

169 FERC ¶ 61,090  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

MDU Resources Group, Inc.  
Montana-Dakota Utilities Co.

Docket No. ER19-834-000

ORDER ON REQUEST FOR WAIVER OF AFFILIATE PRICING RULES

(Issued October 31, 2019)

1. On January 17, 2019, as supplemented on June 7, 2019, MDU Resources Group, Inc. (MDU Resources), on behalf of the companies within its holding company system, filed a request for waiver of sections 35.44(b)(1)<sup>1</sup> and 35.44(b)(2)<sup>2</sup> of the Commission's regulations to allow affiliates within the MDU Resources holding company system to price sales of general administrative and management non-power goods and services to

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<sup>1</sup> 18 C.F.R. § 35.44(b)(1) (2019) (“Unless otherwise permitted by Commission rule or order, and except as permitted by paragraph (b)(4) of this section, sales of any non-power goods or services by a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, including sales made to or through its affiliated exempt wholesale generators or qualifying facilities, to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price.”).

<sup>2</sup> 18 C.F.R. § 35.44(b)(2) (2019) (“Unless otherwise permitted by Commission rule or order, and except as permitted by paragraphs (b)(3) and (b)(4) of this section, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market.”).

each other at cost. In this order, we grant waiver of section 35.44(b)(2), effective as of the date of this order.<sup>3</sup>

## **I. Background**

2. MDU Resources explains that, in June 2018, MDU Resources and its then-operating division Montana-Dakota Utilities Co. (Montana-Dakota) received Commission authorization under section 203 of the Federal Power Act (FPA)<sup>4</sup> to implement a corporate reorganization, which was completed effective January 1, 2019. MDU Resources states that, as part of this reorganization, MDU Resources Group, Inc. changed its name to Montana-Dakota Utilities Co. and became a wholly owned subsidiary of a newly formed holding company, which assumed the name MDU Resources Group, Inc. (i.e., the current MDU Resources).<sup>5</sup>

3. MDU Resources states that, before the reorganization, MDU Resources qualified for an exemption from the Commission's books and records requirements under 18 C.F.R. § 366.2 (2019) and record retention and reporting requirements under 18 C.F.R. §§ 366.21, 366.22, and 366.23 (2019) because MDU Resources and affiliated holding companies were only holding companies by virtue of their ownership interests in natural gas local distribution companies (LDC) that are not regulated as "natural gas companies" under sections 1(b) and 1(c) of the Natural Gas Act (NGA).<sup>6</sup> As a result of the reorganization, MDU Resources notes, this exemption no longer applies because Montana-Dakota, a public utility, became an indirect, wholly owned subsidiary, and not a division, of MDU Resources.<sup>7</sup>

4. MDU Resources represents that, before the reorganization, it provided electric utility and natural gas services through Montana-Dakota and Great Plains Natural Gas Co. (Great Plains) as operating divisions of MDU Resources. MDU Resources states that Montana-Dakota, a franchised public utility,<sup>8</sup> engages in the transmission, distribution, and sale of electric energy subject to the Commission's jurisdiction and provides distribution

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<sup>3</sup> As discussed below, we find that waiver of section 35.44(b)(1) is not necessary.

<sup>4</sup> 16 U.S.C. § 824b (2018).

<sup>5</sup> MDU Resources January 17, 2019 Filing at 4.

<sup>6</sup> 18 C.F.R. § 366.3(b)(2)(vi) (2019); *see also* 15 U.S.C. § 717(b), (c) (2018).

<sup>7</sup> MDU Resources January 17, 2019 Filing at 4-5.

<sup>8</sup> MDU Resources June 7, 2019 Response at 2.

and power sales services to retail customers located in Montana, North Dakota, South Dakota, and Wyoming. MDU Resources explains that Montana-Dakota owns approximately 761 megawatts of generation capacity. MDU Resources states that Montana-Dakota is a transmission owner within the Midcontinent Independent System Operator, Inc. (MISO), which maintains operational control over certain network facilities and network transformers. MDU Resources further explains that the annual transmission revenue requirement for and transmission service rates of Montana-Dakota's transmission facilities are established pursuant to Attachment O-MDU and other provisions of MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff.<sup>9</sup>

5. MDU Resources explains that Montana-Dakota, Great Plains, and MDU Resources' two LDC subsidiaries, Intermountain Gas Company and Cascade Natural Gas Corporation, provide natural gas distribution service to customers in Montana, North Dakota, South Dakota, Idaho, Minnesota, Oregon, Washington, and Wyoming. MDU Resources states that another of its subsidiaries, WBI Energy Transmission, Inc., is an interstate natural gas pipeline regulated by the Commission under the NGA. In addition, MDU Resources states that it engages in the construction materials and contracting and construction services businesses through its subsidiaries, Knife River Corporation and MDU Construction Services Group, Inc.<sup>10</sup>

6. MDU Resources states that, post-reorganization, it is now a "non-utility affiliate"<sup>11</sup> of Montana-Dakota and does not qualify for either exception to the affiliate pricing restrictions under sections 35.44(b)(3)<sup>12</sup> or (b)(4).<sup>13</sup> Accordingly, MDU

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<sup>9</sup> MDU Resources January 17, 2019 Filing at 3.

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> 18 C.F.R. § 35.43(a)(5) (2019) ("Non-utility affiliate means any affiliate that is not in the power sales or transmission business, other than a local gas distribution company or an interstate natural gas pipeline.").

<sup>12</sup> 18 C.F.R. § 35.44(b)(3) (2019) ("A franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may only purchase or receive non-power goods and services from a centralized service company at cost.").

<sup>13</sup> 18 C.F.R. § 35.44(b)(4) (permitting a company in a single-state holding company to provide general administrative and management non-power goods and services to, or receive such goods and services from, other companies in the same holding company system, at cost, provided that the only parties to such transactions are affiliates or associate companies of a holding company in the holding company system).

Resources seeks waiver of sections 35.44(b)(1) and (b)(2) of the Commission's regulations to price sales of general administrative and management non-power goods and services "at cost" in the same manner permitted under section 35.44(b)(4).<sup>14</sup>

7. MDU Resources states that waiver of these affiliate pricing rules is necessary to allow Montana-Dakota to (1) receive general administrative and management non-power goods and services at cost from MDU Resources and (2) provide general administrative and management non-power goods and services to other affiliated LDCs within the MDU Resources holding company system.<sup>15</sup> MDU Resources explains that such general administrative and management non-power goods and services include the types of services that would otherwise be provided by a centralized service company and may include: (1) executive, management, professional, technical and clerical services and (2) financial and accounting services, corporate governance and compliance services, legal services, information and technology services, treasury services, investor relations services, governmental and regulatory services, human resources services, communications services, procurement and fleet management, tax and related services, contract negotiation and administrative services, insurance and risk management services, environmental services and engineering and technical services.

8. MDU Resources asserts that, in Order No. 707-A, which adopted the at-cost pricing exception for single-state holding company systems, the Commission stated that it would be willing to consider requests for waiver on a case-by-case basis for at-cost pricing in the multi-state context under the same circumstances as for single-state holding companies (i.e., only for general and administrative services and the goods to support those services and only where members of the holding company do not sell such goods and services outside the holding company system).<sup>16</sup>

9. MDU Resources contends that waiver in this case is appropriate based on the same policy considerations that led the Commission to establish the "at cost" exception for single-state holding company systems in section 35.44(b)(4). According to MDU Resources,

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<sup>14</sup> MDU Resources January 17, 2019 Filing at 6.

<sup>15</sup> MDU Resources explains that it seeks waiver of section 35.44(b)(1) out of an abundance of caution. According to MDU Resources, LDCs do not meet the definition of a "non-utility affiliate" and, thus, the fact that the natural gas LDC affiliates would receive non-power goods and services from Montana-Dakota at cost does not implicate the policy against cross-subsidization of non-utility affiliates. *Id.* at 2 n.6 & 10.

<sup>16</sup> *Id.* at 7-8 (citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, *order on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047, at P 28 (2008)).

Montana-Dakota and MDU Resources do not, and will not, provide non-power goods and services to non-affiliates. In addition, MDU Resources states that the Commission's policy against cross-subsidization of non-utility affiliates is not implicated because the LDCs are not "non-utility affiliates" within the meaning of section 35.44(b)(1). Accordingly, MDU Resources concludes that there is no basis for a finding that Montana-Dakota is forgoing profits by providing non-power goods and services to affiliates at cost.<sup>17</sup>

10. MDU Resources maintains that, in establishing the at-cost pricing exception for single-state holding companies, the Commission recognized that defining a market price for general and administrative services is a speculative task.<sup>18</sup> MDU Resources states that it would have great difficulty in establishing a price for the general administrative and management services provided to affiliates given the absence of sales to non-affiliated third parties and the fact that such services "are, and always have been, provided on an integrated basis when Montana-Dakota was an operating division of MDU Resources."<sup>19</sup> MDU Resources adds that such services are also provided with more flexibility than can be obtained in the market context, "particularly in the less-populated markets in Montana, North Dakota, South Dakota and Wyoming where Montana-Dakota provides electric service."<sup>20</sup>

11. In addition, MDU Resources notes that the Commission stated in Order No. 707-A that general and administrative services can often be provided less expensively, at cost, by an affiliate than if they were purchased from outside the holding company system.<sup>21</sup> MDU Resources recognizes that most multi-state holding company systems have centralized service companies and are able to benefit from the associated at-cost pricing exception under section 35.44(b)(3). However, MDU Resources explains that a centralized service company was not warranted when Montana-Dakota operated as a division of MDU Resources and that establishing a centralized service company at this time would drastically increase costs for Montana-Dakota's customers.<sup>22</sup>

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<sup>17</sup> *Id.* at 9-10.

<sup>18</sup> *Id.* at 10 (citing Order No. 707-A, 124 FERC ¶ 61,047 at P 24).

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11-12 (citing Order No. 707-A, 124 FERC ¶ 61,047 at P 26).

<sup>22</sup> *Id.* at 12.

12. MDU Resources asserts that the Commission permitted a special pricing rule for single-state holding company systems in part because it believed that the purchase and sale of general and administrative goods and services by franchised public utilities would be susceptible to appropriate state oversight.<sup>23</sup> MDU Resources maintains that each of the states in which Montana-Dakota operates has requirements in place to prevent the cross-subsidization by public utilities of their non-utility affiliates. In addition, MDU Resources notes that the Commission will have access to Montana-Dakota's books and records to ensure that no cross-subsidization occurs. Finally, MDU Resources states that it employs rigorous accounting and cost-allocation procedures under its Intercompany Administrative Services Agreement (Services Agreement).<sup>24</sup>

13. In a June 7, 2019 response to a Commission staff data request, MDU Resources explains that, while some discrete general administrative and management non-power goods and services are available from non-affiliates, most of the specialized services provided by MDU Resources are not readily available in the marketplace. MDU Resources adds that, where these services are available from non-affiliates, they are not comparable to or are more expensive than those provided by MDU Resources because (1) they require institutional knowledge of Montana-Dakota and its operations and (2) MDU Resources has long maintained a dedicated staff to provide these services to all companies within the organization, which drives down the cost of such services.<sup>25</sup>

14. MDU Resources notes that it and Montana-Dakota do procure some discrete services (e.g., legal counsel, consulting and accounting and audit support services) at market prices as needed, but these services are generally for non-routine matters that require specialized expertise not available "in-house" and cost significantly more than similar services allocated "at cost" from MDU Resources.<sup>26</sup> MDU Resources indicates, however, that it is unable to establish an accurate or reliable market price for most of the non-power specialized core services it provides.<sup>27</sup>

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<sup>23</sup> *Id.* at 13.

<sup>24</sup> MDU Resources provided a copy of the Services Agreement. *See* MDU Resources June 7, 2019 Response at Attachment A.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> For example, MDU Resources explains that the average hourly rate of attorneys within its legal department is approximately \$121 per hour, which is substantially less than the hourly rates MDU Resources pays for outside counsel. *Id.* at 4-5.

<sup>27</sup> *Id.* at 5-6.

15. Further, MDU Resources references its Services Agreement, which governs the provision of non-power services to and from Montana-Dakota, and which, MDU Resources argues, ensures that costs are assigned consistent with the Commission's cost causation principles. Pursuant to the Services Agreement, MDU Resources must be able to demonstrate that the services or cost category for those services is reasonable for the utility for the performance of its regulated operations, is not duplicative of services already being performed, and is reasonable and prudent. In addition, MDU Resources must maintain records sufficient to identify costs subject to allocation and to adequately support recovery of costs. Where cost recovery may be denied if costs were directly incurred by Montana-Dakota, the Services Agreement requires those costs to be identified and segregated in the books of the regulated operation. The Services Agreement also provides that state commission staff may audit accounting records.<sup>28</sup>

16. MDU Resources also maintains that granting its requested waiver would not change the Commission's authority to ensure that inappropriate cross-subsidization does not occur within the MDU Resources holding company system. MDU Resources reiterates that the Commission has plenary access to the books and records of public utilities subject to its jurisdiction under FPA section 301.<sup>29</sup>

## II. Notice of Filing

17. Notice of MDU Resources' filing was published in the *Federal Register*, 84 Fed. Reg. 709 (2019), with interventions and protests due on or before February 7, 2019. None was filed.

18. Notice of MDU Resources' June 7, 2019 response to Commission staff's data request was published in the *Federal Register*, 84 Fed. Reg. 27,775 (2019), with interventions and protests due on or before June 28, 2019. None was filed.

## III. Discussion

19. The Commission's pricing rules for affiliate transactions provide that unless otherwise permitted by Commission rule or order, the sale of non-power goods or services to a market-regulated power sales affiliate or a non-utility affiliate from a

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<sup>28</sup> *Id.* at 7. In addition, MDU Resources also provides information regarding its "established allocation methodology," clarifies other statements that it made in its Petition regarding its cost allocation methodology, and provides copies of the Services Agreement and its Cost Allocation Manual, which were provided as attachments to its June 7, 2019 Response. *Id.* at 9-14.

<sup>29</sup> *Id.* at 8-9.

franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities “must be at the higher of cost or market price.”<sup>30</sup> Also, unless otherwise permitted by Commission rule or order, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate “at a price above market.”<sup>31</sup> The Commission’s regulations further specify that a company in a single-state holding company system may provide or receive such non-power goods and services from its affiliates at cost.<sup>32</sup> In Order No. 707-A, the Commission stated it would “consider requests for waiver on a case-by-case basis for at-cost pricing in the multi-state context, under the same circumstances as for single state holding companies (i.e., only for general and administrative services and the goods to support those services and only where members of the holding company do not sell such goods and services outside the holding company system).”<sup>33</sup>

20. As a threshold matter, we find that waiver of section 35.44(b)(1) is unnecessary because LDCs do not fall within the definition of “non-utility affiliate” under section 35.43(a)(5).<sup>34</sup> Accordingly, Montana-Dakota may continue to make sales to its affiliate LDCs at cost without waiver of section 35.44(b)(1).

21. Based on the following representations, we find that granting waiver of section 35.44(b)(2) to allow Montana-Dakota to receive non-power goods and services at cost will not result in inappropriate cross-subsidization. Montana-Dakota, which will purchase general administrative and management services at cost from MDU Resources, is a franchised public utility subject to the regulation and oversight of each state in which it operates, i.e., Montana, North Dakota, South Dakota, and Wyoming. Further, MDU Resources represents that it and Montana-Dakota have complied with the specific regulatory protections against inappropriate cross-subsidization in these states that regulate Montana-Dakota’s utility business. MDU Resources also represents that each state has requirements in place to prevent the cross-subsidization by public utilities of

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<sup>30</sup> 18 C.F.R. § 35.44(b)(1).

<sup>31</sup> *Id.* § 35.44(b)(2).

<sup>32</sup> *Id.* § 35.44(b)(4).

<sup>33</sup> Order No. 707-A, 124 FERC ¶ 61,047 at P 28.

<sup>34</sup> 18 C.F.R. § 35.43(a)(5) (“Non-utility affiliate means any affiliate that is not in the power sales or transmission business, *other than a local gas distribution company* or an interstate natural gas pipeline.”) (emphasis added).



their non-utility affiliates and have sanctioned the provision of non-utility goods and services to Montana-Dakota at cost.

22. In addition, MDU Resources represents that neither it nor Montana-Dakota currently sells, or will sell, general administrative and management services to non-affiliates. MDU Resources also represents that most of the services that it provides are not readily available from third parties and, where they are available, they are more expensive than MDU Resources' services. Our decision to grant waiver relies on the representations that MDU Resources' non-power goods and services either have no comparable market or are usually provided to Montana-Dakota at or below market price. We expect MDU Resources to maintain records to demonstrate that this continues to be the case.

23. Our decision is based on MDU Resources maintaining its current cost allocation methodology embodied in its Services Agreement and its Cost Allocation Manual. MDU Resources shall inform the Commission should there be a material change to that methodology. Further, we will rely on the Commission's ratemaking review process and audit functions, as well as the Commission's ability to access MDU Resources' and Montana-Dakota's books and records, to ensure that costs are allocated appropriately and that no inappropriate cross-subsidization is occurring.

24. In addition, we direct Montana-Dakota to submit a compliance filing, within 30 days of the date of this order, revising its market-based rate tariff to list the specific, limited waiver granted herein and to include a citation to this order.<sup>35</sup>

25. Finally, we note that the waiver granted herein is based on the specific facts and representations made by MDU Resources. To the extent that there is any material change in circumstances that would reflect a departure from the facts and representations that we have relied upon in granting the requested waiver, MDU Resources will be required to inform the Commission within 30 days of any such change.

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<sup>35</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at App. C, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, at P 384, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 567 U.S. 934 (2012).

The Commission orders:

(A) MDU Resources' request for waiver of the affiliate restrictions under section 35.44(b)(2) is hereby granted for the transactions identified in the body of this order, as discussed in the body of this order.

(B) MDU Resources must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the waiver herein, as discussed in the body of this order.

(C) Montana-Dakota is hereby directed to submit a compliance filing, within 30 days of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.