills to revise its proposed protocols to remove the provision to ensure that the Commission and interested entities are not precluded from exercising their statutory rights, or to clarify the provision so that it is consistent with the Commission's findings in the MISO Investigation Order and the MISO Compliance Order.

43. We also find that Black Hills' proposed date for making formal challenges may not allow adequate time for review of the informational filing. Thus, we will direct Black Hills in its compliance filing to revise its formula rate protocols to propose a date for any interested party to submit a formal challenge with the Commission that allows reasonable time for interested parties to review the informational filing.

The Commission orders:

(A) Black Hills' compliance filing is hereby conditionally accepted for filing, to become effective January 1, 2015, as requested, as discussed in the body of this order.

⁵⁸ *Id.* (citing *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 113 (2009)).

⁵⁹ *Id.*

(B) Black Hills is hereby directed to submit a compliance filing within 60 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.