

135 FERC ¶ 61,197  
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 Colorado IPP, LLC

Docket No. ER11-2726-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued May 31, 2011)

1. In this order, we grant Black Hills Colorado IPP, LLC's (Black Hills Colorado IPP) request to make power sales to its affiliate Black Hills/Colorado Electric Utility Company, LP (Black Hills/Colorado Electric), pursuant to a competitive solicitation that we find satisfies the Commission's concerns regarding the potential for affiliate abuse.

**I. Background**

2. On January 21, 2011, as supplemented on April 5, 2011, Black Hills Colorado IPP requested authority to make sales to its affiliate Black Hills/Colorado Electric as the result of Black Hills Colorado IPP's<sup>1</sup> selection as a winning bidder in a 2009 competitive solicitation.

3. Black Hills Colorado IPP is a wholly-owned subsidiary of Black Hills Corporation. Black Hills Corporation is an energy company engaged in the business of providing electric and gas utility service in several different markets in the Northwest Region. Black Hills Corporation conducts its electric utility business in Wyoming, South Dakota, Montana, and Colorado through its wholly-owned utility operating company subsidiaries, Black Hills Power, Inc., Cheyenne Light, Fuel and Power Company, and Black Hills/Colorado Electric. Each of the subsidiaries is a traditional utility that serves captive customers in a franchised retail utility service area. In addition,

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<sup>1</sup> Black Hills Colorado IPP also filed a request for market-based rate authority in a separate proceeding. *See Black Hills Colorado IPP*, Docket No. ER11-2724-000 (May 18, 2011) (delegated letter order).

Black Hills Corporation owns natural gas distribution facilities located in Colorado, Iowa, Kansas, and Nebraska.

4. Black Hills Colorado IPP explains that the Black Hills Corporation subsidiary Black Hills/Colorado Electric received approval from the Colorado Public Utilities Commission to construct and procure approximately 380 megawatts (MW) of electric generating capacity as part of its electric resource planning process.<sup>2</sup> Black Hills Colorado IPP states that the Colorado Public Utilities Commission (Colorado Commission) authorized Black Hills/Colorado Electric to construct and own two generating facilities with a generating capacity of 90 MW each and to procure its remaining capacity needs through a competitive solicitation process.

5. Black Hills Colorado IPP states that on March 25, 2009, Black Hills/Colorado Electric issued a Non-Intermittent Resource Solicitation requesting bids for the supply of electric energy and capacity. Black Hills Colorado IPP explains that a number of bidders submitted proposals to supply generating capacity to Black Hills/Colorado Electric, including a bid by Black Hills Colorado IPP to supply capacity and energy from a new natural gas-fired generating facility that Black Hills Colorado IPP would construct in Colorado.

6. Black Hills Colorado IPP maintains that on the basis of objective evaluation criteria that were identified in the competitive solicitation, Black Hills/Colorado Electric determined that Black Hills Colorado IPP was the least-cost bidder and Black Hills/Colorado Electric selected Black Hills Colorado IPP to supply approximately 200 MW of capacity and energy under a long-term power purchase agreement that extends through December 31, 2031.

7. Black Hills Colorado IPP explains that as a result of its selection as a winning bidder in the competitive solicitation process, Black Hills Colorado IPP is constructing a 200 MW natural gas fired generating facility located in the Pueblo, Colorado vicinity. Black Hills Colorado IPP proposes to sell the entire capacity and output of this facility to its affiliate Black Hills/Colorado Electric pursuant to a long-term power purchase agreement that extends through December 31, 2031.<sup>3</sup>

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<sup>2</sup> Black Hills/Colorado Electric currently purchases 75 percent of its capacity from the Public Service Company of Colorado under the terms of a power purchase agreement that will expire on December 31, 2011.

<sup>3</sup> Black Hills Colorado IPP proposes to begin making sales of energy and capacity to Black Hills/Colorado Electric when Black Hills Colorado IPP completes construction of the facility and commences commercial operation.

8. Black Hills Colorado IPP maintains that the competitive solicitation satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales in *Edgar*<sup>4</sup> as well as the four guidelines outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).<sup>5</sup>

9. In support, as described below, Black Hills Colorado IPP explains that its winning bid was the result of head-to-head competition with non-affiliates in a competitive solicitation on the basis of objective evaluation criteria that was approved by the Colorado Commission and supervised by an independent evaluator. Accordingly, Black Hills Colorado IPP requests that the Commission authorize it to make sales of energy and capacity to its affiliate Black Hills/Colorado Electric effective June 1, 2011.

## **II. Notice and Responsive Pleadings**

10. Notice of Black Hills Colorado IPP's filing was published in the *Federal Register*,<sup>6</sup> with motions to intervene and protests due on or before February 11, 2011 and April 26, 2011. None was filed. On December 30, 2010, the Colorado Commission filed a letter in support of Black Hills Colorado IPP's filing.

11. In its submittal, the Colorado Commission states that it supports Black Hills/Colorado Electric's and Black Hills Colorado IPP's request that the Commission accept the power purchase agreement for filing. The Colorado Commission states that Black Hills/Colorado Electric and Black Hills Colorado IPP entered into the power purchase agreement as the result of a Colorado Commission-required and Colorado Commission-approved competitive resource acquisition process conducted by Black Hills/Colorado Electric to procure capacity resources needed to serve the company's approximately 93,000 customers in the state of Colorado.<sup>7</sup>

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<sup>4</sup> *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

<sup>5</sup> *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

<sup>6</sup> 76 Fed. Reg. 5575 (2011); 76 Fed. Reg. 22,390 (2011).

<sup>7</sup> We note that Article 6.1 (D) of the power purchase agreement states that the Colorado Commission authorizes Black Hills/Colorado Electric to enter into a power purchase agreement without the Colorado Commission's approval pursuant to Decision Nos. C09-0184, C09-0337, and C09-0444 in Docket 08A-346E.

12. The Colorado Commission explains that it allowed Black Hills/Colorado Electric's unregulated affiliates to participate in the bidding process, and required that the process be overseen by an independent evaluator. The Colorado Commission states that the independent evaluator was selected jointly by Black Hills/Colorado Electric, the Staff of the Colorado Commission and the Colorado Office of Consumer Counsel and approved by the Colorado Commission.

13. The Colorado Commission informs the Commission that a number of bidders submitted proposals to supply generating capacity to Black Hills/Colorado Electric, including a bid by Black Hills Colorado IPP to supply 200 MW of long-term energy and capacity from a new generating facility that Black Hills Colorado IPP would construct. The Colorado Commission further explains that bids were modeled by a third-party, Black & Veatch, using the STRATEGIST model and that Black & Veatch did not know the identities of the bidders. The Colorado Commission states that bids were evaluated on the basis of objective criteria set forth in the request for proposals and that the independent evaluator oversaw the entire bid solicitation, evaluation, and power purchase agreement negotiation process.

14. The Colorado Commission states that the independent evaluator submitted regular bi-weekly reports to the Colorado Commission, the Trial Staff and the Office of Consumer Counsel during the course of the competitive solicitation process and following the submittal of the independent evaluator's final report, the independent evaluator also met individually with two of the three Colorado Commissioners to discuss the bid evaluation and power purchase agreement negotiation process.

15. The Colorado Commission states that it understands that the entire competitive solicitation process was conducted in a manner that was transparent, open, and fair; that the products solicited in the request for proposals were adequately defined; that the evaluation criteria used to assess bids were objective and applied equally to all bidders; that Black Hills Colorado IPP was treated as any other party would be treated in the negotiation process; and that the process was overseen by the independent evaluator at every stage.

16. The Colorado Commission further states that it believes that the competitive solicitation process was conducted fairly and did not favor Black Hills Colorado IPP over non-affiliated bidders and that the Colorado Commission supports the request of Black Hills/Colorado Electric and Black Hills Colorado IPP that the Commission accept the power purchase agreement for filing.

### III. Discussion

#### Analysis

##### 1. Affiliate Abuse Analysis

17. At issue here is whether Black Hills Colorado IPP's filing satisfies the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. Under *Edgar*, the Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.<sup>8</sup>

18. When an entity presents evidence seeking to satisfy the *Edgar* criteria, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.<sup>9</sup>

19. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.<sup>10</sup> As the Commission stated in *Allegheny*, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue

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<sup>8</sup> See *Edgar*, 55 FERC ¶ 61,382 at 62,167-69. See also *Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027, at 61,059-60 (1999).

<sup>9</sup> *Edgar*, 55 FERC ¶ 61,382 at 62,168.

<sup>10</sup> See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection. The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse.

20. As discussed below, the Commission concludes that the competitive solicitation described by Black Hills Colorado IPP satisfies the Commission's concerns regarding affiliate abuse. Accordingly, the Commission will grant Black Hills Colorado IPP's request for authorization to make affiliate sales to Black Hills/Colorado Electric pursuant to the competitive solicitation, effective June 1, 2011, as requested.

**a. Transparency Principle**

21. Black Hills Colorado IPP argues that the competitive solicitation was consistent with the Transparency guideline. Black Hills Colorado IPP states that Black Hills/Colorado Electric issued a press release to provide notice of issuance of the competitive solicitation and Black Hills/Colorado Electric posted notice of the competitive solicitation on a webpage on the Black Hills Corporation website that was publicly available to everyone without any restrictions. Black Hills Colorado IPP states that Black Hills/Colorado Electric also conducted a pre-bid information session that was open to all potential bidders, and Black Hills/Colorado Electric recorded the presentation and posted the recording, the meeting presentation materials, and all other inquiries on the Black Hills Corporation website so that the information would be available to all potential bidders. The Colorado Commission states that it understands that the entire competitive solicitation process was conducted in a manner that was transparent, open, and fair. The Colorado Commission additionally states that the power purchase agreement was entered into as a result of a Colorado Commission required and approved competitive resource acquisition process.

22. Based on Black Hills Colorado IPP's representations, the Commission finds that the competitive solicitation is consistent with the Commission's Transparency guideline.

**b. Definition Principle**

23. Black Hill Colorado IPP argues that Black Hills/Colorado Electric's competitive solicitation meets the Definition guideline because Black Hills/Colorado Electric clearly stated and defined the products for which Black Hills/Colorado Electric was soliciting

proposals and gave potential bidders the flexibility to propose products that would satisfy Black Hills/Colorado Electric's objectives.

24. Black Hills Colorado IPP represents that in the competitive solicitation, Black Hills/Colorado Electric stated that assuming a 15 percent reserve margin, Black Hills/Colorado Electric requires additional resources that will meet its need for approximately 175 to 200 MW of non-interruptible generation capacity on January 1, 2012. Black Hills/Colorado Electric further explained that the bidders could propose a power purchase agreement structure, a generation development structure, or other structure to meet its resource need. Additionally, the Colorado Commission states that the request for proposals and model contract that were used to initiate the competitive solicitation were approved by the Colorado Commission and the products solicited in the request for proposals were adequately defined.

25. Based on these representations, the Commission finds that the competitive solicitation is consistent with the Commission's Definition guideline.

**c. Evaluation Principle**

26. Black Hills Colorado IPP argues that the competitive solicitation is consistent with the Evaluation guideline because Black Hills/Colorado Electric identified in detail the standardized evaluation criteria that would be applied to all bidders. Black Hills Colorado IPP explains that Black Hills/Colorado Electric's competitive solicitation specified a multi-step evaluation process that would: (1) evaluate compliance with the bidding rules and ensure bid completeness; (2) make transmission assessments and initial economic evaluations, which would include an evaluation of cost estimates, a transmission upgrade assessment, and initial economic screening; (3) analyze non-economic factors; and (4) include a portfolio analysis of bids, to be followed by contract negotiations. The Colorado Commission states that bids were evaluated on the basis of objective criteria set forth in the request for proposals and that the independent evaluator oversaw the entire bid solicitation, evaluation, and power purchase agreement negotiation process.

27. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Evaluation guideline.

**d. Oversight Principle**

28. Black Hills Colorado IPP argues that the instant process satisfies the Oversight guidelines. In support, Black Hills Colorado IPP notes that the Black Hills/Colorado Electric competitive solicitation was overseen by an independent evaluator approved by the Colorado Commission. Black Hills Colorado IPP maintains that the independent evaluator was a consultant employed by a third party firm and was not an employee of Black Hills/Colorado Electric or any affiliate. Black Hills Colorado IPP states that the

Colorado Commission ordered that the independent evaluator shall be included in the bid evaluation process as well as significant aspects of contract negotiations such as, but not limited to, alterations in price, term, or modifications of security requirements. Black Hills Colorado IPP further explains that the individual evaluator must maintain a log of meetings, contracts, and issues to be filed with its bi-weekly report. The Colorado Commission monitored the competitive solicitation process and, accordingly, asks that the Commission approve the power purchase agreement.

29. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Oversight guideline.

## 2. Other Issues

30. This order satisfies the requirement that Black Hills Colorado IPP must first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates for these affiliate sales.<sup>11</sup> We note that Black Hills Colorado IPP must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.

31. Finally, we will direct Black Hills Colorado IPP to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions section of its market-based rate tariff to list the specific, limited waiver granted herein and include a citation to this order.<sup>12</sup>

### The Commission orders:

(A) Black Hills Colorado IPP's request for authorization to make power sales to Black Hills/Colorado Electric, pursuant to Black Hills/Colorado Electric's 2009 March Solicitation is granted, effective June 1, 2011, as discussed in the body of this order.

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<sup>11</sup> Although Black Hills Colorado IPP's submittal includes a request that the Commission accept the power purchase agreement that governs the terms of this affiliate transaction, Order No. 2001, which implemented section 35.1(g) of the Commission's regulations, obviates the need to file with the Commission service agreements under market-based power sales tariffs. *See* 18 C.F.R. § 35.1(g) (2011) ("[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.").

<sup>12</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384.

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

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.