

A. New Rules 6a-5 and 15Aa-3 under the Exchange Act, which would require SROs to implement certain minimum governance standards, including a majority independent board, fully independent Nominating, Governance, Audit, Compensation, and Regulatory Oversight Committees, and the separation of an SRO's regulatory functions from its market operations and other business interests ("Governance Standards Proposal").

B. Amendments to Rules 6a-2, 15Aa-1, and Rule 15Aa-2 (redesignated Rule 15Aj-1) and to Form 1 and to new Form 2 (redesignated Form X-15AA-1) and repeal of Forms X-15Aj-1 and X-15Aj-2 under the Exchange Act, which would require the SROs to provide to the Commission, and publicly disclose, greater and more current information about their operation and structure, including their governance processes, regulatory programs, financial condition, and ownership ("Transparency Proposal").

C. New Rule 17a-26 under the Exchange Act, which would require SROs to file with the Commission quarterly and annual reports containing specified information on the operation of their regulatory programs, including their examination, investigation, and enforcement activities ("SRO Reporting Proposal").

D. New Rules 6a-5(o) and 15Aa-3(o), new Rule 17a-27, and amendments to Form 1 and new Form 2, which would require SROs to (i) restrict ownership and voting levels of individual members to no more than 20% and (ii) report significant accumulations of ownership by any person, and would require SRO members to report significant ownership interest information as well ("SRO Ownership Proposal").

E. New Regulation AL, which would impose reporting and notification requirements on an SRO that lists or trades its own securities or those of its trading facilities or affiliates ("SRO Self-Listing Proposal").

F. Amendment to Rule 17a-1 under the Exchange Act, which would codify the current practice of the SROs to keep at least one copy of their required books and records in the United States ("Books and Records Proposal").

The Commission also will consider whether to publish for public comment a Concept Release, which would request and examine public comment on a variety of issues relating to the efficacy of the current self-regulatory system, including the possibility of implementing specified enhancements to the current SRO system or pursuing one of several possible alternative regulatory models.

For further information, please contact Geraldine Idrizi at (202) 942-7317 (Governance Standards Proposal); Susie Cho at (202) 942-0748 or Leah Mesfin at (202) 942-0196 (Transparency Proposal); Richard Holley at (202) 942-8086 (SRO Reporting Proposal); Sonia Trocchio at (202) 942-0753 (SRO Self-Listing Proposal, SRO Ownership Proposal, and Books and Records Proposal); and Christopher Stone at (202) 942-7938 (Concept Release).

2. The Commission will hear oral argument on appeals by Leslie A. Arouh and the Division of Enforcement of an initial decision of an administrative law judge. Arouh was formerly an associated person with First Union Capital Markets ("First Union"), a registered broker-dealer. The law judge concluded that Arouh participated in an adjusted trading scheme which consisted of First Union's (1) buying \$100 million of corporate bonds at prices above the prevailing market price from a group of accounts at ARM Capital Advisors LLC ("ARM"), a registered investment adviser, (2) selling the same bonds, at market price, to a different group of ARM accounts shortly thereafter, resulting in a \$1.376 million loss to First Union, and (3) selling to ARM accounts bonds that were marked up sufficiently above the prevailing market price to reimburse First Union's losses on the first two legs.

The law judge found Arouh willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5. The law judge suspended Arouh from association with a broker or dealer for ninety days and ordered Arouh to pay a civil money penalty of \$330,000.

Arouh argues that the record does not support the law judge's findings of violation, that the sanctions imposed by the law judge are excessive, and that no sanctions are warranted. The Division has appealed the sanctions, arguing that, in addition to the civil money penalty, the Commission should bar Arouh permanently from association with any broker or dealer and impose a cease-and-desist order against him.

Among the issues likely to be considered are:

A. Whether respondent committed the alleged violations; and

B. If so, whether sanctions should be imposed in the public interest.

The subject matter of the Closed Meeting scheduled for Tuesday, November 9, 2004 will be: Post argument discussion.

The subject matter of the Closed Meeting scheduled for Wednesday, November 10, 2004 will be:

Formal orders of investigations; Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings of an enforcement nature; and An adjudicatory matter.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942-7070.

Dated: November 2, 2004.

Jonathan G. Katz,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 35-27907]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

November 1, 2004.

Notice is hereby given that the following filings(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by November 24, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549-0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After November 24, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Black Hills Corporation, et al. (70–10237)

Black Hills Corporation (“Black Hills”), a public-utility holding company exempt under section 3(a)(1) of the Act by rule 2, and its subsidiaries, including Black Hills Power, Inc. (“Black Hills Power” or “Utility Subsidiary”), its electric-utility company subsidiary (collectively, “Subsidiaries”), all located at 625 Ninth Street, Rapid City, SD 57701 (collectively, “Applicants”), have filed an application-declaration, as amended (“Application”) with the Commission under sections 6, 7, 9, 10, 11, 12, 13, 32, 33, 34 of the Act and rules 42, 43, 45, 52, 53, 54, 58 and 88 through 92.

I. Background

Black Hills, a South Dakota corporation, is an integrated energy company with three principal subsidiaries engaged in three major lines of business: (i) Black Hills Power, a subsidiary electric-utility company engaged in the generation, transmission, distribution and sale of electricity to customers in South Dakota, Wyoming and Montana and the wholesale sale of power in the western United States,¹ (ii) Black Hills Energy, Inc. (“Black Hills Energy”), a direct wholly owned subsidiary engaged, through subsidiaries, in the development, ownership and operation of exempt wholesale generators, as defined in section 32 of the Act (“EWGs”), and qualifying facilities as defined in the Public Utility Regulatory Policies Act of 1978 (“PURPA”) (“QFs”), the production, transportation and marketing of natural gas, oil, coal and other energy commodities, power marketing and other energy-related activities; and (iii) Black Hills FiberCom, LLC (“Black Hills FiberCom”), a subsidiary engaged in telecommunications activities and which Applicants anticipate will become an exempt telecommunications company, as defined in section 34 of the Act (“ETC”). Black Hills Power is regulated as a public-utility company by

the states of South Dakota, Wyoming and Montana, with these states regulating Black Hills Power’s retail electric rates and charges and most of its securities issuances. Black Hills Power is also subject to regulation, under the Federal Power Act, by the Federal Energy Regulatory Commission (“FERC”). Black Hills Energy, directly and indirectly, owns interests in nonutility subsidiaries, all primarily engaged in energy-related or telecommunications activities (“Nonutility Subsidiaries”).

Black Hills proposes to continue to compete in the utility business by developing generation projects, expanding its power marketing operations and pursuing additional, related growth opportunities. Black Hills seeks authorizations to enable it and its Subsidiaries to operate and engage in financing and investment activities, intrasystem services and other related activities and transactions following its registration as a public-utility holding company under the Act. Black Hills states that it intends to register as a public-utility holding company under section 5 of the Act upon the issuance of the Commission’s order in this matter.

Upon its registration as a public-utility holding company, Black Hills proposes to form Black Hills Services Company, Inc. (“Black Hills Services”), to provide centralized services (such as accounting, financial, human resources, information technology and legal services) to the companies in the Black Hills system (“Black Hills System”). Black Hills also intends to purchase an additional electric-utility company, Cheyenne Light, Fuel & Power Company, which is currently a subsidiary of Xcel Energy, Inc., a registered holding company under the Act.²

II. Summary of Requested Authority

Applicants request the following financing authorizations, for the period beginning with the effective date of an order issued in this matter, through December 31, 2007 (“Authorization Period”), and authorizations for certain related actions, as described in more detail in subsequent sections of this notice:

1. For Black Hills, directly or indirectly, to retain or refinance existing outstanding financing arrangements and debt issuances in the total amount of up to \$1.534 billion, consisting of approximately (a) \$807.1 million in utility and nonutility debt arrangements; (b) up to \$350 million in short-

term debt and available credit lines (“Existing Short-Term Debt”); and (c) \$367.7 million in guarantees and other forms of credit support (“Existing Guarantees”) (collectively, “Existing Financings”);

2. For Black Hills and its Subsidiaries, to issue and sell securities, of up to an additional \$1 billion in securities outstanding at any one time (“Aggregate Additional Financing Limit”), comprised of:

(a) For Black Hills, (i) common stock (“Common Stock,” as defined below), (ii) preferred stock and preferred stock equivalent securities (collectively, “Preferred Securities,” as defined below), (iii) unsecured debt (“Long-Term Debt”) (excluding the additional issuance of 2.7 million shares of common stock under various plans, described below); and

(b) For the Subsidiaries, (a) common stock (“Subsidiary Common Stock,” as defined below), (b) preferred stock and preferred stock equivalent securities (“Subsidiaries Preferred Securities,” as described below), (c) unsecured and secured short-term debt (“Subsidiary Short-Term Debt”) and (d) unsecured and secured long-term debt (“Subsidiary Long-Term Debt”);

3. For Black Hills and its Subsidiaries, to enter into transactions to manage interest rate risk, including anticipatory hedging transactions (together, “Interest Rate Hedging Transactions”);

4. For Black Hills and its Subsidiaries, to issue grantees and other credit support (“Guarantees”) in an aggregate amount of up to \$400 million (excluding Existing Guarantees) (“Additional Guarantee Limit”);

5. For Black Hills and its Subsidiaries, (a) to form financing entities (“Financing Subsidiaries,” as defined below) and (b) to issue and sell securities through Financing Subsidiaries, subject to the Aggregate Additional Financing Limit;

6. For Black Hills and its Subsidiaries, to establish two money pools and enter into certain intrasystem financing arrangements;

7. For Black Hills, directly or indirectly through Nonutility Subsidiaries to engage, and make investments, in nonutility activities (such as EWGs, FUCOs, energy-related activities or subsidiaries authorized under rule 58 (“Rule 58 Subsidiaries”) and other energy-related activities, assets or subsidiaries (collectively, “Permitted Nonutility Investments”));

(a) to (i) engage in energy marketing and brokering (“Energy Marketing,” as further defined below) in Canada and Mexico and elsewhere in the world outside of the United States (subject to the Commission’s reservation or jurisdiction over these activities outside of the United States, Mexico and Canada), and (ii) render energy management services (“Energy Management Services,” as described below) and consulting services (“Consulting Services,” as described below) anywhere in the world outside of the United States (collectively “Non-U.S. Energy-Related Subsidiaries”);

(b) to invest in energy-related assets (“Energy-Related Assets,” as further defined below) in an amount of up to \$300 million (“Energy-Related Assets Financing Limit”);

(c) to invest in an aggregate amount of up to \$1.4 billion in EWGs and FUCOs

¹ Black Hills Power has approximately 60,000 retail customers in eleven counties throughout a 9,300 square mile service territory in portions of western South Dakota, eastern Wyoming and southern Montana. It also sells bundled capacity and energy service to Gillette, Wyoming and wholesale capacity and energy to other wholesale customers; owns generating facilities in its South Dakota service area, in Wyoming’s Powder River Basin (just west of Black Hills Power’s service territory) and a small transmission system (consisting of 230 kV and smaller transmission facilities in southwest South Dakota and northeast Wyoming, with a 69 kV distribution extension into southeast Montana, totalling 2,195 miles of transmission facilities).

² See SEC File Nos. 70–10229 (May 14, 2004) and 70–10225 (October 14, 2004).

(excluding its existing investments) ("EWG/FUCO Financing Limit"); and

(d) to engage, and invest an amount of up to \$100 million (on a revolving fund basis), in (i) preliminary development activities ("Development Activities," as defined below) and (ii) administrative and management activities ("Administrative Activities," as defined below) related to EWGs, FUCOs, Rule 58 Subsidiaries, Energy-Related Assets and Non-U.S. Energy-Related Subsidiaries;

8. For Black Hills and its Subsidiaries, to alter the capital stock of all 50%-or-more owned Subsidiaries, subject to the Commission's reservation of jurisdiction over partially owned Subsidiaries;

9. For Nonutility Subsidiaries, to pay dividends out of capital and unearned surplus (including revaluation reserve);

10. For Black Hills, directly or through Nonutility Subsidiaries, to acquire the securities of one or more corporations, trusts, partnerships, limited liability companies or other entities organized exclusively for the purpose of acquiring, holding and/or financing or facilitating the acquisition or disposition of Permitted Nonutility Investments ("Intermediate Subsidiaries");

11. For Black Hills and its Subsidiaries, to undertake internal reorganizations of subsidiaries and businesses;

12. For Black Hills, for the Commission to find, concerning the formation of a service company, that Black Hills Services will be so organized and so conducted as to meet the requirements of section 13(b) of the Act and that the filing of a Form U-13-1 is unnecessary; to be permitted an interim transition period after registration (no later than 12 months following the date of the Commission's order in this matter), to implement the service company; and to be excepted, among other things, from various at-cost rules applicable to transactions among Black Hills System companies; and

13. For Black Hills, to retain all of its existing investments in (a) EWGs and QFs, (b) energy-related exploration, production, transportation and marketing of energy commodities, power marketing and other activities; (c) telecommunications activities and (d) related businesses.

III. General Financing Parameters and Use of Proceeds

Black Hills proposes that the following general terms be applicable to the external financing transactions.

A. Effective Cost of Money

Applicants propose that the effective cost of capital on the proposed Preferred Securities, Short-Term Debt and Long-Term Debt and Black Hills' Subsidiaries' preferred securities, short-term debt and long-term debt will not exceed competitive market rates available at the time of the issuance of securities, having the same or reasonably similar terms and conditions issued by companies of reasonably comparable credit quality; *provided that* in no event will the effective cost of capital exceed, (1) on any series of Preferred Securities, Long-

Term Debt or Subsidiary Preferred Securities or Subsidiary Long-Term Debt, 500 basis points over a U.S. Treasury security having a remaining term equal to the term of the series; and (2) on Short-Term Debt, or Subsidiary Short-Term Debt, 300 basis points over the London Interbank Offered Rate ("LIBOR") for maturities of less than one year.

B. Maturity of Debt and Final Redemption of Preferred Securities

Applicants state that the maturity of the proposed long-term indebtedness will not exceed 50 years. In addition, they state that all preferred securities will be redeemed no later than 50 years after their issuance.

C. Issuance Expenses

Applicants state that the underwriting fees, commissions, or other similar remuneration paid in connection with the non-competitive issue, sale or distribution of a security that is the subject of this Application (not including any original issue discount) will not exceed 5% of the principal or total amount of the security being issued.

D. Common Equity Ratio and Investment Grade Condition

The consolidated common equity of Black Hills was 47% of total consolidated capitalization (common equity, preferred stock and long-term and short-term debt, including current maturities on long-term debt), as of June 30, 2004, Black Hills and its Utility Subsidiary commit that they will each maintain a common equity ratio (as reflected in the most recent 10-K or 10-Q (filed with the Commission as required by the Securities Exchange Act of 1934, as amended ("34 Act"), and as adjusted to reflect subsequent events that affect capitalization) of at least 30% of capitalization.

Applicants represent that, apart from securities issued for the purpose of funding money pool operations, no guarantees or other securities, other than common stock, may be issued in reliance upon the authorization to be granted by the Commission in this matter, unless (i) the security to be issued, if rated, is rated investment grade; (ii) all outstanding securities of the issuer, that are rated, are rated investment grade; and (iii) all outstanding securities of Black Hills (the holding company in the Black Hills System), that will be registered, that are rated, are rated investment grade ("Investment Grade Condition"). For purposes of this Investment Grade Condition, a security will be deemed to

be rated "investment grade," if it is rated investment grade by at least one nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of rule 15c3-1 under the 34 Act. The Investment Grade Condition ratings test will not apply to any issuance of common stock. Applicants request that the Commission reserve jurisdiction over the issuance of any of such securities that are rated below investment grade. Applicants further request that the Commission reserve jurisdiction over the issuance of any guarantee or other securities at any time that the conditions set forth in clauses (i) through (iii) above are not satisfied.

E. Use of Proceeds

Applicants state that proceeds from the sale of securities in external financing transactions will be used for general corporate purposes, including, in part, capital expenditures of the Black Hills System, working capital requirements of the Black Hills System, the acquisition, retirement or redemption under rule 42 of the securities previously issued by Black Hills or its Subsidiaries and other purposes, including direct or indirect investment in authorized assets and securities (*i.e.*, energy-related assets and companies, EWGs, FUCOs and ETCs).

IV. Retention and Refinancing of Existing Financing

Applicants request authorizations, during the Authorization Period, for Black Hills, directly or indirectly, to retain and refinance existing outstanding financing arrangements and debt issuances in the total amount of up to \$1.534 billion, consisting of, approximately, (a) \$807.1 million in Utility and Nonutility debt arrangements; (b) up to \$350 million in short-term debt and available credit lines (the Existing Short-Term Debt); and (c) \$376.7 million in guarantees and other forms of credit support (the Existing Guarantees).³ With respect to its Existing Short-Term Debt, Black Hills requests that the Commission include in its approval the retention and refinancing of Black Hills' existing revolving credit facilities (up to \$350 million in borrowing ability at any one time on a short-term basis), although Black Hills may not draw down the full amount of its facilities at the time of a Commission order and, thus, not have actually incurred "short-term debt."⁴

³ Existing Financings are described in detail in Exhibit I-2 of the Application.

⁴ Applicants note that this request includes amounts that have been obtained through Financing

V. Proposed Additional Financing and Other Related Authority

Applicants request authority to issue and sell additional equity and debt securities in an amount of up to \$1 billion and Additional Guarantees in an amount of up to \$400 million, among other things, in addition to the refinancing of its Existing Financings (described above), during the Authorization Period. Specifically, Black Hills requests authorization to issue, directly and indirectly, (a) common stock (other than 2.7 million shares for employee benefits plans or stock purchase and dividend reinvestment plans, discussed below), (b) preferred stock and preferred securities, (c) long-term debt and (d) short-term debt, in an aggregate amount of up to \$1 billion (the Aggregate Additional Financing Limit), and guarantees and other credit support in an aggregate amount of up to \$400 million (the Additional Guarantee Limit). Applicants also seek financing authority (a) for certain energy-related investments, in an aggregate amount of up to \$300 million (the Energy-Related Assets Financing Limit), and (b) for additional investments in EWGs and FUCOs, in an aggregate amount of up to \$1.4 billion (the EWG/FUCO Financing Limit), during the Authorization Period and other related authority, described further, below.

A. Common Stock

Black Hills now requests authority to issue and sell its common stock, denominated as "common stock," and including (unless the context indicates otherwise) outstanding options, warrants and other stock purchase rights exercisable for Black Hills' common stock (but not Black Hills' Preferred Stock that is convertible into its common stock, prior to conversion) ("Common Stock"), subject to the Aggregate Additional Financing Limit of up to \$1 billion, during the Authorization Period.

In addition, Black Hills requests authority to issue up to 2.7 million additional shares of Common Stock through various plans, in accordance with the terms of the programs.⁵ Black

Hills proposes in this regard, from time to time, to issue new shares and/or acquire in open market transactions, or by some other method, up to 400,000 additional shares of Black Hills Common Stock, during the Authorization Period. Black Hills also proposes to issue new shares and/or acquire in open market transactions, or by some other method, up to 2.3 million additional shares of Black Hills Common Stock under the employee stock-based plans (excluding shares that may be issued through the exercise of outstanding options and issuance of shares for outstanding restricted stock units and performance shares), from time to time, during the Authorization Period.⁶

B. Preferred Securities

Black Hills requests authority to issue additional shares of its authorized Preferred Stock, defined below, or other types of preferred securities of Black Hills Corporation (including trust-preferred securities, monthly income preferred securities and equity-linked securities) (together, "Preferred Securities"), directly or indirectly through one or more financing entities ("Financing Subsidiaries," as defined below), organized by Black Hills, subject to the Aggregate Additional Financing Limit. Preferred Stock is defined as stock of Black Hills Corporation denominated as "preferred stock" and having preference rights with respect to payment of dividends and other benefits, which may include, in certain

Stock Option Plan and a 2001 Omnibus Incentive Compensation Plan). Black Hills' DRP enables its shareholders to reinvest dividends and make optional cash investments to purchase additional shares of common stock. Black Hills' ESPP sells shares of Black Hills common stock to employees at 90% of the stock's market price on the offering date. At June 30, 2004, 129,244 shares have been reserved and are available for issuance under the ESPP. Under the Short-Term Incentive Plan, certain key employees are awarded short-term incentive bonuses, a portion or all of which may be paid in common stock. The 1996 and 1999 Stock Option Plans permit Black Hills to grant stock options to its employees. The 2001 Omnibus Incentive Compensation Plan permits it to issue restricted stock, restricted stock units, performance shares, performance units, stock appreciation rights, stock options and other awards, as determined by the Compensation Committee of the Board of Directors.

⁶ Black Hills proposes that its common stock financings may be effected by underwriting agreements customary in the industry and public distributions effected by private negotiation with underwriters, dealers or agents, as described below, or through competitive bidding among underwriters. In addition, it is proposed that sales may be made through private placements or other non-public offerings to one or more persons. Black Hills states that all common stock sales would be at rates or prices and under conditions negotiated or based upon, or otherwise determined by, competitive capital markets. Black Hills may also buy back shares of its stock or options during the Authorization Period in accordance with rule 42.

circumstances, the right of conversion into Common Stock.⁷

C. Debt Securities

1. Long-Term Debt

Black Hills requests authority to issue and sell unsecured long-term debt securities, comprised of notes and debentures and other forms of unsecured indebtedness having maturities of one year or longer ("Long-Term Debt"), up to the Aggregate Additional Financing Limit (which excludes renewals of Existing Financings).⁸

2. Short-Term Debt

Black Hills seeks authority to issue unsecured short-term debt securities, comprised of commercial paper, promissory notes and other forms of indebtedness having maturities of less than one year ("Short-Term Debt"), up to the Aggregate Additional Financing Limit (which excludes renewals of Existing Financings).⁹

⁷ Preferred Securities may be issued in one or more series with rights, preferences and priorities, as may be determined by Black Hills' Board of Directors. Dividends or distributions on Preferred Securities will be made periodically, but may be made subject to terms, which allow the issuer to defer dividend payments for specified periods. Preferred Securities may be convertible or exchangeable into shares of Black Hills common stock or indebtedness. Preferred Securities may be sold directly through underwriters or dealers in connection with an acquisition in a manner similar to that described for common stock.

⁸ Any long-term debt may: (a) Be convertible into any other securities of Black Hills; (b) will have maturities ranging from one to 50 years; (c) be subject to optional and/or mandatory redemption, in whole or in part, at par or at various premiums above the principal amount; (d) be entitled to mandatory or optional sinking fund provisions; (e) provide for reset of the coupon as required by a remarketing arrangement; (f) be subject to tender or the obligation of the issuer to repurchase at the election of the holder or upon the occurrence of a specified event; (g) be called from existing investors by a third party; and (h) be entitled to the benefit of positive or negative financial or other covenant. Maturity dates, interest rates, redemption and sinking fund provisions, tender or repurchase and conversion features, if any, with respect to the long-term securities of a particular series, as well as any associated placement, underwriting or selling agent fees, commissions and discounts, if any, will be established by negotiation or competitive bidding. Borrowings from the banks and other financial institutions may be unsecured and *pari passu* with debt securities issued under the Black Hills Indenture and the short-term credit facilities. Specific terms of any borrowings will be determined by Black Hills at the time of issuance and will comply in all regards with the parameters of the financing authorization described in section III, above.

⁹ Commercial paper may be sold in established domestic and European commercial markets. Commercial paper would be sold to dealers at the discount rate or the coupon rate *per annum* prevailing at the date of issuance for commercial paper of comparable quality and maturities sold to commercial paper dealers generally. It is expected that the dealers acquiring commercial paper from

Subsidiaries. Applicants also note that they are requesting authority to retain existing Financing Subsidiaries. See sections V.F. and VI, below. Existing Financing Subsidiaries are Black Hills Nevada Real Estate Holdings LLC, Black Hills Valmont Colorado Inc., E-Next A Equipment Leasing Company LLC and Las Vegas Cogeneration Energy Financing Company LLC.

⁵ Black Hills currently maintains a divided reinvestment plan ("DRP") for its shareholders and various employee stock-based plans (an employee stock purchase plan (the "ESPP"), a Short-Term Incentive Plan, a 1996 Stock Option Plan, a 1999

D. *Subsidiary Financings*

Applicants also request that Black Hills' Subsidiaries be authorized to issue and sell Subsidiary Common Stock and Subsidiary Preferred Securities, Subsidiary Long-Term Debt and Subsidiary Short-Term Debt, subject to the Aggregate Additional Financing Limit and the parameters described in section III, above, during the Authorization Period. Black Hills' Utility Subsidiary and its Nonutility Subsidiaries request this financing authority to the extent that Subsidiaries may require financing that is outside rule 52 exempt financing.¹⁰ The Utility Subsidiary specifically requests authority to issue unsecured and secured short-term debt securities, including commercial paper and credit lines, subject to the Aggregate Additional Financing Limit and the parameters described in section III, above, during the Authorization Period.

E. *Financing Risk Management Devices*

Black Hills, directly or indirectly through its Subsidiaries, requests authority to enter into interest rate hedging transactions utilizing various financial instruments (collectively, "Interest Rate Hedges"), subject to certain limitations and restrictions, in order to reduce or manage interest rate costs. Black Hills will not engage in speculative transactions.

Applicants state that Interest Rate Hedges (other than exchange-traded interest rate futures or options contracts)¹¹ will only be entered into with counterparties whose senior debt ratings, or the senior debt ratings of any credit support providers who have guaranteed the obligations of such counterparties, as published by Standard and Poor's Ratings Group, are equal to or greater than BBB, or an equivalent rating from Moody's, Fitch Investor Service or Duff and Phelps ("Approved Counterparties"). Applicants also state that fees,

Black Hills will offer the paper at a discount to corporate, institutional and, with respect to European commercial paper, individual investors. Institutional investors are expected to include commercial banks, insurance companies, pension funds, investment trusts, foundations, colleges and universities, and finance companies.

¹⁰ Applicants anticipate that the majority of the financings will be exempt from prior Commission authorization under rule 52(b).

¹¹ Interest Rate Hedges will include the use of financial instruments commonly used in today's capital markets, such as interest rate forwards, futures, swaps, caps, collars, floors and structured notes (*i.e.*, a debt instrument in which the principal and/or interest payments are linked to the value of an underlying asset or index), or transactions involving the purchase or sale, including short sales, of government or agency (*e.g.*, Fannie Mae) obligations or LIBOR-based swap instruments.

commissions and other amounts payable to an Approved Counterparty or exchange or other party (excluding, however, the swap or option payments) in connection with an Interest Rate Hedge, will not exceed those generally obtainable in competitive markets for parties of comparable credit quality.

Applicants also request authority to enter into interest rate hedging transactions for anticipated debt offerings ("Anticipatory Hedges"). Black Hills states that Anticipatory Hedges would be utilized to fix an/or limit the interest rate risk associated with any new issuance.¹² Anticipatory Hedges may be executed on-exchange ("On-Exchange Trades"), through brokers by the opening of futures and/or options positions traded on the Chicago Board of Trade, the opening of over-the-counter positions with one or more Approved Counterparties ("Off-Exchange Trades") or a combination of On-Exchange Trades and Off-Exchange Trades.

Applicants state that they will comply with Statement of Financial Accounting Standards No. 133 ("SFAS 133"), "Accounting for Derivatives Instruments and Hedging Activities" or other standards relating to accounting for derivative transactions as are adopted and implemented by the Financial Accounting Standards Board ("FASB"). The Interest Rate Hedges and Anticipatory Hedges will qualify for hedge accounting treatment under the FASB standards in effect and as determined at the date Interest Rate Hedges or Anticipatory Hedges are entered into.

F. *Additional Guarantees (\$400 Million)*

Applicants request authority to guarantee performance of a Subsidiary or an affiliate and to provide other forms of credit support ("Guarantees") in an aggregate principal amount not to exceed \$400 million outstanding at any one time, the Additional Guarantee Limit, during the Authorization Period. Applicants also request authority to charge each Subsidiary a guarantee fee that is comparable to those fees charged by third parties. Black Hills further requests that any Guarantees

¹² Anticipatory Hedges may be implemented through: (a) A forward sale of exchange-traded Interest Rate Hedges (a "Forward Sale"); (b) the purchase of put options on Interest Rate Hedges (a "Put Options Purchase"); (c) a Put Options Purchase in combination with the sale of call options Interest Rate Hedges (a "Zero Cost Collar"); (d) transactions involving the purchase or sale, including short sales, of Interest Rate Hedges; or (e) some combination of a Forward Sale, Put Options Purchase, Zero Cost Collar and/or other derivative or cash transactions, including, but not limited to, appropriate structured notes, caps or collars.

outstanding at the end of the Authorization Period be permitted to continue until expiration or termination in accordance with their terms.¹³

G. *Financing Subsidiaries*

Applicants request authority to acquire, directly or indirectly, the equity securities of one or more corporations, trusts, partnerships, limited liability companies, or other entities, created specifically for the purpose of facilitating the financing of authorized and exempt activities (including authorized and exempt acquisitions) ("Financing Subsidiaries"), through the issuance of Subsidiary Common Stock or Subsidiary Preferred Securities, or Subsidiary Long-Term Debt, and to transfer of the proceeds to the Black Hills System company involved.¹⁴ Applicants also request authority to issue Guarantees for the Financing Subsidiaries, subject to the Additional Guarantee Limit. Applicants further request authority to enter into support, servicing or expense agreements ("Expense Agreements") for obligations of Financing Subsidiaries.¹⁵ Applicants request authority for Financing Subsidiaries to pledge revenues or other assets or grant security interests solely to accommodate the intrasystem mirror structure of the financings; *provided that* the security pledged will not consist of the assets (other than an income stream in support of the financing) or stock of any Black Hills operation subsidiary.¹⁶

Black Hills and its Subsidiaries also request authority to issue and sell to any Financing Subsidiary, from time to time, in one or more series, unsecured debentures, unsecured promissory notes, or other unsecured debt

¹³ Certain Guarantees may be for obligations not capable of exact quantification. For measuring compliance with the \$400 million limitation appropriate means will be utilized, including estimation of exposure based on loss experience or projected potential payment amounts. If appropriate, estimates will be in accordance with GAAP. Estimates will be reevaluated periodically.

¹⁴ Applicants are also requesting authority to retain existing Financing Subsidiaries. See sections IV, above, and VI, below.

¹⁵ In an Expense Agreement, an Applicant would provide financial support and pay necessary operating expenses of a Financing Subsidiary to facilitate the subsidiary's agreements with third parties in financing activities approved through this Application.

¹⁶ See section V.N., below. Applicants also request approval under section 13(b) of the Act and rules 87 and 90 to provide these services at market prices but only for so long as an Expense Agreement is in place. Applicants explain that, to have ratings agencies recognize Financing Subsidiaries as separate from their parents or affiliates, Expense Agreements must be at market prices (*i.e.*, the contracts would be assumable by a successor without interruption or an increase of fees).

instruments ("Notes").¹⁷ Applicants further request authority for the Financing Subsidiaries to apply the proceeds of any external financing by a Financing Subsidiary, plus the amount of any equity contribution made to it, from time to time, by its parent corporation and other funds that may be available, or obtained in an exempt financing transaction, to purchase Notes. Applicants state that amounts issued by Financing Subsidiaries to third parties will be subject to the Aggregate Additional Financing Limit. However, Applicants request that underlying intrasystem mirror debt (including Notes), and parent guarantee, not be so included, so as to avoid double counting.

H. Money Pools

Black Hills and its Utility Subsidiary request authorization to establish a utility money pool ("Utility Money Pool") and Black Hills and its Nonutility Subsidiaries request authority to establish a nonutility money pool ("Nonutility Money Pool"), separate from the Utility Money Pool.¹⁸ Black Hills also requests that utility-related Financing Subsidiaries be permitted to participate in the Utility Money Pool (due to their financing relationship with the Utility Subsidiary). Black Hills also asks the Commission to reserve jurisdiction over the addition of other participants to the Money Pools in the future.

The Utility Subsidiary, to the extent not exempted under rule 52, requests authority to make unsecured short-term borrowings from, contribute surplus funds to, and to lend and extend credit to (and acquire promissory notes from) other participants in the Utility Money Pool, through the Utility Money Pool.¹⁹

¹⁷ The terms (*e.g.*, interest rate, maturity, amortization, prepayment terms, default provisions, *etc.*) of the Notes would be designed to parallel the terms of the securities issued by the Financing Subsidiary to which the Notes relate.

¹⁸ Black Hills states that, although it is requesting this authorization, it may not implement either the Utility or Nonutility Money Pool immediately upon registration for various reasons, including the need to meet requirements of state regulatory commissions. Initial participants in the Nonutility Money Pool would be Black Hills Services, Black Hills Energy and Black Hills FiberCom.

¹⁹ Under the proposed Utility Money Pool terms, short-term funds would be available from: (1) Surplus funds in the treasuries of Utility Money Pool participants other than Black Hills, (2) surplus funds in the treasury of Black Hills, and (3) proceeds from bank borrowings by Utility Money Pool participants or the sale of commercial paper by Black Hills or the Utility Subsidiary for loan to the Utility Money Pool. Funds would be made available as Black Hills Services may determine would result in a lower cost of borrowing, consistent with the individual borrowing needs and financing standing of pool participants.

Applicants propose that the Nonutility Money Pool would be operated on the same terms and conditions as the Utility Money Pool, except that Black Hills' funds made available to Money Pools will be made available to the Utility Money Pool first and only afterward to the Nonutility Money Pool. No loans would be made to, and no borrowings from, the Nonutility Money Pool by a Utility Subsidiary.

Black Hills requests authorization to contribute surplus funds and to lend and extend credit to: (1) The Utility Subsidiary through the Utility Money Pool and (2) the Nonutility Subsidiaries through the Nonutility Money Pool. Black Hills and the Utility Subsidiary, including related Financing Entities, may contribute funds from the issuance of short-term debt to the Utility Money Pool. Black Hills and the Nonutility Subsidiaries may contribute funds from the issuance of short-term debt to the Nonutility Money Pool.²⁰

I. Intrasystem Financing

Black Hills and the Subsidiaries request that they be permitted, when making intrasystem loans or extending intrasystem credit (in the event a loan or an extension of credit is not exempt under rules 45(b) or 52), to charge interest at the same effective rate of interest as the daily weighted average of commercial paper, revolving credit and/or other short-term borrowings of the respective lending Subsidiary, including an allocated share of commitment fees and related expenses.²¹

Applicants also request authority for Black Hills, directly or indirectly through a Nonutility Subsidiary, to make loans to partially owned Subsidiaries at interest rates and maturities designed to provide a return to the lending company of not less than its effective cost of capital.²²

²⁰ Applicants state that the Money Pools will be operated by Black Hills Services on an at-cost basis and separate records will be maintained for each pool. Surplus funds of the Utility Money Pool and the Nonutility Money Pool may be combined in common short-term investments, but separate records will be maintained and interest will be allocated separately, on a daily basis, to each money pool in the proportion that the amount of each money pool's surplus funds bears to the total amount of surplus funds available for investment from both money pools.

²¹ Applicants state that, if no borrowings are outstanding, then the interest rate will be predicated on the Federal Funds' effective rate of interest as quoted daily by the Federal Reserve Bank of New York.

²² Black Hills states that, generally, loans to, and purchase of capital stock form, borrowing Subsidiaries will be exempt under rule 52 and capital contributions and open account advances without interest will be exempt under rule 45(b). Loans by Black Hills or a Nonutility Subsidiary to

J. Energy-Related Activities and Other Additional Nonutility Investments

Applicants seek authorization for certain activities related to nonutility investments in EWGs, FUCOs and other energy-related investments permitted under rule 58, as well as investments in Energy-Related Assets and Non-U.S. Energy Related Subsidiaries, for the duration of the Authorization Period, *i.e.*, Permitted Nonutility Investments, as discussed below.

1. Certain Energy-Related Activities

Black Hills requests authority, directly or indirectly through Nonutility Subsidiaries, to (a) engage in Energy Marketing²³ in Canada and Mexico and elsewhere in the world outside of the United States, subject to the Commission's reservation of jurisdiction over these activities outside of the United States, Mexico and Canada, and (b) render Energy Management Service²⁴ and Consulting Services²⁵

a Nonutility Subsidiary generally will have interest rates and maturity dates that are designed to parallel the lending company's effective cost of capital, in accordance with rule 52(b).

²³ Black Hills defines Energy Marketing to consist of the brokering and marketing of electricity, natural gas and other energy commodities, as well as incidental related services, such as fuel management, storage and procurement.

²⁴ Black Hills defines Energy Management Services to include the marketing, sale, installation, operation and maintenance of various products and services related to energy management and demand-side management, including energy and efficiency audits; meter data management, facility design and process control and enhancements; construction, installation, testing, sales and maintenance of (and training client personnel to operate) energy conservation equipment; design implementation, monitoring and evaluation of energy conservation programs; development and review of architectural, structural and engineering drawings for energy efficiencies, design and specification of energy consuming equipment and general advice on programs; the design, construction, installation, testing, sales, operation and maintenance of new and retrofit heating, ventilating, and air conditioning, electrical and power systems, alarm, security, access control and warning systems, motors, pumps, lighting, water, water-purification and plumbing systems, building automation and temperature controls, installation and maintenance of refrigeration systems, building infrastructure wiring supporting voice, video, data and controls networks, environmental monitoring and control, ventilation system calibration and maintenance, piping and fire protection systems, and design, sale, engineering, installation, operation and maintenance of emergency or distributed power generation systems, and related structures, in connection with energy-related needs; and the provision of services and products designed to prevent, control, or mitigate adverse effects of power disturbances on a customer's electrical systems.

²⁵ Applicants define Consulting Services to include technical and consulting services involving technology assessments, power factor correction and harmonics mitigation analysis, meter reading and repair, rate schedule design and analysis, environmental services, engineering services, billing services (including consolidation or

anywhere in the world outside of the United States. To the extent that operations outside the U.S. involve additional or different risks than U.S. operations, Black Hills states that it will evaluate and seek to mitigate those risks in a manner similar to the manner it evaluates EWG and FUCO investments, described below.

2. Additional Investments in Energy-Related Assets (\$300 Million)

Black Hills also requests authority, directly or indirectly through Nonutility Subsidiaries, to invest in nonutility energy assets that are incidental and related to its business as an electricity and energy commodities marketer and broker or to its other energy-related businesses, including natural gas exploration and production, gathering, processing, storage and transportation facilities and equipment, liquid oil reserves and transportation and storage facilities, gas or coal reserves, electric metering and customer electric equipment and associated facilities, and other physical assets that are incidental to and reasonably necessary in the day-to-day conduct of energy marketing, brokering and trading operations or other energy-related businesses ("Energy-Related Assets") in an amount of up to \$300 million ("Energy-Related Assets Financing Limit").²⁶ Black Hills further defines Energy-Related Assets to exclude additional investments in EWGs or FUCOs, addressed in section V.1.3., below. Black Hills states that Energy-Related Assets will be acquired only in the countries in which it is authorized to conduct its electricity and energy commodities marketing and brokering business (currently the United States and, if approved, Canada and Mexico).

3. Additional Investment in EWGs and FUCOs (\$1.4 Billion)

Applicants seek financing authority in an aggregate amount of up to \$1.4 billion for additional investments in EWGs and FUCOs during the Authorization Period (excluding Black Hills investment as of June 30, 2004, of \$705 million in EWGs)²⁷ ("EWG/FUCO Investment Limit"). Black Hills states that the proposed amount represents approximately 458% of Black Hills'

centralized billing, bill desegregation tools and bill inserts), risk management services, communications systems, information systems/data processing, system planning, strategic planning, finance, general management consulting including training activities, feasibility studies, and other similar related services.

²⁶ Black Hills states that Energy-Related Assets will not include any "utility assets" within the meaning of the Act.

²⁷ Black Hills has no FUCOs.

"average consolidate retained earnings," as defined in rule 53(a)(1), for the four quarterly periods ending June 30, 2004, and the proposed investment limit of \$1.4 billion compare favorably with other EWG/FUCO investment limits authorized by the Commission.

4. Investment in Development Activities and Administrative Activities

Black Hills and its Subsidiaries also request authority to invest, using a "revolving fund" concept described below, an amount of up to \$100 million, in (i) Development Activities²⁸ and (ii) Administrative Activities²⁹ related to EWGs, FUCOs, Rule 58 Subsidiaries, Energy-Related Assets and Energy-Related Subsidiaries. Development Activities will be designed to result in nonutility investments, eventually, such as EWGs, FUCOs, Rule 58 Subsidiaries, Energy-Related Assets or Energy-Related Subsidiaries.

Black Hills proposes a "revolving fund," which would provide that, to the extent that funds are expended for Development Activities (or Administrative Activities, as the case may be) and result in an EWG, FUCO, or a Rule 58 Subsidiary, or other authorized investment, the amount will cease to be allocable to the Development Activities financing limit of \$100 million, but will then be allocable to the particular, applicable investment limit related to the investment. For example, Development Activities expenditures that result in an EWG would count against the EWB/FUCO Aggregate Financing Limit (described in section V.1.3., above) and expenditures resulting in a Rule 58 Subsidiary would count against the limitation on investment in rule 58, or expenditures resulting in an Energy-Related Asset would count against the Energy-Related Assets Financing Limit (described in

²⁸ Development Activities will include due diligence and design review; market studies; preliminary engineering; site inspection; preparation of bid proposals, including, in connection with these activities, posting of bid bonds; application for required permits and/or regulatory approvals; acquisition of site options and options on other necessary rights; negotiation and execution of contractual commitments with owners of existing facilities, equipment vendors, construction firms, power purchasers, thermal "hosts," fuel suppliers and other project contractors; negotiation of financing commitments with lenders and other third-party investors; and such other preliminary activities as may be required in connection with the purchase, acquisition, financing or construction of facilities or the acquisition of securities of, or interests in, new businesses.

²⁹ Administrative Activities will include personnel, accounting, engineering, legal, financial and other support activities necessary to manage Black Hills and its Subsidiaries' investments in nonutility subsidiaries.

section V.1.s., above), or any other applicable limitation.

K. Changes in Capital Stock of Subsidiaries

Applicants request authority to change the terms of any wholly owned Subsidiary's authorized capital stock capitalization or other interests by an amount deemed appropriate by Black Hills or another intermediate parent company, as needed to accommodate transactions and future issuances. Applicants propose that a wholly owned Subsidiary be able to change the par value, or change between par value and no-par stock, without additional Commission approval.³⁰

Black Hills also states that the Utility Subsidiary would only take this action upon receipt of necessary approvals from interested state commission. Black Hills also requests that the Commission reserve jurisdiction over these transactions by partially owned Subsidiaries, pending completion of the record.

L. Nonutilities' Payment of Dividends Out of Capital and Unearned Surplus

Black Hills Energy and Black Hills FiberCom also request that they be permitted, directly or indirectly through their Nonutility Subsidiaries, to pay dividends, from time to time, out of capital and unearned surplus (including revaluation reserve), to the extent permitted under applicable state corporate law, during the Authorization Period.

M. Intermediate Subsidiaries

Black Hills requests authority to acquire, directly or indirectly through the Utility Subsidiary or Nonutility Subsidiaries, the securities of one or more corporations, trusts, partnerships, limited liability companies or other entities to be created and organized exclusively for the purpose of acquiring, holding and/or financing or facilitating the acquisition or disposition of investments ("Intermediate Subsidiaries").³¹ Black Hills states that,

³⁰ Applicants state that they cannot ascertain at this time how a Subsidiary's financing may be effected under rule 52, including, for example, what portion may be a sale of capital securities (i.e., common or preferred stock) to Black Hills or an intermediate parent or whether it may exceed then-authorized capital stock or whether capital stock with no par value may be used.

³¹ Black Hills states that there are various legal and business reasons for using Intermediate Subsidiaries. Limited purpose subsidiaries are often necessary or desirable to facilitate financing the acquisition and ownership of a FUCO, an EWG or other enterprise. The laws of some foreign countries may require that a bidder in a privatization program be organized in that country. Using one or more

Continued

to the extent that it provides funds to an Intermediate Subsidiary for investment in an EWG, FUCO or a Rule 58 Subsidiary or other investment, the amount will be included in Black Hills' Aggregate EWG/FUCO Financing Limit of \$1.4 billion or other applicable financing limit, as the case may be.

N. Internal Corporate Reorganizations

Applicants request authority to undertake internal reorganizations of Subsidiaries and businesses. Internal reorganizations may be accomplished through a contribution, sale, distribution, assignment or other transfer from one entity, and the acquisition by another entity, of the securities, asset or interests in an entity. None of the proposed reorganizations will include a transfer of assets or securities of a Subsidiary that owns or operates utility assets within the meaning of sections 2(a)(3), 2(a)(4) and 2(a)(18) of the Act.

Black Hills and its Subsidiaries request authority to sell or to cause any Subsidiary to sell, or otherwise transfer, (1) businesses, (2) the securities of current Subsidiaries engaged in some or all of these businesses, or (3) investments which do not involve a Subsidiary (*i.e.*, less than 10% voting interest) to a Subsidiary, and to acquire the assets of businesses, subsidiaries or other investment interests or, alternatively, to transfer securities or assets by share exchanges, share distributions or dividends, followed by contribution of securities or assets to a Subsidiary. Black Hills also requests that it be permitted, following direct or indirect acquisition of securities of Nonutility Subsidiaries, to transfer securities or assets of Nonutility Subsidiaries to other Subsidiaries using any of these methods or to liquidate or merge Nonutility Subsidiaries.

O. Intrasystem Service Transactions

Black Hills states that the Black Hills System will engage in a variety of affiliate transactions for the provision of goods, services and construction, under rules 87, 90 and 91. For an interim period following registration, no longer than 12 months after the date of the Commission's order in this matter, Applicants request various exceptions to the at-cost rules, among other things, as described more fully below.

Intermediate Subsidiaries may allow Black Hills to secure more favorable U.S. and foreign tax treatment and achieve tax efficient corporate structures, minimizing state or federal taxes. Intermediate Subsidiaries may also isolate business risks and facilitate adjustments to ownership interests or raising debt or equity capital in domestic or foreign markets.

1. Establishment of Black Hills Services Company

Black Hills expects to form Black Hills Services within 60 days of the issuance of the Commission's order in this matter. Black Hills seeks authority to delay, for a period not longer than 12 months following the date of its registration, the full implementation of all service agreements and arrangements and required accounting systems and cost allocation methodologies. The transition period is necessary to accommodate the complexities of the formation of the service company.³² In addition, Black Hills commits, however, to implement the at-cost requirements as soon as practicable.

In connection with the formation of the service company, Black Hills requests that the Commission find that Black Hills Services will be so organized and shall be so conducted as to meet the requirements of section 13(b), and that the filing of a Form U-13-1 is unnecessary, or, alternatively, that this Application be deemed to constitute a filing on Form U-13-1 as required by rule 88.

Black Hills Services will be the service company subsidiary for the Black Hills System and will provide Black Hills Power, any future utility subsidiaries and Black Hills' Nonutility Subsidiaries with some or all of the following services: administrative, management and support services, including services relating to support of electric and gas plant operations (*i.e.*, energy supply management of the bulk power and natural gas supply, procurement of fuels, coordination of electric and natural gas distribution systems, maintenance, construction and engineering work); customer bills, and related matters; materials management; facilities; real estate; rights of way; human resources; finance; accounting; internal auditing; information systems; corporate planning and research; public affairs; corporate communications; legal; environmental matters; and executive services.³³ The cost of services provided by Black Hills Services will be directly assigned, distributed or allocated by activity, project, program, work order or other appropriate basis. Black Hills Services will be staffed primarily by personnel transferred from Black Hills,

³² Black Hills states that, first, appropriate personnel from Black Hills and its Subsidiaries will be transferred to Black Hills Services' employ, subject to requirements associated with the transfer employee benefit, health and pension plans, contracts, licenses, and permits to Black Hills Services and subject to approvals and consents from regulators, counterparties and vendors.

³³ Black Hills Services will have total equity capital of not more than \$10,000.

Black Hills Power and certain Nonutility Subsidiaries. It will have its headquarters in Rapid City, South Dakota, and will conduct substantial operations in Rapid City and Golden, Colorado.

2. Services, Goods and Assets Involving a Utility Subsidiary

The Utility Subsidiary may provide to other associate companies, services that are incidental to its utility businesses, including, but not limited to, infrastructure services maintenance, storm outage emergency repairs, supply planning services, switchyard activities and services of personnel with specialized expertise related to the operation of the utility. To the extent these services might exceed those allowable under applicable rules, Black Hills seeks approval for Black Hills Power to provide services to any other Subsidiary.

3. Nonutility Subsidiary Transactions

Black Hills requests authorization for Black Hills Services and the Nonutility Subsidiaries to enter into agreements (and/or continue the effectiveness of existing agreements, described in section V.N.4, below) to provide construction, goods or services to certain associate companies at fair market prices determined without regard to cost. Specifically, Black Hills seeks an exemption for Black Hills Services and the Nonutility Subsidiaries under section 13(b) from the cost standards of rules 90 and 91 (to the extent that rule 90(d) does not apply), if the company being provided construction, goods or service is: (1) A FUCO or an EWG that derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale within the U.S.; (2) an EWG that sells electricity at market-based rates that have been approved by the FERC or appropriate state public-utility commission, *provided that* the purchaser of the EWG's electricity is not an affiliated public-utility or an affiliate that resells the power to an affiliated public-utility; (3) a QF that sells electricity exclusively at rates negotiated at arm's-length to one or more industrial or commercial customers purchasing the electricity for their own use and not for resale, or to an electric utility company (other than an affiliated electric utility) at the purchaser's "avoided cost," as determined under PURPA; (4) an EWG or a QF that sells electricity at rates based upon its cost of service, as approved by FERC or any state public-utility commission having jurisdiction,

provided that the purchaser of the electricity is not an affiliated public-utility; or (5) an ETC, an "energy-related" company under rule 58 or any other Nonutility Subsidiary that (i) is partially owned, *provided that* the ultimate purchaser of goods or services is not a Utility Subsidiary, (ii) is engaged solely in the business of developing, owning, operating, and/or providing services or goods to Nonutility Subsidiaries described in (1) through (4) above, or (iii) does not derive, directly or indirectly, any part of its income from sources within the U.S. and is not a public-utility company operating within the U.S.

4. Request for Exemption for Existing Affiliate Arrangements

Black Hills requests a determination that the Subsidiaries may continue to engage in certain affiliate transactions under rule 87(a)(3) or otherwise. Black Hills also seeks approval for Black Hills Power and affiliated EWGs to provide services (such as engineering and technical support functions, fuel procurement, information systems, maintenance, quality assurance, management services and support and safety review) at cost as defined in rules 90 and 91, to each other.

VI. Retention

Black Hills is engaged in various nonutility businesses through Subsidiaries and through affiliated business ventures, including the following: (1) EWGs and QFs, (2) investments in energy-related businesses involving exploration and production, transmission and distribution and cogeneration, among other things; and (3) telecommunications activities. Applicants also request that they be permitted to retain existing Financing Subsidiaries, Black Hills Nevada Real Estate Holdings LLC, Black Hills Valmont Colorado Inc., E-Next A Equipment Leasing Company LLC, and Las Vegas Cogeneration Energy Financing Company LLC.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50618/File No. S7-12-01]

Order Extending Temporary Exemption of Banks, Savings Associations, and Savings Banks From the Definition of "Broker" Under Section 3(a)(4) of the Securities Exchange Act of 1934

November 1, 2004.

I. Background

The Gramm-Leach-Bliley Act ("GLBA") repealed the blanket exception of banks from the definitions of "broker" and "dealer" under the Securities Exchange Act of 1934 ("Exchange Act")¹ and replaced this full exception with functional exceptions incorporated in amended definitions of "broker" and "dealer." Under the GLBA, banks that engage in securities activities either must conduct those activities through a registered broker-dealer or ensure that their securities activities fit within the terms of a functional exception to the amended definitions of "broker" and "dealer."

The GLBA provided that the amended definitions of "broker" and "dealer" were to become effective May 12, 2001. On May 11, 2001, the Securities and Exchange Commission ("Commission") issued interim final rules ("Interim Rules") to define certain terms used in, and grant additional exemptions from, the amended definitions of "broker" and "dealer."² Among other things, the Interim Rules extended the exceptions and exemptions granted to banks under the statute and Interim Rules to savings associations and savings banks. They also included a temporary exemption that gave banks time to come into full compliance with the more narrowly-tailored exceptions from broker-dealer registration.³ To further accommodate the banking industry's continuing compliance concerns, the Commission delayed the effective date of the bank "broker" and "dealer" rules through a series of orders that ultimately extended the temporary exemption from the definition of "broker" to November 12, 2004, and from the definition of "dealer" to September 30, 2003.⁴

¹ As defined in Exchange Act Sections 3(a)(4) and 3(a)(5) [15 U.S.C. 78c(a)(4) and 78c(a)(5)].

² See Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001).

³ 17 CFR 240.15a-7.

⁴ See Exchange Act Release No. 44570 (July 18, 2001); Exchange Act Release No. 45897 (May 8,

In June 2004, the Commission proposed Regulation B, which would revise and replace the Interim Rules.⁵ The comment period for Regulation B expired on September 1, 2004,⁶ and the Commission has received over 105 comments, including comments from the banking industry, banking regulators, and members of Congress.

In the Interim Rules, the Commission adopted Exchange Act Rule 15a-7,⁷ which provided that banks must begin complying with the GLBA on January 1, 2002. We proposed to amend this provision in Regulation B by providing banks and other financial institutions until January 1, 2006, to begin complying with the GLBA.⁸

II. Extension of Temporary Exemption From Definition of "Broker"

The Commission is carefully considering comments to determine what final action should be taken with regard to the Regulation B proposal. The Commission anticipates that this review process will not be completed before the exemption from the Interim Rules relating to the definition of "broker" expires on November 12, 2004.

Therefore, the Commission finds that extending the temporary exemption of banks, savings associations, and savings banks from the definition of "broker" is necessary and appropriate in the public interest, and is consistent with the protection of investors. The Commission believes that extending the exemption from the definition of "broker" until March 31, 2005, will prevent banks and other financial institutions from unnecessarily incurring costs to comply with the statutory scheme based on the current Interim Rules and will give the Commission time to fully consider comments received on Regulation B and

2002); and Exchange Act Release No. 46745 (October 30, 2002); Exchange Act Release No. 47649 (April 8, 2003) (extending the exemption from the definition of "broker" until November 12, 2004); Exchange Act Release No. 47366 (February 13, 2003) (extending exemption from the definition of "dealer" until September 30, 2003). On February 13, 2003, the Commission adopted amendments to certain parts of the Interim Rules that define terms used in the dealer exceptions, as well as certain dealer exemptions ("Dealer Release") Exchange Act Release No. 47364 (February 13, 2003), 68 FR 8686 (February 24, 2003). Therefore, this order is limited to an extension of the temporary exemption from the definition of "broker".

⁵ Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004).

⁶ See Exchange Act Release No. 50056 (July 22, 2004) 69 FR 44988 (July 28, 2004) (extending comment period on Regulation B until September 1, 2004).

⁷ 17 CFR 240.15a-7.

⁸ In proposing Regulation B, the Commission proposed Rule 781 as a re-designation of Rule 15a-7 and proposed a compliance date of January 1, 2006. See 17 CFR 242.781.