

123 FERC ¶ 62,236  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Black Hills Wyoming, Inc.

Docket No. EC08-88-000

ORDER AUTHORIZING ACQUISITION OF  
GENERATION FACILITY

(Issued June 19, 2008)

On May 16, 2008, Black Hills Wyoming, Inc. (Black Hills Wyoming or Applicant) submitted an application pursuant to section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization for the acquisition by Black Hills Wyoming of Wygen Funding L.P.'s (Wygen Funding) Wygen I Generating Facility (Wygen Facility) that it already leases and operates.

Wygen Funding is a limited partnership formed to act as lessor under a lease arrangement under which it owns the Wygen Facility and leases it to Black Hills Wyoming. Wygen Funding is a passive owner of the Wygen Facility and does not operate, maintain, or control it. The Wygen Facility is a 90 megawatt, exempt wholesale generator, located in Gillette, Wyoming.

Black Hills Wyoming currently leases, controls, and sells the majority of the output and capacity of the Wygen Facility on a long-term basis. Black Hills Wyoming is a wholly-owned, indirect subsidiary of Black Hills Corporation, which is a holding company that engages in electric and gas utility service in South Dakota, Wyoming and Montana, and wholesale energy production and marketing in the western United States and Canada. Black Hills Corporation conducts its wholesale energy production and marketing through Black Hills Energy, Inc., which in turn owns Black Hills Generation, Inc. Black Hills Generation, Inc. owns a series of project companies that own and operate generating facilities in the western United States, among which is Black Hills Wyoming. Black Hills Wyoming has market-based rate authority.

Pursuant to a Lease Agreement between Wygen Funding and Black Hills Generation, Inc., dated July 20, 2001, Black Hills Wyoming has the right to purchase the Wygen Facility from Wygen Funding pursuant to a provision of prior written notice. Black Hills Wyoming provided written notice to Wygen Funding on March 19, 2008, and

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<sup>1</sup> 16 U.S.C. § 824b (2000), *as amended* by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

indicated that it intends to complete its purchase of the Wygen Facility on June 20, 2008, at which time Black Hills Wyoming will own the Wygen Facility in its entirety.

Applicant states that the transaction is consistent with the public interest and will not adversely affect competition, rates or regulation, and it does not raise any cross-subsidization issues. With respect to competition, Applicant states that the proposed transfer raises no horizontal market power concerns. Applicant states that because it currently leases and controls the Wygen Facility, the transaction is simply a change in ownership, and, therefore, the transaction will not result in a combination of generating facilities in any region or an effective change in control over any generating facility. Applicant states that 80 megawatts of capacity from the Wygen Facility are committed under long-term contracts to both an affiliate and a non-affiliate, and the remaining 10 megawatts of capacity are marketed under short-term contracts. Applicant states that the transaction will not change either of those practices. Applicant states that the transaction raises no vertical market power concerns. Applicant states that the transaction does not involve or affect any input to electricity production owned by any party or affiliate. Applicant states that the transactions will not cause Black Hills Wyoming to gain the ability or incentive to affect prices or outputs in the downstream electricity markets or to discourage entry by new generators.

Applicant states that the transaction will have no adverse effect on rates. Applicant contends that the rights of the long-term contract holders will not be affected by the transaction. Applicant states that it does not serve retail customers, and thus, no retail customers will be affected by the transaction. In addition, Applicant states that its market-based rates will not be affected by the transaction.

Applicant states that the transaction will not affect the ability of the Commission to regulate its jurisdictional activities because Black Hills Wyoming will continue to operate and serve its customers under their pre-transaction sales contracts without change. Further, Black Hills Wyoming states that it will remain subject to the Commission's regulations pursuant to its market-based rate tariff. Applicant also states that the transaction will not adversely affect the ability of state regulators to regulate the sale of power to retail customers.

Applicant states that the transaction does not raise any cross-subsidization concerns. Applicant contends that neither Black Hills Wyoming nor Wygen Funding has any captive customers. In addition, Applicant asserts that none of the captive customers of Black Hills Wyoming's affiliates will be affected by the transaction. Thus, Applicant contends that the transaction qualifies as a safe harbor transaction.<sup>2</sup> In addition,

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<sup>2</sup> See *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008).

Applicant provides affirmative statements that the proposed transaction will not result in improper cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of any non-utility associate company at the time of the transaction or in the future.

Order No. 652 requires that sellers with market-based rate authorization 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.<sup>3</sup> The foregoing authorization may result in a change in status. Accordingly, Applicant is advised that it must comply with the requirements of Order No. 652. In addition, Applicant shall make appropriate filings under section 205 of the FPA, to implement the transaction.

This filing was noticed on May 19, 2008, with comments, protests or interventions due on or before June 6, 2008. None was received. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). Any opposed or untimely filed motion to intervene is governed by the provision of Rule 214.

After consideration, it is concluded that the transaction is consistent with the public interest and is hereby authorized, subject to the following conditions:

- (1) The transaction is authorized upon the terms and conditions and for the purposes set forth in the application;
- (2) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determination of cost or any other matter whatsoever now pending or which may come before the Commission;
- (3) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;
- (4) The Commission retains authority under sections 203(b) and 309 of the FPA, to issue supplemental orders as appropriate;

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<sup>3</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

- (5) If the transaction results in changes in the status or the upstream ownership of Applicant's affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made;
- (6) Applicant shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction;
- (7) Applicant must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction; and
- (8) Applicant shall notify the Commission within 10 days of the date that the transaction has been consummated.

This action is taken pursuant to the authority delegated to the Director, Division of Tariffs and Market Development – West under 18 C.F.R. § 375.307. This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order pursuant to 18 C.F.R. § 385.713.

Steve P. Rodgers  
Director  
Division of Tariffs and Market Development - West

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