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

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

Cheyenne Light, Fuel and Power Company
Black Hills Wyoming, LLC

Docket No. ER19-2529-002

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF REVISIONS AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 21, 2020)

1. On August 2, 2019, pursuant to section 205 of the Federal Power Act (FPA) and sections 35.39(b) and 35.44(a) of the Commission's regulations, Cheyenne Light, Fuel and Power Company (Cheyenne Light) and Black Hills Wyoming, LLC (Black Hills Wyoming) (together, Applicants) requested authorization to make affiliate sales under a long-term energy purchase agreement whereby Black Hills Wyoming will sell energy and capacity to its affiliate, Cheyenne Light (2023 Agreement) and submitted corresponding revisions to Black Hills' market-based tariff. As discussed below, we accept for filing Applicants' proposed market-based rate tariff revisions,[1] and suspend them for a nominal period, to become effective October 2, 2019, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. Applicants state that they are wholly owned subsidiaries of Black Hills Corporation, a vertically integrated energy company engaged in two lines of business: traditional electric and gas utility service and wholesale energy production in the western United States.[2]

[1] Black Hills Wyoming, LLC, FERC FPA Electric Tariff, Market-Based Rate Tariff of Black Hills Wyoming, LLC; Market-Based Rate Tariff, FERC Electric Tariff, 2.0.1.

[2] Application at 2.

3. Applicants state that Cheyenne Light, a traditional public utility serving captive customers in franchised retail utility service areas, serves approximately 42,700 retail electric customers in and around Cheyenne, Wyoming, using a mix of supply resources, including its own generation resources and capacity and energy purchased from affiliated and unaffiliated suppliers. Applicants state that Cheyenne Light is a direct subsidiary of Black Hills Corporation and is located in the Western Area Power Administration-Colorado-Missouri (WACM) balancing authority area.[3]

4. Applicants state that Black Hills Corporation conducts its wholesale energy production business through its wholly-owned direct subsidiary, Black Hills Non-regulated Holdings, LLC, and that Black Hills Wyoming is a wholly-owned direct subsidiary of Black Hills Electric Generation, LLC, which itself is a wholly-owned direct subsidiary of Black Hills Non-regulated Holdings, LLC. They state that in addition to having market-based rate authority, Black Hills Wyoming is an Exempt Wholesale Generator.[4] Applicants state that Black Hills Wyoming owns a 76.5 percent interest in the 85 megawatts (MW) mine-mouth coal-fired generating facility known as Wygen I, also located in the WACM balancing authority area.[5]

5. Applicants explain that Black Hills Wyoming currently supplies Cheyenne Light with 60 MW of unit-contingent wholesale capacity and energy under a power purchase agreement authorized by the Commission in 2009 (2009 Agreement).[6] Applicants state that Cheyenne Light's Integrated Resource Plan filed with the Wyoming Public Service Commission indicated that the expiration of the 2009 Agreement on December 31, 2022 will result in a significant energy and capacity deficit for Cheyenne Light. Applicants state that the 2023 Agreement will allow Cheyenne Light to continue purchasing capacity and energy from Wygen I from January 1, 2023 through December 31, 2042, thus eliminating the energy and capacity deficit.[7]

6. Applicants explain that the pricing under the 2023 Agreement has two components, a capacity payment and an energy payment. The initial capacity price is a stated amount of $24.77 per kilowatt month, which is subject to an annual adjustment tied

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[3] *Id*. at 2-3.

[4] *Id*. at 3 (citing *Black Hills Generation, Inc.*, 95 FERC ¶ 62,025 (2001) (granting Black Hills Wyoming's predecessor-in-interest EWG status)).

[5] *Id*.

[6] *Id*. (citing *Black Hills Wyoming, LLC*, 128 FERC ¶ 61,285 (2009) (Black Hills Wyoming 2009 Order)).

[7] *Id*. at 4.

to the U.S. Consumer Price Index (less one percent), with a minimum escalation of one percent, and also includes a provision whereby Cheyenne Light will be responsible for a portion of governmental impositions related to Black Hills Wyoming's ownership and operation of the Wygen I Facility. Applicants further explain that the energy price consists of two elements: (1) an initial energy rate of $2.73 per delivered megawatt-hour, which is subject to an annual adjustment tied to the U.S. Consumer Price Index (less one percent), with a minimum escalation of one percent; and (2) the cost of fuel utilized to produce the energy delivered, with the fuel price being equal to the price paid by Cheyenne Light for fuel for its utility-owned plant that is adjacent to Wygen I. Other elements of the 2023 Agreement include a dispatchability provision in the favor of Cheyenne Light and an availability guaranty from Black Hills Wyoming to Cheyenne Light.[8]

7. Applicants assert that the 2023 Agreement will allow Black Hills Wyoming to continue supplying 60 MW of unit-contingent wholesale capacity and energy to Cheyenne Light through December 31, 2042. Applicants state that the rates, terms, and conditions of the 2023 Agreement were established based upon objective market information ascertained from an arm's-length sale between non-affiliates of unit-contingent capacity and energy from the same generating facility. As further described below, Applicants argue that the 2023 Agreement satisfies the Commission's *Edgar*[9] standards for permissible affiliate power sales and that its rates, terms, and conditions of service are just and reasonable.

II. Notices and Responsive Pleadings

8. Notice of Applicants' August 2, 2019 filing was published in the *Federal Register*,[10] with interventions and protests due on or before August 23, 2019. On August 23, 2019, the Wyoming Office of Consumer Advocate (Wyoming Consumer Advocate) filed a protest, and Dyno Nobel, Inc. and HollyFrontier Cheyenne Refining LLC (together, Dyno Nobel/HollyFrontier) filed a joint motion to intervene and protest. On September 6, 2019, Applicants filed an answer to the protests (Answer).

9. On September 17, 2019, Commission staff issued a deficiency letter to Applicants, asking that they clarify what effective date they request for the 2023 Agreement and Black Hills Wyoming's tariff revisions. On September 26, 2019, Applicants filed a response to the deficiency letter. Notice of Applicants' September 26, 2019 deficiency

[8] *Id*. at 4-5.

[9] *Bos. Edison Co. Re: Edgar Elec. Energy Co*., 55 FERC ¶ 61,382 (1991) (*Edgar*).

[10] 84 Fed. Reg. 39,293 (2019).

response was published in the *Federal Register*,[11] with interventions and protests due on or before October 17, 2019. None was filed.

10. On November 25, 2019, Commission staff issued a second deficiency letter to Applicants. On December 23, 2019, Applicants filed a response to the deficiency letter (Second Deficiency Response). Notice of Applicants' Second Deficiency Response was published in the *Federal Register*,[12] with interventions and protests due on or before January 13, 2020. On January 13, 2020, Dyno Nobel/HollyFrontier filed joint comments on the Second Deficiency Response (January Comments). On January 28, 2020, Applicants filed an answer to Dyno Nobel/HollyFrontier's comments (January Answer).

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motion to intervene serves to make Dyno Nobel/HollyFrontier a party to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Applicants' Answer and January Answer because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Affiliate Review Under *Edgar*

13. At issue here is whether Applicants' filing satisfies the Commission's concerns regarding the potential for affiliate abuse. Under the Commission's regulations, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the FPA.[13] The

[11] 84 Fed. Reg. 52,499 (2019).

[12] 84 Fed. Reg. 72,350 (2019).

[13] 18 C.F.R. § 35.39(b) (2019): *see Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at P 467, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *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

Commission must ensure that the rates, terms and conditions of jurisdictional service are just, reasonable and not unduly discriminatory or preferential. As part of the Commission's obligation in administering this FPA standard, it ensures that wholesale customers' rates do not reflect costs that are the result of undue preferences granted to affiliates or that are imprudent or unreasonable as a result of affiliate transactions.[14] The Commission traditionally places limits on wholesale power sales by wholesale generators and marketers to affiliated franchised public utilities with captive customers out of concern for affiliate abuse.[15]

14. In *Edgar*, the Commission explained that there are three examples of approaches to demonstrate that a franchised public utility has chosen the lowest cost supplier and thus that it has not unduly preferred an affiliate.[16] First, the utility may submit evidence of direct head-to-head competition between affiliated and non-affiliated suppliers either in a formal solicitation or in an informal negotiation process. Second, the utility may present evidence of the prices that non-affiliated buyers were willing to pay for similar services from that project. The Commission has stated that this second type of evidence is credible only to the extent that the non-affiliated buyers are in the same relevant market as the franchised public utility and are not subject to market power by the seller or its affiliates. Finally, the utility may provide "benchmark" evidence of the prices, terms and conditions of sales by non-affiliated sellers.[17]

¶ 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).

[14] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, at P 3, *order on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008).

[15] Order No. 697, 119 FERC ¶ 61,295 at P 492; Order No. 707, 122 FERC ¶ 61,155 at PP 4-7.

[16] In Order No. 697, the Commission stated that it would continue its approach for determining the types of affiliate transactions that are permissible and the criteria that should be used to make those decisions, including evaluation of the *Edgar* criteria. Order No. 697, 119 FERC ¶ 61,295 at P 540.

[17] *Edgar*, 55 FERC ¶ 61,382 at 62,168-69.

2. Analysis of Proposed Affiliate Transaction

a. Applicants' Analysis

15. Applicants assert that the 2023 Agreement is a permissible affiliate transaction under *Edgar* because it provides for wholesale power sales between affiliates at rates that are identical to those paid by a non-affiliate for energy and capacity from the same facility (i.e., Wygen I). Applicants assert that under its *Edgar* policy, the Commission allows affiliate wholesale transactions where the parties demonstrate the absence of affiliate abuse, which can be shown through any one of the following approaches: (1) evidence of direct head-to-head competition between affiliated and unaffiliated suppliers; (2) evidence of the prices that non-affiliated buyers were willing to pay for similar services from the affiliate; or (3) benchmark evidence of the prices, terms, and conditions of sales made by non-affiliated sellers. Applicants explain that *Edgar*'s second approach is satisfied "only to the extent that the non-affiliated buyers are in the [same] relevant market as the purchaser, and are not subject to market power by the seller or its affiliates."[18]

16. In support of their argument that the 2023 Agreement is a permissible affiliate transaction under *Edgar*, Applicants state that Black Hills Wyoming recently entered into an agreement negotiated at arm's length with the City of Gillette, a non-affiliate, for the sale of 5 MW of unit-contingent capacity and associated energy from Wygen I to the City of Gillette from January 1, 2023 through December 31, 2042 (Gillette Agreement). Applicants state that "the rates, terms, and conditions of the Gillette [Agreement] are the basis for" the 2023 Agreement.[19] Applicants state that both the City of Gillette and Cheyenne Light are located within the WACM balancing authority area, and that the City of Gillette is not subject to market power by Black Hills Wyoming or its affiliates. Applicants also argue that in discussing the hallmarks of a permissible affiliate sale premised on "the prices that non-affiliated buyers were willing to pay for similar services from the affiliate," the Commission emphasized that a key inquiry is whether the proposed sales are from the same facility or a similar facility in a similar location.[20] Applicants assert that this key inquiry is plainly satisfied where, as here, both the 2023 Agreement and the Gillette Agreement involve unit-contingent sales from Wygen I.

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[18] Application at 5 (citing *Edgar*, 55 FERC ¶ 61,382 at 62,168-69).

[19] *Id*. at 4.

[20] *Id.* at 6 (citing *Duke Energy Ind., Inc*., 136 FERC ¶ 61,001, at PP 15-18 (2011); *Avista Turbine Power, Inc*., 129 FERC ¶ 61,296, at P 20 (2009); Black Hills Wyoming 2009 Order, 128 FERC ¶ 61,285 at PP 15-17).

17. Additionally, Applicants point to the following evidence supporting the conclusion that the Commission's *Edgar* requirements are satisfied: (1) Black Hills Wyoming's sales to Cheyenne Light under the 2023 Agreement will be at prices, terms, and conditions identical to those an unaffiliated buyer (City of Gillette) was willing to pay for similar services from Black Hills Wyoming from the same facility (Wygen I), after an arm's-length negotiation; (2) the transactions are contemporaneous and involve identical start and end dates; (3) the 2023 Agreement results in reduced costs and new favorable terms for Cheyenne Light customers, when compared to the projected rate under the 2009 Agreement during the last year of its term (ending December 31, 2022); and (4) the 2023 Agreement also includes price escalation provisions more favorable to Cheyenne Light than the 2009 Agreement.[21]

b. Protests

18. Wyoming Consumer Advocate and Dyno Nobel/HollyFrontier (together, Protestors) raise several issues with the 2023 Agreement. Wyoming Consumer Advocate argues that Black Hills Wyoming "is abusing its affiliate Cheyenne Light with the 2023 Agreement," and requests that the Commission deny authorization for the transaction, deem the Gillette Agreement not arm's length, and further amend *Edgar* to eliminate the second approach in favor of a bright-line requirement for competitive bidding.[22] Dyno Nobel/HollyFrontier argue that Applicants have not demonstrated that the 2023 Agreement represents the "lowest cost" supply option for Cheyenne Light, and that the Commission should deny authorization without prejudice.[23]

19. Protestors argue that the Gillette Agreement is not an arm's-length transaction. Protestors assert that the City of Gillette has numerous business relationships with various Black Hills Corporation entities, including joint ownership in mine-mouth coal-fired generation Wygen III Facility (Wygen III) co-located with Wygen I. Wyoming Consumer Advocate states that the City of Gillette is a minority owner in Wygen III, and its ownership interest could be negatively impacted by higher average coal prices if Wygen I were to cease operations. Wyoming Consumer Advocate also explains that the City of Gillette is heavily invested in the future of coal mining and coal-fired generation nearby. Wyoming Consumer Advocate states that all employees of Wygen I live and pay

[21] *Id*. at 6-7.

[22] Wyoming Consumer Advocate Protest at 3-4, 7.

[23] Dyno Nobel/HollyFrontier Protest at 1.

taxes in and around the City of Gillette, and that a small 5 MW PPA, even at uneconomic rates, could cause the City of Gillette to reap millions of dollars in future tax revenue.[24]

20. Dyno Nobel/HollyFrontier state that the interrelated and overlapping interests between Black Hills Wyoming and the City of Gillette "clearly raise questions as to whether the sale to the City of Gillette should truly be considered an 'arms length' transaction, and whether the terms of that sale truly are consistent with what would have been produced in a competitive market."[25] Dyno Nobel/HollyFrontier argue that a more likely explanation is that the City of Gillette entered into the "nominal purchase knowing the purchase price was above market for the express purpose of assisting Black Hills Wyoming in establishing a benchmark for its larger affiliate sale to Cheyenne Light."[26] Dyno Nobel/HollyFrontier further argue that the City of Gillette's ulterior motivations for doing so "may have been to protect its own generation investments, to promote the continued operation of the generation and mining facilities from which the city benefits (e.g., in terms of employment, tax base, etc.), and perhaps to receive considerations from Black Hills Wyoming under its other agreements with the city (e.g., other electricity supply agreements, coal supply agreements, waste agreements, etc.)."[27]

21. Wyoming Consumer Advocate asserts that the Gillette Agreement is not comparable in size or scope to the 2023 Agreement. It notes that the Gillette Agreement is for 5 MW of capacity and energy, or 8.5 percent of the 2023 Agreement values, but that Cheyenne Light is not 12 times larger than the City of Gillette on any electricity related metric. Wyoming Consumer Advocate also notes that Cheyenne Light's service territory contains only 2.85 times more customers, and that its peak load is only 3.80 times higher.[28]

22. Wyoming Consumer Advocate argues that the 2023 Agreement is affiliate abuse for price, term, and risk shift. It asserts that dozens of nearby, local power purchase agreements have been proffered and/or signed in the last several years, utilizing several different generating technologies, ranging from $21/MWh to $36/MWh that satisfy various energy and capacity needs. Wyoming Consumer Advocate states that each of these agreements were subject to an open and competitive bidding process, and not an uncompetitive affiliate transaction under *Edgar*'s second approach. Wyoming Consumer

[24] Wyoming Consumer Advocate Protest at 4-6.

[25] Dyno Nobel/HollyFrontier Protest at 10.

[26] *Id*.

[27] *Id*.

[28] Wyoming Consumer Advocate Protest at 8.

Advocate maintains that "[p]aying approximately $50/MWh in the first year of a [20] year affiliate [agreement], with guaranteed increases, is not just, reasonable, or in the public interest."[29] Wyoming Consumer Advocate also argues that 20 years is an unacceptable term for a coal-fired power purchase agreement under the current market uncertainties, and that the 2023 Agreement shifts risk from Black Hills Wyoming shareholders to Cheyenne Light ratepayers.[30]

23. Dyno Nobel/HollyFrontier state that the issue before the Commission is not whether the proposed affiliate sale does not harm customers or is consistent with other non-affiliate sales made by Black Hills Wyoming, but whether the "buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and nonprice terms (i.e., that it has not preferred its affiliate without justification)."[31] Dyno Nobel/HollyFrontier state that the Commission's objective is to ensure that affiliate transactions are "above suspicion" and that "the market is not distorted."[32]

24. Dyno Nobel/HollyFrontier argue that the Gillette Agreement is not credible evidence that the proposed affiliate sale represents the lowest cost supply option for Cheyenne Light. They argue that Applicants have not provided any information regarding the facts and circumstances relating to the Gillette Agreement. They state that Applicants have not explained, for example, whether the sale was entered into by the City of Gillette after conducting a competitive solicitation and evaluating supply offers from multiple suppliers, with price being the primary criteria used to select the winning bidder.[33]

25. Dyno Nobel/HollyFrontier argue that other publicly-available evidence indicates that the proposed affiliate sale is likely not the lowest cost supply option. They note that Applicants state that the initial energy and capacity rates are projected to equal a combined $49.62 per MWh, but Applicants do not state how this amount was calculated. Dyno Nobel/HollyFrontier state that Applicants have not provided any competitive analysis, have not identified what other supply options Cheyenne Light may have considered (if any), have not provided any expert testimony, and overall have not even

[29] *Id*. at 9.

[30] *Id*. at 9-11.

[31] Dyno Nobel/HollyFrontier Protest at 5 (citing *Edgar*, 55 FERC ¶ 61,382 at 62,168) (emphasis added by Dyno Nobel/HollyFrontier).

[32] *Id*. at 6 (citing *Edgar*, 55 FERC ¶ 61,382 at 62,167).

[33] *Id*. at 7.

suggested that the pricing is, in fact, competitive or that it represents Cheyenne Light's lowest cost supply option.[34]

c. Applicants' Answer

26. In their Answer, Applicants respond that, among other things, Protestors have misunderstood and/or misapplied the Commission's *Edgar* precedent and affiliate restrictions. Applicants assert that they correctly stated Commission policy established in *Edgar* by recognizing that the presence or absence of affiliate abuse is a primary concern of the Commission. Applicants argue that Dyno Nobel/HollyFrontier have taken the phrase "lowest cost supplier" out of context to urge a full prudency review, which Applicants state the Commission has recognized is the role of the state commission, and ignore the plain import of *Edgar* and its progeny. Applicants state that Protestors have not convincingly disputed that Applicants have met the key inquiries recognized as relevant under the second approach of *Edgar*, and they assert that they explained how each of these inquiries is satisfied, and have demonstrated that the 2023 Agreement and the Gillette Agreement have the same, rates, terms, and conditions. [35]

27. Applicants also argue that Protestors have not established that the Gillette Agreement is anything other than a commercial transaction between two non-affiliated parties. Applicants explain that under the second *Edgar* approach, Applicants can satisfy the standard by providing evidence of "the prices which non-affiliated buyers were willing to pay for similar services from the [same] project,"[36] and that *Edgar* did not mandate the non-affiliated buyer and seller be complete strangers or have no other business dealings, but rather spoke in terms of "non-affiliates." Applicants state that the Commission's definition of an "affiliate" is well established and codified in the Code of Federal Regulations, and that under that definition, the City of Gillette cannot be considered an affiliate of Black Hills Wyoming, because Black Hills Wyoming does not have any ownership or control over the City of Gillette, and the two are not under any type of common control by another entity.[37] Applicants argue that the fact that the City of Gillette has been involved in other transactions with Black Hills Wyoming and its affiliates does not provide a credible basis from which to conclude that the Gillette Agreement was not at arm's length. They argue that Protestors have not pointed to any contemporaneous pending transaction between Black Hills Wyoming and the City of

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[34] *Id*. at 11.

[35] *Id*. at 14.

[36] Applicants Answer at 14 (citing *Edgar*, 55 FERC ¶ 61,382 at 62,168).

[37] *Id*. at 14-15.

Gillette that would have placed the City of Gillette in a precarious bargaining position during negotiation of the Gillette Agreement.[38]

28. Applicants state that Protestors' arguments that the City of Gillette had ulterior motives (other than the need for capacity and energy), and that those theoretical ulterior motives invalidate the Gillette Agreement, are speculative. Applicants state that none of Protestors' arguments substantiates a conclusion by the Commission that a negotiation for energy and capacity needed by City of Gillette was not at arm's length.[39] Applicants state that equally speculative is the argument that, since Gillette is a joint owner in Wygen III, it "might" agree to an "above market" agreement, so as to avoid an unquantified increase in coal prices.[40] Applicants state that to accept this premise one must assume that, without approval of the 2023 Agreement, Wygen I will cease to operate. Applicants further state neither Wyoming Consumer Advocate nor Dyno Nobel/HollyFrontier have provided analysis or back-up to quantify the impact on the City of Gillette of an alleged increase in coal price as compared to the Gillette Agreement price.[41]

29. Applicants state that there is no dispute that the City of Gillette had a need for energy and capacity, that the ensuing Gillette Agreement was approved by the City of Gillette's city council, that the energy and capacity is sourced from the same facility as the 2023 Agreement and, unlike the other contracts and sources referenced in the protests, that the Gillette Agreement occurred in the same relevant market as the 2023 Agreement. Moreover, Applicants state that there is no viable allegation that the City of Gillette entered into the Gillette Agreement unwillingly or did so as a result of an exercise of market power by Black Hills Wyoming. Applicants argue that "[i]t is these facts that are important, as they answer the key inquiries under the second *Edgar* approach: whether [the agreement with the non-affiliated purchaser] is in the same relevant market as the affiliate purchase, and whether the non-affiliated purchaser is subject to market power at the hands of the seller."[42]

30. Additionally, Applicants argue that the market evidence offered by Protestors that they claim calls into question the price of the 2023 Agreement is irrelevant. For instance, although Wyoming Consumer Advocate urges that "[d]ozens of nearby, *local* PPAs have

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[38] *Id*. at 15.

[39] *Id*. at 16.

[40] *Id*.

[41] *Id*.

[42] *Id.* at 17-18.

been proffered and/or signed"[43] at a lesser price, Applicants state that the only support Wyoming Consumer Advocate offers is a Utility Dive news article wholly dedicated to an Xcel Energy Inc. (Xcel) resource solicitation undertaken under Colorado law on behalf of Xcel's Public Service Company of Colorado affiliate, which is in a different balancing authority area and is not interconnected with Cheyenne Light through any current interconnection. Applicants note that the competitive solicitation was vastly different in scope, seeking proposals for up to 1,000 MW of wind, 700 MW of solar, and 700 MW of natural gas or storage.[44]

31. Applicants also argue that the distinction in volume (60 MW in the 2023 Agreement versus 5 MW in the Gillette Agreement) is not relevant and that neither *Edgar* nor or the subsequent cases interpreting it require that the services be identical or of an identical volume. Rather, Applicants state that under *Edgar*, this second type of evidence is "credible" when the buyer is "in the same relevant market as the purchaser," and is "not subject to market power by the seller or its affiliates."[45]

d. Second Deficiency Letter and Response

32. On November 25, 2019, Commission staff issued a deficiency letter to Applicants, asking if Cheyenne Light considered other purchase options besides the 2023 Agreement, and requesting that Applicants explain the circumstances of how Black Hills Wyoming and the City of Gillette came to enter into the Gillette Agreement.

33. In their Second Deficiency Response, Applicants first explain that Cheyenne Light considered a number of portfolio options in conjunction with an Integrated Resource Plan that was filed with the Wyoming Public Service Commission on November 30, 2018. Applicants state that the timing of Cheyenne Light's Integrated Resource Plan was driven by two factors: (1) the anticipated expiration of the 2009 Agreement; and (2) the existence of a Cheyenne Light option to purchase all of Black Hills Wyoming's interest in Wygen I, which was included as a term within the 2009 Agreement (Cheyenne Light Option). Applicants state that the Cheyenne Light Option expired on December 31, 2019. The potential resource plans or portfolios developed by Cheyenne Light included: Wygen I ownership (the Cheyenne Light Option); solar generation (30 MW and 60 MW options); wind generation (30 MW and 60 MW options); simple cycle gas fired turbine (LM6000) and a larger simple cycle gas fired turbine (LM6000+); an aeroderivative simple cycle gas fired turbine (LMS 100); combined-cycle turbines modeled at 1x1 and

[43] *Id*. at 18 (citing Wyoming Consumer Advocate Protest at 9) (emphasis added by Applicants).

[44] *Id*.

[45] *Id.* at 21.

2x1 configurations (LM6000 and LM6000+); and Wartsila reciprocating engines (totaling 51 MW, 102 MW, and 98.3 MW options).[46] Applicants state that Cheyenne Light conducted a cost and risk analysis for each of the potential portfolios, which led to the Cheyenne Light Option as the preferred plan. Applicants state that Cheyenne Light also clarified that it would continue to review the market and other options and that, in order for Cheyenne Light to exercise the Cheyenne Light Option, Commission approval and a market comparable sales transaction would be required.[47]

34. Applicants explain that the Wyoming Public Service Commission does not formally approve or deny a utility's Integrated Resource Plan or its preferred resource plan, but instead allows stakeholders, customers, and interested parties to file comments. Applicants state that the Wyoming Consumer Advocate and Dyno Nobel Inc./HollyFrontier and other stakeholders filed comments in Cheyenne Light's Integrated Resource Plan docket. Applicants note that one example of those comments is a criticism by Dyno Nobel/HollyFrontier that Cheyenne Light should have also considered re-negotiation and extension of the current 2009 Agreement. Applicants explain further that after the Integrated Resource Plan was filed and Cheyenne Light provided its reply comments, but while the docket remained open, Black Hills Wyoming negotiated and entered into the Gillette Agreement, and after full execution of the Gillette Agreement, Black Hills Wyoming offered Cheyenne Light an agreement with the same terms and conditions (including pricing) for a new, 60-MW, unit-contingent agreement sourced from Wygen I: the 2023 Agreement. Applicants state that Cheyenne Light added the 2023 Agreement to the original Integrated Resource Plan as another option, and that the 2023 Agreement was determined to be a more economical alternative than the other non-Wygen I resources considered in the Integrated Resource Plan.[48]

35. Second, Applicants explain that before entering into the Gillette Agreement, Black Hills Wyoming had 5 MW of uncommitted energy and capacity at Wygen I, which has been traded and sold in the market through shorter term transactions. Applicants state that Black Hills Wyoming and the City of Gillette both operate within the WACM Balancing Area Authority, and both have electric generation assets located at the Gillette Energy Complex, where Wygen I is located. Applicants state that in an effort to locate a longer-term sales solution for the 5 MW of uncommitted energy and capacity from Wygen I, Black Hills Wyoming approached the City of Gillette and asked if it would be interested in considering a purchase of the uncommitted 5 MW. Applicants state that the City of Gillette indicated it was interested in exploring a potential purchase, and an

[46] Applicants Second Deficiency Response at 2-3.

[47] *Id*. at 3.

[48] *Id*. at 3-4.

agreement was negotiated and then approved by the City of Gillette city council. Applicants state that the Gillette Agreement was executed on May 30, 2019.[49]

e. Reply Comments

36. Dyno Nobel/HollyFrontier argue that Applicants have not demonstrated that Cheyenne Light gave adequate consideration to other alternatives. Dyno Nobel/HollyFrontier point to previous cases in which franchised public utilities with captive customers have relied, at least in part, on their state-level Integrated Resource Plan processes to justify affiliate purchases. Dyno Nobel/HollyFrontier state that it appears that the processes employed by those public utilities generally included competitive solicitations, involved independent third-party review of proposed sales, were approved by state commissions, and/or were unopposed by all parties. Dyno Nobel/HollyFrontier state that none of those factors are present here.[50]

37. Dyno Nobel/HollyFrontier explain that they and others criticized the Integrated Resource Plan in comments filed with the Wyoming Public Service Commission, noting, among other things, that Cheyenne Light did not solicit offers from other suppliers. Dyno Nobel/HollyFrontier state that, even if the Integrated Resource Plan is considered in the best evidentiary light possible and is assumed to constitute evidence that Cheyenne Light considered other alternatives, it still does not establish that such consideration was adequate or sufficient for Applicants to meet their evidentiary burden under *Edgar*.[51]

38. Dyno Nobel/HollyFrontier also argue that the additional information filed by Applicants confirms Dyno Nobel/HollyFrontier's previous arguments that the sale to the City of Gillette has no probative value and should be disregarded in its entirety. Dyno Nobel/HollyFrontier state that the information provided confirms that the sale was not entered into as the result of a competitive solicitation, and that "there is no other evidence indicating that the City of Gillette: (1) considered other supply alternatives; (2) determined that Black Hills Wyoming represented the lowest cost supply option in the market; or (3) did not have ulterior motives when entering into the transaction."[52] Dyno Nobel/HollyFrontier assert that "the information confirms that the sale should not be

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

[50] Dyno Nobel/HollyFrontier January Comments at 2.

[51] *Id*. at 3-4.

[52] *Id*. at 4.

considered evidence of what constitutes the lowest cost supply option in this market and is not relevant to any other issue before the Commission."[53]

f. Applicants' Answer

39. Applicants respond to Dyno Nobel/HollyFrontier by arguing that Dyno Nobel/HollyFrontier continue to misinterpret *Edgar* precedent, as neither *Edgar* nor subsequent Commission precedent requires a request for proposal by Applicants (or by the City of Gillette) as a prerequisite for Commission approval.[54] Applicants respond that the existence of the original Integrated Resource Plan (and the subsequent analysis of the 2023 Agreement within that general Integrated Resource Plan framework) "was not offered as justification for the affiliate contract, but rather as a direct response to the Commission's question inquiring whether Cheyenne Light considered other options. The [Integrated Resource Plan] shows the other options that were considered and the manner in which they were considered."[55]

40. In response to Dyno Nobel/HollyFrontier's criticism that Applicants did not present evidence of the City of Gillette's decision-making process, and Dyno Nobel/HollyFrontier's repeated arguments that the Commission should "presume" that, despite garnering its City Council's approval, City of Gillette had "ulterior motives" and "was very likely motivated by consideration other than price,"[56] Applicants argue that there is nothing in *Edgar* precedent which would support Dyno Nobel/HollyFrontier's argument that the Commission should begin its evaluation of a non-affiliate, negotiated transaction with a presumption of "ulterior motives" on the part of the purchaser.[57]

C. Hearing and Settlement Judge Procedures

41. Applicants' proposed filing raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Specifically, we are setting for hearing the issue of whether Applicants have satisfied the second of *Edgar*'s approaches, i.e., whether the Gillette Agreement provides evidence of prices that a non-affiliated buyer

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[53] *Id*.

[54] Applicants January Answer at 4-5.

[55] *Id*. at 6.

[56] *Id*. at 7 (citing Dyno Nobel/HollyFrontier January Comments at 4-5).

[57] *Id*. at 6-7.

(i.e., the City of Gillette) was willing to pay for similar services from the affiliate, and whether the Gillette Agreement was an arms-length transaction.

42. Our preliminary analysis indicates that Applicants' proposed filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we accept Applicants' proposed market-based rate tariff revisions for filing, suspend them for a nominal period, make them effective October 2, 2019, subject to refund, and set the proposed filing for hearing and settlement judge procedures.

43. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[58] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.[59] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Applicants' proposed market-based rate tariff revisions are hereby accepted for filing and suspended for a nominal period, to become effective October 2, 2019, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a

[58] 18 C.F.R. § 385.603 (2019).

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

public hearing shall be held concerning Applicants' proposed filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.