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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08A-470E

**IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO
ELECTRIC UTILITY COMPANY, LP, FOR AN ORDER APPROVING ITS 2009
QUALIFYING RETAIL UTILITY COMPLIANCE PLAN.**

**SETTLEMENT AGREEMENT
AND MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT**

Black Hills/Colorado Electric Utility Company, LP ("Black Hills" or the "Company"), the Trial Staff of the Colorado Public Utilities Commission ("Trial Staff"), and the Colorado Office of Consumer Counsel ("OCC") (together referred to as the "Parties"), by and through their respective undersigned counsel, and for good and valuable consideration, herewith enter into this Settlement Agreement ("Settlement Agreement") to resolve all disputed issues that have arisen or could have arisen in this docket regarding the Verified Application for an order approving Black Hills' 2009 Qualifying Retail Utility Compliance Plan ("2009 Compliance Plan"). The Parties submit that this Settlement Agreement results in a fair disposition of all disputed issues in this docket and that this Settlement Agreement is just and reasonable. Therefore, the Parties respectfully request that the Commission vacate all remaining filing dates and deadlines,¹ vacate the hearing set for March 19-20, 2009,² and approve this Settlement Agreement.

¹ Black Hills's rebuttal testimony and exhibits are due on March 4, 2009.

² In the event the Commission wishes to hold a hearing on this Settlement Agreement, the Parties respectfully request that the hearing occur on March 19, 2009, the first day of the scheduled hearing.

I. PROCEDURAL HISTORY

1. On October 20, 2008, Black Hills filed its application for an order approving its 2009 Compliance Plan. The Commission issued its Notice of Application Filed on October 21, 2008. Trial Staff and the OCC timely intervened and are the only other parties in this docket.

2. By Minute Order dated December 3, 2008, the Commission assigned this matter to Administrative Law Judge Mana L. Jennings-Fader.

3. By Minute Order also dated December 3, 2008, the Commission deemed the Application complete as of December 5, 2008. A Commission decision in this docket should issue within 210 days of that date (*i.e.*, July 3, 2009), pursuant to Colo. Rev. Stat. § 40-6-109.5(2).

4. In Decision No. R09-0015-I issued January 7, 2009, Administrative Law Judge Jennings-Fader established the procedural schedule in this docket, including *inter alia* various filing dates and a hearing set for March 19 and 20, 2009.

5. Pursuant to the adopted procedural schedule, Black Hills filed its direct testimony and exhibits on January 7, 2009, and Trial Staff and OCC filed their answer testimony and exhibits on February 9, 2009.³ Black Hills's rebuttal testimony and exhibits are due on March 4, 2009. Stipulations are due on or before March 16, 2009.

6. During the prehearing phase of this docket, the Parties have actively exchanged information through audit requests, formal data requests, and informal exchanges of information and discussions. As a result of settlement negotiations, Black Hills, Trial Staff and the OCC have concluded a settlement of all the disputed issues in this docket. An agreement in principle

³ By Decision Nos. R09-0093-I and R09-0120-I, the due dates for answer testimony and exhibits were extended to February 9, 2009 for all intervenors.

to settle all disputed issues in this docket was reached by the Parties on February 25, 2009.

7. This Settlement Agreement memorializes the negotiated settlement and stipulations among the Parties. As a result of the settlement negotiations, all Parties agree, as set forth below, that all issues in dispute, or that could have been disputed in this docket, have been resolved to the satisfaction of the Parties, and that the terms and stipulations in this Settlement Agreement are fair, just and reasonable.

II. THE SETTLEMENT

8. A total of seven (7) issues were disputed between the Parties. This section of the Settlement Agreement will set forth the position of the Party who raised each disputed issue and the negotiated resolution of the disputed issue.

- a) **Issue:** The OCC recommended that the Commission not allow Black Hills to use Solar On-site Renewable Energy Credits ("SO-RECs") to satisfy a portion of its remaining solar compliance requirement because SO-RECs are a more expensive form of compliance. In order to meet the remaining portion of its solar requirement for 2009, the OCC recommended that Black Hills be required to purchase Solar Renewable Energy Credits ("S-RECs") in the open market.

Resolution: Black Hills agrees with the OCC's recommendation. The OCC recommendation essentially allows banking of RECs separately by type and source. Black Hills agrees that the Commission's Renewable Energy Standard Rules, 4 *Colo. Code Regs.* 723-3-3650 *et seq.*, do not specifically prohibit this practice, and concurs with OCC that banking of RECs is the preferred practice. Black Hills agrees to follow a process substantially the same as the process used for acquiring S-RECs for compliance

years 2007 and 2008 where such S-RECs were acquired on the open market from providers of Green-E certified RECs.

- b) **Issue:** Trial Staff recommended that Black Hills identify possible renewable energy resource acquisitions within 90 days after the conclusion of Docket No. 08A-346E, the Company's Energy Resource Plan or with its 2010 Compliance Plan Filing. Trial Staff recommended that the Company agree in this docket to adjust the Renewable Energy Standard Adjustment ("RESA") if the results of Docket No. 08A-346E resulted in changes to the proposed plan in this docket and an adjustment to the RESA.

Resolution: This Trial Staff recommendation asks Black Hills to confirm formally its future renewable energy resource acquisitions once the outcome of Docket No. 08A-346E is finally determined. Black Hills has always planned to do that. Black Hills agrees to identify future renewable energy resource acquisitions in the 2010 Compliance Plan, if practicable, but in any event no later than 90 days after the effective date of the final Commission decision resolving Docket No. 08A-346E. In the event that the resolution of Docket No. 08A-346E causes the need for an adjustment to the RESA recovery rate, Black Hills agrees to file a tariff change request (with thirty days notice) as soon as practicable after the effective date of the final Commission decision resolving the final application for rehearing, reargument or reconsideration of the Commission's Phase I decision in Docket No. 08A-346E.

- c) **Issue:** Trial Staff recommended that the Commission shorten filing time from 90-days to 60-days after compliance month for submittal of the monthly Colorado Renewable Energy Standard reports to the Commission.

Resolution: In general, Black Hills understands Trial Staff's concerns, but finds only part of this request reasonable in light of exigent circumstances. Staff, upon explanation by Black Hills, now understands that completion of monthly RES reports is dependent on receipt of the Public Service Company ("Public Service or PSCo") monthly wholesale Power Purchase Agreement ("PPA") invoice, which is out of the control of Black Hills. Generally, the PSCo wind REC data is available for reporting 60 to 70 days after the end of the month reported. Allowing time for processing and report preparation, it takes a minimum of 65 to 75 days to submit the report. Occasionally, vacations, holidays or unforeseen events can push that out a few days. The current 90 days is a reasonable filing time with adequate cushion for unusual circumstances. Black Hills has discussed reporting alternatives that increase the timeliness of the non-PSCo related data. Black Hills agrees to submit each monthly report within forty-five days of the end of the month being reported with the understanding that there will be a two month delay in reporting the information provided to Black Hills by PSCo. As an example, for clarity, the January report would typically be due on March 17th and contain all the required data for January with the exception of the data supplied by PSCo. The typical January report would contain PSCo provided data for November of the preceding year.

- d) **Issue:** Trial Staff recommended that, if Black Hills chooses to use another source besides the Western Renewable Energy Generation Information System ("WREGIS") for tracking its RECs, that it pick another supplier within 30 days of its decision not to use WREGIS, and make a filing with the Commission within 30 days after its decision to select another supplier, providing the necessary information on the new system of tracking REC compliance.

Resolution: Black Hills currently tracks RECs needed for Colorado RES compliance in an internally designed spreadsheet. Black Hills has explored the option of using WREGIS and has not identified any other practical third-party alternative. Black Hills has decided to utilize WREGIS for tracking RECs produced by Company generation in jurisdictions other than Colorado. Black Hills understands that WREGIS is not available for tracking RECs from small customer located systems. Those systems will continue to be tracked in the internally designed spreadsheet currently being provided by Black Hills. Non-solar RECs are primarily received from and tracked by PSCo under the wholesale PPA. In Colorado, Black Hills currently has to track just four large system solar contracts along with the minimal bio-mass/bio-diesel generation at Company-owned plants. Black Hills is evaluating the economic value in incurring the WREGIS fees for such limited need. Black Hills acknowledges that this situation will likely change as more contracts are signed and when the PSCo PPA expires in 2012. It is our intent to use WREGIS in Colorado as soon as it becomes practical. Black Hills agrees to submit, as part of the 2010 Compliance Plan, a discussion of and a detailed timeline for the initiation of tracking through WREGIS the RECs from Company-owned generation and customer owned systems with production meters.

- e) **Issue:** Trial Staff recommended that the Commission require the Company to monitor Public Service Solar acquisition activities, and intervene in any docket filed by Public Service if Black Hills believes PSCo solar acquisition impacts Black Hills' ability to acquire its required solar resources in its Colorado service territory.

Resolution: Black Hills acknowledges Trial Staff's concern and agrees to monitor PSCo activities within our service territory to the extent they become known to the Company.

In general, Black Hills already monitors PSCo's activity at the Commission. Although the PUC lacks the authority to order Black Hills to intervene in another utility's dockets, Black Hills may choose to intervene when it determines that a PSCo docket may economically impact its customers or infringe on the rights of the Company to serve its customers or to earn its authorized return. Black Hills also acknowledges the significance of this issue and agrees to review and modify, as necessary, the marketing and outreach efforts to our large customers to avoid any "cherry picking" of the on-system RECs available from Black Hills customers by other utilities or parties seeking RECs for their own requirements.

- f) **Issue:** Trial Staff recommended that the Commission order Black Hills to provide copies of any internal audits and/or reports conducted or initiated by Black Hills regarding Black Hills' compliance with Colorado Renewable Energy Standards within 30 days of the completion of those audits or reports.

Resolution: In general, Black Hills accepts this recommendation. In certain situations, Company departments may be allowed time to respond to and even correct internal audit findings. Black Hills would deem an audit or report "complete" only after that response period and the subsequent acceptance of the report by management. With that understanding, Black Hills agrees to provide to Trial Staff and the OCC the complete internal audits or reports (under confidential seal if required) on or before 30 days after they are deemed complete by Black Hills management.

- g) **Issue:** Trial Staff Recommended that Black Hills submit the 2009 third-party audit report as required by Rule 3659 (l) (IV) as an attachment to either 2008 Renewable Energy Standard Compliance Report or 2010 Renewable Energy Standard Compliance Plan.

Resolution: Black Hills acknowledges its obligation to have the third-party audit performed. Because Black Hills requires time to 1) identify potential auditors, 2) select an auditor, 3) agree to the scope of work, 4) allow the auditor time to perform the audit and 5) review and respond to the audit report as necessary, Black Hills agrees to submit the final audit report on or before September 1, 2009.

III. GENERAL TERMS AND CONDITIONS

9. Through active prehearing investigation and negotiation, the Parties have reached the settlement set forth herein resolving all contested and disputed issues in this docket in a manner which the Parties agree is just and reasonable and in the public interest. This Settlement Agreement reflects the compromise and settlement of all issues raised or that could have been raised in this docket. The Parties further agree that reaching agreement by means of negotiation and settlement rather than through litigation is in the public interest.

10. The Parties agree to present, to support, and to defend this Settlement Agreement before the Commission and in the courts. The Parties further agree, if the Commission sets a hearing on this Settlement Agreement, to present testimony and exhibits in a hearing to obtain the Commission's approval of this Settlement Agreement. If such a hearing is conducted, the Parties hereby agree that all pre-filed testimony and exhibits shall be admitted into evidence in this docket without cross-examination.

11. This Settlement Agreement shall not become effective until the issuance of a final Commission Order approving the Settlement Agreement, which Order does not contain any modifications of the terms and conditions of this Settlement Agreement that are unacceptable to either of the Parties. In the event the Commission modifies this Settlement Agreement in a

manner unacceptable to any Party, that Party shall have the right to withdraw from this Settlement Agreement and proceed to hearing on the issues that may be appropriately raised by that Party in this docket. The withdrawing Party shall notify the Commission and the other Party to this Settlement Agreement by e-mail and facsimile within five (5) business days of the Commission Order that the Party is withdrawing from the Settlement Agreement and that the Party is ready to proceed to hearing; the e-mail and facsimile notice shall designate the precise issue or issues on which the Party desires to proceed to hearing (the "Hearing Notice").

12. The withdrawal of a Party shall not automatically terminate this Settlement Agreement as to any other Party. Within three (3) business days of the date of the Hearing Notice from the first withdrawing Party, all Parties shall confer to arrive at a comprehensive list of issues that shall proceed to hearing and a list of issues that remain settled as a result of the first Party's withdrawal from this Settlement Agreement. Within five (5) business days of the date of the Hearing Notice, the Parties shall file with the Commission a formal notice containing the list of issues that shall proceed to hearing and those issues that remain settled. The Parties who proceed to hearing shall have and be entitled to exercise all rights with respect to the issues that are heard that they would have had in the absence of this Settlement Agreement.

13. Hearing shall be scheduled as soon as practicable on all of the issues designated in the formal Hearing Notice filed with the Commission. In the event that this Settlement Agreement is not approved, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall not be admissible into evidence in this or any other proceeding. In the event that this Settlement Agreement is approved with conditions that are unacceptable to any Party who subsequently withdraws, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall not be admissible into evidence in this or any other

proceeding as to that withdrawing Party. However, as to Parties which do not withdraw from this Settlement Agreement, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall be admissible into evidence in any proceeding to enforce the terms of this Settlement Agreement.

14. Approval by the Commission of this Settlement Agreement shall constitute a determination that the Settlement Agreement represents a just, equitable and reasonable resolution of all issues that were or could have been contested among the Parties in this proceeding.

15. All Parties specifically agree and understand that this Settlement Agreement represents a negotiated settlement in the public interest with respect to the various matters and issues presented in this docket, for the sole purpose of the settlement of the matters agreed to in this Settlement Agreement. No Party or person shall be deemed to have approved, accepted, agreed to, or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in this Settlement Agreement, other than as specifically provided for herein. Notwithstanding the resolution of the issues set forth in this Settlement Agreement, none of the methods or principles herein contained shall be deemed by the Parties to constitute a settled practice or precedent in any future proceeding.

16. This Settlement Agreement may be executed in counterparts and by facsimile copies of signatures, all of which when taken together shall constitute the entire Settlement Agreement with respect to the issues addressed by this Settlement Agreement.

CONCLUSION

For the reasons stated above, the Parties respectfully request that the Commission enter an order vacating all remaining pre-filing dates and approving this Settlement Agreement

with the finding that the Commission's approval of this Settlement Agreement represents a fair, just, and reasonable resolution of all disputed issues that have arisen, or which could have arisen, in this docket and further closing this docket.

DATED this 3rd day of March 2009.

Agreed on behalf of:

BLACK HILLS, INC., d/b/a BLACK HILLS
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BLACK HILLS, INC., d/b/a BLACK HILLS
ENERGY:

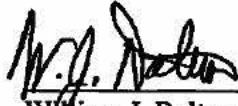
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DATED this 3rd day of March 2009.

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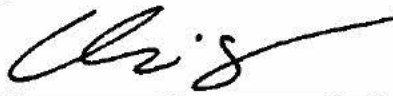
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