

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

May 6, 2005

In Reply Refer To:

Black Hills Colorado, LLC

Docket Nos. ER00-1952-001 and
ER00-1952-002

Black Hills Pepperell Power Associates, Inc.

Docket Nos. ER96-1635-008,
ER96-1635-009 and ER05-789-000

Black Hills Power, Inc

Docket Nos. ER99-2287-001 and
ER99-2287-002

Black Hills Wyoming, Inc.

Docket No. ER03-802-002

Fountain Valley Power, LLC

Docket Nos. ER01-1784-004 and
ER01-1784-005

Harbor Cogeneration Company, LLC

Docket Nos. ER99-1248-003 and
ER99-1248-004

Las Vegas Cogeneration II, LLC

Docket No. ER03-222-004

Morgan, Lewis & Bockius LLP
Attn: Michael C. Griffen, Esq.
Attorney for Black Hills Corporation
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Griffen:

1. On November 25, 2002, Black Hills Corporation (Black Hills) filed a consolidated updated market power analysis on behalf of Black Hills Colorado, LLC (Black Hills Colorado), Black Hills Pepperell Power Associates, Inc. (Black Hills Pepperell), Black Hills Power, Inc. (Black Hills Power), Black Hills Wyoming, Inc. (Black Hills Wyoming), Fountain Valley Power, LLC (Fountain Valley), and Harbor Cogeneration Company, LLC (Harbor Cogeneration) (collectively, the Black Hills Utilities) pursuant to

the requirements of the Commission's order granting the Black Hills Utilities authority to sell capacity and energy at market-based rates.¹

2. On December 23, 2004, Black Hills filed a consolidated updated market power analysis on behalf of the Black Hills Utilities, pursuant to the Commission's order issued on May 13, 2004.² Black Hills states that the May 13 Order did not identify Las Vegas Cogeneration II, L.L.C. (LV Cogen II) as subject to the updated market power analysis requirement. Black Hills states that in the interest of providing a comprehensive analysis of all the Black Hills Utilities, Black Hills provides an analysis for LV Cogen II.³

3. On April 6, 2005, Black Hills filed on behalf of its subsidiary Black Hills Pepperell, formerly known as Indeck Pepperell Power Associates, Inc. (Pepperell), a notice of cancellation of Pepperell's market-based rate wholesale power sales tariff and all service agreements under the tariff.⁴

4. As discussed below, the Commission concludes that, with the tariff modification directed herein, the Black Hills Utilities satisfy the Commission's standards for market-based rate authority. The Commission also accepts the notice of cancellation of Black Hills Pepperell's market-based rate tariff and all service agreements under the tariff, effective April 7, 2005 as requested.

5. Black Hills, a South Dakota based company, is the parent company of the Black Hills Utilities. The Black Hills Utilities own generation in the Western Area Power Administration-Colorado Missouri (WACM), Public Service Company of Colorado (PSCo), and Nevada Power Company (Nevada Power) control areas, and the California

¹ *Indeck Colorado, LLC*, Docket No. ER00-1952-000 (May 5, 2000) (unpublished letter order), *Black Hills Power, Inc.*, 87 FERC ¶ 61,163 (1999), *Black Hills Generation, Inc.*, Docket No. ER01-1844-000 (June 22, 2001) (unpublished letter order), *Fountain Valley Power, LLC*, Docket No. ER01-1784-000 (June 11, 2001) (unpublished letter order), *Harbor Cogeneration Company*, 86 FERC ¶ 61,255 (1999).

² *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

³ See *Las Vegas Cogeneration II, LLC*, Docket No. ER03-222-000 (February 28, 2003) (unpublished letter order).

⁴ Pepperell states that commercial operations ceased in October 2003 and that they have not made any sales of electric power, under the tariff or otherwise, since then due to operational and market conditions. Pepperell further states in their filing that they do not have any power sales customers nor any obligations to make sales. All service agreements under the tariff have terminated by their own terms.

Independent System Operator Corporation (CAISO) and the New England Independent System Operator (ISO-NE) markets. Specifically, Black Hills Power and Black Hills Wyoming own 621 MW in the WACM control area. Fountain Valley and Black Hills Colorado own 534 MW in the PSCO control area. Las Vegas Cogeneration, LP⁵ and LV Cogen II own 278 MW in the Nevada Power control area. Black Hills Ontario, LLC⁶ and Harbor Cogeneration own 109 MW in the CAISO market and Black Hills Pepperell owned a 40 MW facility in the ISO-NE market.

Procedural Matters

6. Notice of the Black Hills Utilities' November 25, 2002 filing was published in the *Federal Register*, 67 Fed. Reg. 72,938 (2002), with interventions and protests due on or before December 16, 2002. None was filed.

7. Notice of the Black Hills Utilities' December 23, 2004 filing was published in the *Federal Register*, 70 Fed. Reg. 1,429 (2004), with interventions and protests due on or before January 13, 2005. None was filed.

8. Notice of the Black Hills Utilities' April 6, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 20,890 (2005), with protests and interventions due on or before April 27, 2005. None was filed.

Discussion

Market-Based Rate Authorization

9. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁷ As discussed below,

⁵ Las Vegas Cogeneration, LLC, is a wholly-owned, indirect subsidiary of Black Hills Corporation, which does not have market-based rate authority.

⁶ Black Hills Ontario, LLC, is a qualifying cogeneration facility located in California, which does not have market-based rate authority.

⁷ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

the Commission concludes that, with the tariff modification directed herein, the Black Hills Utilities satisfy the Commission's standards for market-based rate authority.

10. In its order issued in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004), the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Black Hills has prepared both the pivotal supplier and the wholesale market share screen analyses for the WACM and Nevada Power control areas, and the CAISO market. In addition, Black Hills states that the Black Hills Utilities also own generation in the PSCo control area and ISO-NE market. Black Hills also states that all of the generating capacity that its subsidiaries own in the PSCo control area is committed under a long-term contract that provides all output and dispatch rights to PSCo. Further, Black Hills states that the only generation owned by the Black Hills Utilities in the ISO-NE market is a 40 MW facility (of which they own 28 MW), which is no longer in service.⁸

11. The Commission has reviewed the Black Hills Utilities' generation market power screens and has determined that the Black Hills Utilities pass both the pivotal supplier and wholesale market share screens. Accordingly, the Commission finds that the Black Hills Utilities satisfy the Commission's generation market power standard for the grant of market-based rate authority.

12. The Black Hills Utilities state that only Black Hills Power owns or controls transmission facilities and that open access transmission service over Black Hills Power's transmission system is available under the joint open access transmission tariff of Black Hills Power, Basin Electric Power Cooperative, and Powder River Energy Corporation.⁹ No intervenors have raised transmission market power concerns. Based on these representations, the Commission finds that the Black Hills Utilities satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

13. Black Hills explains that none of the Black Hills Utilities or their affiliates owns or controls natural gas transmission systems, sites for potential construction of new generation, or any other key inputs into the domestic power supply industry that may be used to create barriers to entry for competing power suppliers. While affiliates of the Black Hills Utilities own and operate natural gas and oil transportation systems, none

⁸As discussed above, a notice of cancellation has been filed, herein, for Pepperell.

⁹See *Black Hills Power Inc.*, 108 FERC ¶ 61,165 (2004).

control access to fuel supplies that could be used to foreclose entry to the electric generating market by potential competitors. No intervenors have raised concerns regarding barriers to entry. Based on these representations, the Commission is satisfied that the Black Hills Utilities cannot erect barriers to entry. However, should the Black Hills Utilities deny, delay or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, then that electric competitor may file a complaint with the Commission that could result in the suspension of the Black Hills Utilities' authority to sell power at market-based rates.¹⁰

14. Black Hills Utilities state that their market-based rate wholesale power sales tariffs are subject to the Commission's market-based rate code of conduct requirements and the rules addressing affiliate abuse and reciprocal dealing. No intervenors have raised affiliate abuse concerns. However, based on the Commission's review of the Black Hills Utilities' market-based rate tariffs, with the exception of Black Hills Wyoming, the tariffs do not prohibit sales to Black Hills Utilities affiliates "without first receiving" Commission authorization of the transaction under section 205 of the Federal Power Act (FPA). Therefore, consistent with Commission precedent, the Black Hills Utilities are directed to make a compliance filing within 30 days of the date of issuance of this order to revise their market-based rate tariffs, with the exception of the Black Hills Wyoming tariff, to include such language.¹¹ Based on the Black Hills Utilities' representations and subject to the tariff revision we direct herein, we find that the Black Hills Utilities satisfy the Commission's concerns with regard to affiliate abuse.

15. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹² Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹³

¹⁰ See, e.g., *Louisville Gas & Electric Company*, 62 FERC ¶ 61,016 (1993).

¹¹ *Aquila, Inc.*, 101 FERC ¶ 61,331 at P 12 (2002).

¹² *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

16. Black Hills Wyoming and LV Cogen, II. have the market behavior rules on file.¹⁴ However, our review of the market-based rate tariffs of Black Hills Colorado, Black Hills Power, Fountain Valley Power, and Harbor Cogeneration indicate that they have not submitted the Commission's market behavior rules as directed in the Market Behavior Rules Order.¹⁵ Accordingly, these companies are directed, within 30 days of the date of issuance of this order, to revise their respective market-based rate tariffs to incorporate the market behavior rules.

17. The Black Hills Utilities must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁶ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, the Black Hills Utilities are directed, within 30 days of the date of issuance of this order, to revise the respective market-based rate tariffs to incorporate the following provision:

[Insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based

¹³ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

¹⁴ See *Williams Power Company, Inc.*, Docket No. ER03-1331-002 (March 29, 2004) (unpublished letter order).

¹⁵ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) (Market Behavior Rules Order), *order on reh'g*, 107 ¶ FERC 61,175 (2004).

¹⁶ *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652).

rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

18. The Black Hills Utilities are directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

By direction of the Commission.

Magalie R. Salas,
Secretary.