

CLIENT ALERT

# Mind the Gap: Don't Come Up Short on Required FERC Filings

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## AUTHORS

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On December 5, 2023, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved a Stipulation and Consent Agreement (“Consent Agreement”) between the Office of Enforcement (“OE”) and Black Hills Corporation (“BHC”), as the corporate parent of, and on behalf of, its three electric public utility subsidiaries (collectively, the “Black Hills Electric Public Utilities”).<sup>1</sup> The Consent Agreement resolves OE’s investigation into whether BHC and the Black Hills Electric Public Utilities (collectively, “Black Hills”) violated Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d (2018) (Section 205), and Part 35 of the Commission’s regulations, 18 C.F.R. Part 35 (2022), by failing to timely file 103 FERC-jurisdictional agreements with the Commission.<sup>2</sup> Notably, Black Hills self-reported the failures to OE and fully admitted to the violations in the Consent Agreement. Under the Consent Agreement, Black Hills agreed to pay a \$150,000 civil monetary penalty, provide semi-annual Status Reports, and file annual Compliance Monitoring Reports with the Commission.

<sup>1</sup> *Black Hills Corp. et al.*, 185 FERC ¶ 61,172 (2023).

<sup>2</sup> The Black Hills Electric Public Utilities are composed of Black Hills Power, Inc.; Cheyenne Light, Fuel and Power Company; and Black Hills Colorado Electric, LLC.

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### Background

The Black Hills Electric Public Utilities are subsidiaries of BHC. These subsidiaries are not electrically interconnected, and each has its own Open Access Transmission Tariff and Market-Based Rate Authority. The subsidiaries are incorporated in different states and are each engaged in generating, transmitting, and distributing electricity.<sup>3</sup>

In July 2017, Black Hills Power, Inc., one of the Black Hills Electric Public Utilities, submitted a self-report to OE that identified six jurisdictional agreements that it had failed to file with the Commission (four transmission interconnection agreements and two generation dispatch and energy management agreements).<sup>4</sup> Later that month, Black Hills Power filed the six agreements and refunded \$8,621.42.<sup>5</sup>

In November 2021, BHC updated the self-report and identified 97 additional unfiled contracts, necessitating an estimated \$1.2 million in refunds.<sup>6</sup> BHC also self-reported that it had identified three instances of historical wires-to-wires transmission interconnections with no corresponding interconnection agreements. Nearly half of the identified unfiled agreements were “short-term firm and non-firm transmission service contracts that had the same deviation from the Commission-approved *pro forma* agreement in existence at the time the contract was executed.”<sup>7</sup> Other identified agreements included: transmission wires-to-wires interconnection agreements; delivery service to wholesale customers over distribution assets agreements; joint ownership agreements for transmission assets; operation and maintenance services on transmission type assets; and administration agreements for the common-use system.<sup>8</sup> By August 2022, all 103 identified agreements had been filed with the Commission.<sup>9</sup> Although some of these agreements have been accepted, others are still pending before the Commission or have been rejected and must be refiled. Of the accepted agreements, Black Hills has issued, or has committed to issue, refunds where applicable.

### Violations, Remedies, and Sanctions

OE concluded that Black Hills violated FPA Section 205 and Part 35 of FERC's Regulations by failing to timely file 103 jurisdictional agreements that were required to be filed with the Commission.<sup>10</sup> Black Hills admitted to the violations. In the Consent Agreement, Black Hills agreed to pay a civil penalty of \$150,000 and issue any necessary refunds.<sup>11</sup> In addition, Black Hills agreed to (1) submit semi-annual Status Reports detailing the status of each of the 103 previously

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<sup>3</sup> Consent Agreement at P 3.

<sup>4</sup> *Id.* at P 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at P 6.

<sup>7</sup> *Id.* at P 7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 12.

<sup>10</sup> See 18 C.F.R. § 35.3(a)(1)–(2).

<sup>11</sup> Consent Agreement at P 14–15.

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unfiled agreements until the Commission has accepted or finally disposed of all agreements, and (2) file an annual Compliance Monitoring Report for two years following the acceptance or final disposition of all filed agreements, describing any known Commission regulatory violations, all compliance measures and procedures instituted or modified, and all compliance training administered, during the preceding year.<sup>12</sup> The report must include a signed affidavit from a Black Hills officer affirming the report's accuracy.

### Takeaways

This is an unusual case in a number of respects. First, Black Hills admitted to the violations. This and its self-reports and cooperation with FERC during the investigation undoubtedly helped to reduce its penalty exposure. Typically, economic gain or harm drives the penalty amount. Here, Black Hills will apparently pay more than \$1.2 million in refunds, yet its penalty is only \$150,000. This is a notable example of the way in which mitigating factors in the penalty guidelines give credit to self-reports, cooperation, admissions (which are rare), and settlements. Second, it is uncommon to see an enforcement action based on section 205 violations. The lesson here is that a utility must have strong internal controls and make filings required by the Commission. Although a utility might get a pass for a limited number of inadvertent failures to file, it may face enforcement consequences when there are more systemic problems involving a high number of missed filings that also trigger substantial refunds.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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<sup>12</sup> *Id.* at P 16–18.

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