

BEFORE THE UTILITY DIVISION

DEPARTMENT OF PUBLIC SERVICE REGULATION
MONTANA PUBLIC SERVICE COMMISSION

In the Matter of the Application of)		
BLACK HILLS POWER AND LIGHT COMPANY))	DOCKET NO.	6410
for an Order (1) Authorizing Applicant)		
to Assume Liability for the Payment of)	DEFAULT ORDER NO.	4254
Up to \$21,500,000 in an Aggregate)		
Principal Amount of Interim Notes to)		
be Issued by Wyodak Construction Company,)		
Inc., (2) Authorizing Applicant to Issue)		
Term Notes of Not Exceeding \$43,000,000)		
in an Aggregate Principal Amount to Pay)		
Such Interim Notes Upon Maturity; and)		
(3) Disclaiming Jurisdiction with Respect)		
to, or Authorizing, the Proposed Sale and)		
Repurchase of the Wyodak Project and the)		
Loaning or Advancing of Funds to Wyodak)		
Construction Company, Inc.)		

On March 29, 1976, BLACK HILLS POWER AND LIGHT COMPANY, hereinafter referred to as Applicant, a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and qualified to transact business in Montana, filed with the Montana Public Service Commission its verified Application, pursuant to Sections 70-117.1 to 70-117.6, inclusive, RCM 1947, requesting an Order:

- (1) authorizing Applicant to guarantee 10% of the obligations of Wyodak Construction Company, Inc., a Wyoming corporation, (Construction Company) to certain Banks (Banks), under a Loan Agreement (the Loan Agreement) for which Banks, Manufacturers Hanover Trust Company is acting as Agent (Agent), by entering into a Purchase Agreement (the Purchase Agreement) among Applicant, Pacific Power & Light Company (Pacific Power) and Construction Company, which obligations include, among other things, the payment of an aggregate principal amount of up to \$215,000,000 (10% of which is \$21,500,000) and interest thereon represented by interim notes to be issued by Construction Company to the Banks (Interim Notes) to fund the construction of the Wyodak Steam Electric Generating Project (Wyodak Project) hereinafter defined;
- (2) authorizing Applicant, upon purchase of the Wyodak Project from Construction Company under the Purchase Agreement, to issue five-year term promissory notes (the Term Notes) to finance such purchase of the Wyodak Project by paying the Interim Notes issued by Construction Company in an amount not exceeding

\$43,000,000 in an aggregate principal amount pursuant to the Loan Agreement;
and

- (3) authorizing the entire transaction contemplated by the Sale Agreement, Purchase Agreement, Loan Agreement, Guaranty Agreement, Assumption Agreement and related documents.
- (4) to the extent jurisdiction is not disclaimed, authorizing the entire transaction contemplated by the Sale Agreement, Purchase Agreement, Loan Agreement, Guaranty Agreement, Assumption Agreement and related documents.

The Application is supported by exhibits and data in accordance with the rules and regulations of the Commission governing the authorization of issuance of securities by electric and gas utility companies operating within Montana. For detailed information with respect to the general character of Applicant's business and the territories served by it, reference is made to its annual reports on file with the Commission.

At a regular open session of the Montana Public Service Commission, held in its office at 1227 11th Avenue, Helena, Montana, on April 23, 1976, there being present Chairman Gordon E. Bollinger and Commissioners P. J. Gilfeather, Thomas G. Monahan, James R. Shea and George Turman, there came before the Commission for final action the matters and things in Docket No. 6410, and the Commission, having fully considered the Application and all the data and records pertaining thereto on file with the Commission and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Applicant, Black Hills Power and Light Company, is a corporation organized and existing under and by virtue of the laws of the State of South Dakota and is qualified to transact business in the State of Montana.
2. Applicant is operating as a public utility as defined in Section 70-103, RCM 1947, and as such is engaged in furnishing utility service in Montana.
3. The Commission has jurisdiction over the proposed guaranty of the Interim Notes and the issue of said Term Notes of said application under Sections 70-117.1 through 70-117.6, RCM 1947. Commission jurisdiction over the subject matter in this application also arises from the fact that it is an integrated financing transaction; "loan agreements" are considered "securities" under the usual legal definition of "security." Also, the Commission has full powers of supervision of utilities under sections 70-101 and 70-103, RCM 1947, and has "... authority to

inquire into the management of the business of all public utilities.. .“ under section 70-117, RCM 1947 (emphasis supplied).

4. Public notice of the filing of Application and opportunity for the public hearing was given on April 9, 1976, in the Ekalaka Eagle, Ekalaka, Montana; and no protests or requests for a formal hearing were received by April 20, 1976.

5. Applicant’s Board of Directors, at a meeting of the Board on April 6, 1976, resolved to approve the Application in this Docket.

6. Applicant and Pacific Power are jointly constructing a coal-fired, steam-electric generating plant having an expected aggregate capacity of 330,000 kilowatts and associated equipment and facilities (excluding transmission facilities) on a site near Gillette, Wyoming (such equipment, facilities and site being referred to herein as the “Wyodak Project”), adjacent to coal reserves owned by Wyodak Resources Development Corp. , a coal-mining subsidiary of Applicant. It is presently contemplated that Pacific Power will be entitled to 90% of the output of the Wyodak Project and Applicant 10% of the output upon completion with Applicant having the right, upon certain conditions being satisfied, to increase its participation in the Wyodak Project.

To facilitate the financing of the construction of the Wyodak Project, Applicant and Pacific Power intend to convey all of their right, title and interest in and to the Wyodak Project (and a Coal Supply Agreement among Applicant and Pacific Power and Wyodak Resources Development Corp.) to Construction Company, a wholly-owned subsidiary of BEDCO Leasing Company, Inc. (BEDCO) which is a wholly-owned subsidiary of Blyth Eastman Dillon & Co. Incorporated (Blyth) , a Delaware corporation engaged in the investment banking business with headquarters at 1 Chase Manhattan Plaza, New York, N.Y., 10005. Neither Applicant nor Pacific Power has any ownership interest in Blyth. The Articles of Incorporation of Construction Company will prohibit it from owning or operating an operational electric generating facility, and the Purchase Agreement will require that Construction Company sell the Wyodak Project before it is operational.

Applicant and Pacific Power intend that Construction Company will sell the Wyodak Project to a lessor for lease to Applicant and Pacific Power. If such a lease or other satisfactory arrangement cannot be accomplished, Applicant and Pacific Power will be obligated under the Purchase Agreement to repurchase the Wyodak Project from Construction Company, as more fully described below.

The Sale Agreement by which Applicant and Pacific Power will convey and assign the Wyodak Project to Construction Company, substantially in the form attached as Exhibit E-1, will require Construction Company to continue with the construction of the Wyodak Project in accordance with the specifications provided by Applicant and Pacific Power. Pursuant to a Construction Agency Agreement substantially in the form of an agreement attached as Exhibit E-2 (Construction Agency Agreement), Pacific Power will oversee the supervision of the construction of the Wyodak Project by Stone & Webster Engineering Corporation.

Interim Notes

Construction Company will finance all of the costs of the financing and construction of the Wyodak Project (including (a) reimbursement to Applicant and Pacific Power for costs incurred in connection with the Wyodak Project prior to the conveyance and assignment to Construction Company and (b) interest during construction on the Interim Notes (defined below)) through borrowings by Construction Company, advances on loans from Applicant and Pacific Power, and, possibly, pollution control revenue bond financing, approval for which would be the subject of a separate application.

Such borrowings will be made through the Loan Agreement with the Banks substantially in the form attached as Exhibit E-3, pursuant to which the Banks will commit to lend to Construction Company up to \$215,000,000 to finance construction of the Wyodak Project. These loans will be evidenced by promissory notes (Interim Notes, as defined in the Loan Agreement) of Construction Company substantially in the form attached to Exhibit E-3. The Interim Note issued to each Bank shall (i) be dated the date of the initial loans, (ii) be payable to the order of such Bank on the earlier of the date on which Applicant and Pacific Power shall be required to pay the purchase price under the Purchase Agreement or December 15, 1978, and (iii) bear interest from the date thereof on the unpaid principal amount thereof from time to time at a rate per annum equal to 118% of the commercial loan rate of Manufacturers Hanover Trust Company from time to time in effect in New York, New York on a 90-day loans to its most responsible and substantial domestic and corporate borrowers (MHTC Rate) payable quarterly, provided that any amounts not paid when due (whether at the stated maturity, by acceleration or otherwise), shall thereafter be payable at a rate per annum equal to the sum of 2% plus 118% of the MHTC Rate until such amount shall be paid in full.

Construction Company shall pay to the Agent, for the account of the Banks, a commitment fee to and including December 15, 1978, or such earlier date on which the

Commitments may be terminated, computed at the rate of 1/2 of 1% annum on the daily average unused portion of the Commitments in effect during the period for which payment is made. Such commitment fee shall be payable quarterly and on the date on which the Commitments are terminated or the Term Notes hereinafter mentioned are issued.

Construction Company also shall pay to the Agent, for the account of the Banks, quarterly in advance, a facility fee for the period from and including the effective date of the Loan Agreement to the date on which the Commitments are, terminated, computed at the rate of 1/4 of 1% per annum on the aggregate amount of the Commitments (both used and unused) in effect on the first day of the period for which payment is made. Such facility fee shall be payable (i) on the date of the initial borrowing for the period commencing on the effective date of the Loan Agreement, (ii) quarterly in advance thereafter in each year through the last of such dates next preceding the date on which the term loans are made for the next succeeding quarterly period.

Construction Company will also maintain cash compensating balances on account with each of the several Banks in an amount not less than 5% of the commitments of each such Bank and will pay the Agent a one-time agency fee of \$150,000.

As compensation for its efforts in assisting in arranging transaction described herein, Construction Company will pay to Blyth a one-time fee in the amount of \$50,000 and \$10,000 per annum during the construction period for use of the Construction Company, plus certain expenses.

For further description of the provisions relating to the Interim Notes, and the collateral and security therefor, which may include a first security interest in and to the Wyodak Project, reference is made to the Loan Agreement.

Purchase of the Wyodak Project

To induce the Banks to enter into the Loan Agreement with Construction Company, Applicant and Pacific Power will have an unconditional several (but not joint) obligation under the terms of the Purchase Agreement, substantially in the form attached as Exhibit E-4, to purchase an undivided 10% and 90% interest, respectively, in the Wyodak Project. Payment of the purchase price of the Wyodak Project by Applicant and Pacific Power must be made

regardless of whether Construction Company performs its obligations under the Purchase Agreement, including its obligation to sell the Wyodak Project. The right to receive such unconditional payment will be assigned to the Banks as security for the Interim Notes and Applicant and Pacific Power will consent, as the Agent's request, to make such payment directly to the Agent for the account of the Banks. Applicant and Pacific Power shall make such payment upon the first to occur of the following:

(i) date which is thirty (30) days immediately preceding the day on which testing of the Wyodak Project is scheduled to commence;

(ii) December 15, 1978;

(iii) The business day designated by Construction Company in a written notification by Construction Company to Applicant and Pacific Power of the occurrence of an event which makes it unlawful for Construction Company to own or to continue to own the Wyodak Project (which business day shall not be less than 20 nor more than 30 days after the date of such notification);

(iv) The business day designated by Construction Company in a written notification by Construction Company to Applicant and Pacific Power of the inability of Construction Company to borrow funds sufficient to continue construction of the Wyodak Project (which business day shall not be less than 20 nor more than 30 days after the date of such notification); provided, however that, at their option, Applicant and Pacific Power may loan or advance funds sufficient to permit the construction of the Wyodak Project to continue, in which event the reference to the business day for such notification contemplated shall be disregarded;

(v) The business day designated by Applicant and Pacific Power in a written notification by them to Construction Company (which business day shall not be less than 20 nor more than 30 days after the date of such notification) or on such other day and at such other time and place as may be mutually agreeable to the parties to the Purchase Agreement; or

(vi) The first business day following the date on which Applicant and Pacific Power receive notice from the Agent that the Interim Notes are due and payable (whether at the stated maturity, by acceleration or otherwise).

Applicant's and Pacific Power's obligation to purchase their respective percentages of the Wyodak Project is designed to permit Construction Company to satisfy its obligations, including payment of principal and interest on the Interim Notes from cash it receives. Applicant and Pacific Power on a 10% and 90% basis, respectively, will also have the option, upon satisfaction of certain conditions under the Loan Agreement, to obtain Term Loans from the Banks, pursuant to the Loan Agreement, as more fully described below, up to an aggregate principal amount of \$215,000,000.

The Loan Agreement also provides that Applicant shall have an option to receive up to an additional 10% of the Term Loans (with Pacific Power's share in the Term Loans to be reduced to 80%), provided that Applicant shall first meet certain financial tests contained in the Loan Agreement. If Applicant meets such financial tests, it has the option under the Purchase Agreement to purchase up to 20% of the Wyodak Project (with Pacific Power's share being correspondingly reduced). The Purchase Agreement also permits Applicant to increase its share of the Wyodak Project up to 40% on the date of purchase from Construction Company by payment to Pacific Power of the cost of such increased share.

The Loan Agreement permits Pacific Power to assume the obligations of Construction Company to the Banks pursuant to an Assumption Agreement. This provision is to enable Pacific Power to assume the obligations of Construction Company if Construction Company is in default or Pacific Power deems it about to be in default under the terms of the Loan Agreement. The Loan Agreement also provides that Pacific Power may guarantee the obligations of Construction Company pursuant to a Guaranty Agreement, in order to prevent the Interim Notes becoming accelerated on account of a default by Applicant under the Loan Agreement or related documents. The Purchase Agreement provides that if Pacific Power pays the entire amount of the obligations of Construction Company pursuant to the Assumption Agreement or Guaranty Agreement, Applicant must promptly reimburse Pacific Power in full for its share of such obligations. If Applicant fails to do so, Pacific Power's percentage share of the Wyodak Project will increase to 100% and Applicant will have no further interest in the Wyodak Project.

Although, as pointed out above, Applicant and Pacific Power will together have an unconditional obligation to purchase the entire Wyodak Project, they will not be called upon to purchase the Wyodak Project if, prior to the times set forth above, other arrangements can be made for the Wyodak Project to be purchased from Construction Company for the use of Applicant and Pacific Power under a lease or other similar arrangement.

INDIRECT GUARANTY OF INTERIM NOTES

Through the unconditional and non-cancelable obligation to purchase the Wyodak Project or cause it to be purchased under the Purchase Agreement, Applicant and Pacific Power will indirectly guarantee the obligations of Construction Company evidenced by such Interim Notes

to the Banks in their several respective percentage shares (Applicant, 10% Pacific Power, 90%). The indirect guaranty is to be absolute and unconditional and it will apply notwithstanding any default on the part of Construction Company or any compromise, settlement, modification, amendment, release or termination of any or all of the obligations, covenants or agreements of Construction Company.

For a further statement of the provisions of the indirect guaranty of the obligations of Construction Company represented by such Interim Notes, reference is made to the Purchase Agreement and the Loan Agreement.

It is intended that Applicant, will account for the obligations which it has indirectly guaranteed as long-term debt and the Wyodak Project as construction work in progress separately classified to disclose the existence of the fact that Construction Company owns the Project, subject to an obligation to convey it to Applicant and Pacific Power prior to its being placed in service.

TERM NOTES

If Applicant and Pacific Power are unable to cause a third party to purchase the Wyodak Project from Construction Company for use by Applicant and Pacific Power, by lease or otherwise, Applicant and Pacific Power will repurchase the Wyodak Project according to their respective interests and the Banks participating in the Loan Agreement have agreed to make aggregate Term Loans up to \$215,000,000 severally to Applicant and Pacific Power and to substitute Term Notes for the obligations of Construction Company evidenced by the Interim Notes. The Term Loans shall be made on the date on which Applicant and Pacific Power purchase the Wyodak Project from Construction Company, but in no event later than December 15, 1978.

The Term Loans shall be in an aggregate amount of not to exceed \$215,000,000, and shall be made pro rata by the Banks according to their Commitments under the Loan Agreement and shall be evidenced by Term Notes substantially in the form attached to Exhibit E-3, with appropriate insertions therein as to maker, payee, principal amount and dates. Applicant's obligations to the Banks under the Term Notes will be unsecured. Each Term Note shall (i) be appropriately executed and delivered, (ii) be payable to the order of the Bank making the term loan evidenced thereby, (iii) be dated the date the term loans are made, (iv) be stated to mature in

ten (10) consecutive semiannual installments, each as nearly equal as may be, and (v) bear interest from the date thereof on the unpaid principal amount thereof at a rate per annum equal to 125% of the MHTC Rate, provided that any amounts not paid when due (whether at the stated maturity, by acceleration or otherwise) shall thereafter be payable at a rate per annum equal to the sum of 2% plus 125% of the MHTC rate until such amount shall be paid in full. Interest on each Term Note shall be payable quarterly during the term thereof and upon payment in full of the unpaid principal amount thereof.

Either Applicant of Pacific Power may, at its option, at any time or from time to time prepay its Term Notes in whole or in part, upon at least five business days' prior written notice to the Agent specifying the date and the amount of prepayment and upon the payment of accrued interest on the amount prepaid to and including the date of prepayment. Partial prepayments to be applied on the Term Notes shall be applied on account of installments of principal of the Term Notes in the inverse order of their normal maturity. Amounts prepaid on account of the Term Notes may not be re-borrowed.

If Applicant has defaulted under the Loan Agreement or failed to satisfy its terms and conditions, and as a result thereof, the Banks would not be required to make the Term Loans to Applicant, Pacific Power may obtain all the Term Loans up to the Banks' maximum commitment of \$215,000,000 and if Applicant fails to reimburse Pacific Power for its percentage share of the Project purchase price on the purchase date, Pacific Power's percentage share of the Wyodak Project shall increase to 100% and Applicant will have no further interest in the Wyodak Project.

For a further statement of provisions relating to said Term Notes, reference is made to the Loan Agreement.

MORTGAGE AND PLEDGE AGREEMENTS

As further security for Applicant's obligation to purchase its percentage share of the Wyodak Project and to perform its obligations in all related agreements, Applicant intends to pledge and grant a security interest in all of the Capital Stock of Applicant's wholly-owned subsidiary, Wyodak Resources Development Corp. substantially in the form of Exhibit E-5, and further intends to cause Wyodak Resources to mortgage and grant a security interest to the Construction Company to substantially all of Wyodak Resources' real and personal property,

substantially in the Form of Exhibit E-6. The Construction Company will assign the mortgages to the Banks pursuant to an Assignment and Conveyance of Mortgage and Assignment of Projection and Security Agreement substantially in the form of Exhibit E-7.

Applicant will further be required and will grant a similar pledge, mortgage and security interest to secure the payment of the Term Loans if Applicant chooses to exercise the option of financing the purchase of its percentage share of the Wvodak Project by issuing the Term Notes to the Banks.

CONCLUSIONS OF LAW

The transactions proposed by Applicant, as hereinafter authorized, will be for a lawful purpose and is consistent with the public interest; the same is necessary, appropriate and consistent with the proper performance by Applicant of service as a public utility; and the aggregate amount of securities outstanding and proposed to be outstanding will not exceed the fair value of the properties and business of Applicant. The proceeds from these transactions are not chargeable, in whole or in part, to operating expenses or to income.

ORDER

1. That the Application of Black Hills Power and Light Company filed with the Commission for an Order authorizing Applicant to indirectly guarantee 10% of the obligations of Wyodak Construction Company, Inc. , a Wyoming corporation, (Construction Company) to certain Banks (Banks) under a Loan Agreement (the Loan Agreement) for which Banks, Manufacturers Hanover Trust Company is acting as agent (Agent) , by entering into a Purchase Agreement (the Purchase Agreement) among Applicant, Black hills Power and Light Company (Black Hills) and Construction Company, which obligations include, among other things, the total payment of an aggregate principal amount of up to \$215,000,000 (the guarantee of Applicant being 10% thereof or \$21,500,000) and interest thereon represented by Interim Notes to be issued by Construction Company to the Banks (Interim Notes) to fund the construction of the Wyodak Steam Electric Generating Project (Wyodak Project) is hereby granted.

2. That the Application of Black Hills Power and Light Company filed with the Commission for an Order authorizing Applicant, upon purchase of the Wyodak Project from Construction Company under the Purchase Agreement, to issue 5-year term promissory notes (the Term Notes) to finance such purchase of the Wyodak Project by paying Interim Notes issued by Construction Company in an amount not exceeding \$43,000,000 in an aggregate principal amount pursuant to the Loan Agreement is hereby granted.

3. The proposed sale of the Wyodak Project pursuant to the Sale Agreement, the proposed repurchase of the Wyodak Project pursuant to the Purchase Agreement, the proposed loans or advances and all transactions contemplated by said agreements and related documents are granted.

4. Black Hills Power and Light Company shall file with the Commission, from time to time, copies of all such reports as are required to be filed by Applicant with the Federal Power Commission (FPC) under applicable rules and regulations of the FPC, as now in effect or hereafter amended, relating to the indirect guaranty of said Interim Notes and the issue of said Term Notes and shall file true copies of the Sale Agreement, Construction Agency Agreement, Loan Agreement, Interim Notes, Purchase Agreement, Assumption Agreement, Guaranty Agreement and Term Notes within sixty days of the execution of each such statement, when and if executed. The filing shall be with the secretary of the utility division to be placed in the file.

NOTE: Section 70-117.6, RCM 1947, provides that neither the issuance of securities by Applicant pursuant to the provision of this order, nor any other act or deed done or performed in connection therewith, shall be construed to obligate the State of Montana to pay or guarantee in any manner whatsoever any security authorized, issued, assumed or guaranteed hereunder.

The approval of transactions herein authorized shall not be construed as precedent to prejudice any future action of this Commission.

Issuance of this order does not mean acceptance of the Applicant's exhibits or other material accompanying the application for any purpose other than the issuance of this order.

DONE IN OPEN SESSION at a meeting of the Public Service Commission, held April 23, 1976.

GORDON E. BOLLINGER, Chairman
Voting aye

GEORGE TURMAN, Commissioner
Voting aye

THOMAS G. MONAHAN, Commissioner
Voting Aye

JAMES R. SHEA, Commissioner
Voting to dissent

P.J. GILFEATHER, Commissioner
Voting to dissent

ATTEST:

GAIL E. BEHAN
Secretary

(Seal)

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing within thirty (30) days from the service of this Order, a petition for review pursuant to Section 82-4216, RCM 1947.