

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12A-851E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP FOR (1) APPROVAL OF ITS 2012 ELECTRIC RESOURCE PLAN, AND (2) APPROVAL OF ITS 2013-2014 RES COMPLIANCE PLAN.

**ORDER GRANTING, IN PART, AND DENYING,
IN PART, REHEARING, REARGUMENT, OR
RECONSIDERATION AND DENYING MOTION**

Mailed Date: December 14, 2012
Adopted Date: December 5, 2012

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I. BY THE COMMISSION**A. Statement**

1. This matter comes before the Commission for consideration of an Application for Rehearing, Reargument, or Reconsideration (RRR) filed by Black Hills/Colorado Electric Utility Company, LP (Black Hills or Company) on November 14, 2012.

2. By way of background, Black Hills filed an Application for Approval of its 2012 Electric Resource Plan (ERP) and Approval of its 2013-2014 Renewable Energy Standard (RES) Compliance Plan (Application) on July 30, 2012. Black Hills also filed, contemporaneously with the Application, a Motion for Waivers seeking variances from specific provisions of the ERP Rules, 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*

3. By Decision No. C12-1223, mailed October 25, 2012, the Commission dismissed the Application without prejudice and denied the Motion for Waivers. The Commission further ordered Black Hills to file its ERP Application on or before January 18, 2013, consistent with the directives contained in that decision.

4. In the first seven pages of its RRR, Black Hills reviews Decision No. C12-1223 and expresses its disagreement with certain statements and findings contained in that decision. The Company also states that it “does not at this time seek reconsideration of the Commission’s rulings concerning cost recovery and self-build provisions” of the Clean Air-Clean Jobs Act (CACJA). Black Hills explains that, rather than rearguing these issues, it will focus its efforts on its next ERP Application filing. Black Hills nevertheless asks the Commission to recognize its statutory interests under the CACJA “[r]egarding future CACJA-related filings.”

5. The remainder of the Company’s RRR addresses five points for clarification concerning certain directives set forth in Decision No. C12-1223: (1) Black Hills seeks permission to file a separate application for approval of the Company’s 2013 and

2014 onsite solar program; (2) Black Hills requests that the Commission explain whether all requests in the Motion for Waivers were denied, including those not substantively addressed by Decision No. C12-1223; (3) Black Hills seeks approval of its decision not to proceed with a more detailed analysis of the potential life extension of Pueblo units 5 and 6 and requests more details from the Commission about the information it wants in the ERP Application filing concerning Pueblo units 5 and 6; (4) Black Hills seeks more details from the Commission about the information it wants in the ERP Application filing concerning information concerning the Sunflower Swap; and (5) Black Hills seeks an extension of the deadline for the ERP Application.

6. Now being duly advised, we grant the RRR, in part, and deny the RRR, in part.

B. Motion to Strike, Response to Motion to Stay, and Motion for Leave to Respond

7. On November 19, 2012, the Colorado Independent Energy Association (CIEA) filed a Motion to Strike, Response to Motion for Stay, and Limited Petition for Leave to Respond to Black Hills' RRR. CIEA moves the Commission to strike the majority of the first seven pages of the RRR, arguing that the discussion contained in these pages is irrelevant and not applicable to the specific requests for relief made in the RRR.

8. On December 3, 2012, Black Hills filed a response to CIEA's Motion to Strike. Black Hills argues that the Commission should deny the motion, because granting it would set a troubling precedent of encouraging parties to move to strike material in other parties' pleadings whenever they deem it irrelevant. In addition, Black Hills argues that CIEA's Motion to Strike is unnecessary. The Company contends that, if a party includes material in a pleading that the Commission determines to be irrelevant, the Commission is free to give that material little or no weight.

9. We deny the Motion to Strike. The motion addresses the weight of the material in the first seven pages of Black Hills' RRR, rather than its admissibility. The Commission alone has the authority to evaluate a party's argument and assign the weight it deserves.

10. Next, concerning CIEA's Response to the Motion to Stay, we previously denied Black Hills' Motion to Stay Decision No. C12-1223. Decision No. C12-1347, mailed November 19, 2012. This matter is therefore moot and we will not consider CIEA's arguments relating to Black Hills's Motion to Stay.

11. Lastly, we deny CIEA's Limited Petition for Leave to Respond to Black Hills' RRR, because CIEA has not presented a basis for a waiver from Rule 1308(a) of the Rules of Practice of Procedure, 4 CCR 723-1. Rule 1308(a) precludes responses to RRR.

C. Affirmation and Clarification of Decision No. C12-1223

12. Below, we affirm Decision No. C12-1223; clarify our findings and conclusions with respect to the expected contents of the ERP Application; and clarify the standards applicable to Black Hills' request to build and own a new generation facility to replace the capacity of Clark Station.

13. Decision No. C12-1223 states Black Hills' CACJA emission reduction plan will cause the Company to retire 42 MW of coal-fired generation units at Clark Station. In Docket No. 10M-254E, the Commission has already determined that 42 MW of replacement capacity for Clark Station is needed and in the public interest.

14. The Commission generally reviews jurisdictional utilities' requests to build and own new generation resources under one of two approaches: (1) the utility can file a standalone application for a Certificate of Public Convenience and Necessity (CPCN) under Rule 3102 of the Rules Regulating Electric Utilities, 4 CCR 723-3; or (2) the utility can file an application for

a CPCN in conjunction with an application for approval of an ERP under Rule 3611. In addition, the CACJA contains a “self-build” provision that is available to the utilities in certain instances as part of an emission reduction plan. *See*, § 40-3.2-207(6), C.R.S. It is important to note that the public interest is the overarching consideration under all three of these approaches. However, we apply different standards under each approach when analyzing the costs and ownership of the new facilities.

15. In the context of a standalone CPCN application, the Commission focuses on whether there is a present or future need for the construction of the proposed facility. The need for a specific new generation resource usually arises to accommodate load growth on the system or to replace generation resources that will no longer be available (*e.g.*, a plant retirement). The Commission determines whether the proposed facility is cost effective by reviewing existing facilities and potential alternatives to the proposed construction. If appropriate alternatives exist, a traditional CPCN process examines the costs of those alternatives with the goal of identifying the least-cost solution. The standalone CPCN application process does not generally entail competitive bidding.

16. The ERP process is more comprehensive than a CPCN proceeding because it looks at total system resource needs for a particular period in the future. The ERP Rules express a preference for competitive bidding for the acquisition of new generation resources. However, the Commission adopted these rules with the intent to reconcile competitive bidding with utility requests to construct new generation facilities. Specifically, the ERP Rules accommodate an alternative method of resource acquisition, where the utility may propose that a portion of its resource need be met with resources not acquired through competitive bidding, provided that this alternative approach is shown to serve the public interest. Rule 3611(c).

Rule 3611(e) further requires a utility to file, simultaneously with its ERP, an application for a CPCN for that new resource.¹

17. The ERP process culminates in a cost-effective resource plan or “a designated combination of new resources that the Commission determines can be acquired at a reasonable cost and rate impact.” When identifying the utility’s cost-effective resource plan, the standard for approval is whether all of the resources included in the plan are deemed reasonable in light of the expected benefits they bring to the system.

18. Section 40-3.2-202, C.R.S., states the overall goal of the CACJA is to achieve emission reductions from coal-fired generation facilities by means of a coordinated plan that cuts pollutants at a lower cost than a piecemeal approach. The statute requires consideration of the need for emission controls, for repowering coal plants with natural gas, and for replacing plants with new and less-polluting facilities. The CACJA, at § 40-3.2-207(6), C.R.S., also states that the Commission shall allow the utility to develop and own as utility rate-based property any new electric generating plant constructed primarily to replace any coal-fired electric generating unit retired pursuant to a CACJA emission plan. Due to the Colorado Legislature’s embrace of a coordinated approach for emission reduction, the CACJA approach to resource acquisition also differs from CPCN or ERP proceedings. That approach focuses on whether the replacement capacity can be accomplished prudently and for reasonable rate impacts. *See*, § 40-3.2-206(1)(a), C.R.S.

19. In light of the above overview, we make the following clarifications regarding the information in the filed ERP Application that will be necessary to support the approval of the replacement capacity for Clark Station and the standard of review that we will apply.

¹ Decision No. C12-1223 contemplates this approach for Black Hills’ ERP Application filing.

First, the filing that Black Hills submitted in this docket did not provide enough information on the scope, schedule, and costs of Black Hills' proposed replacement capacity for Clark Station to enable the Commission to make the necessary findings under any of the public interest standards discussed above. We therefore affirm Decision No. C12-1223, specifically the decision to dismiss, the Application without prejudice. It is our intent to review the Company's replacement capacity project in its next ERP proceeding. Black Hills is therefore directed to provide detailed costs to inform our review, consistent with the project's scope and schedule.

20. Second, we affirm that Black Hills continues to enjoy a presumption under the CACJA that the replacement capacity for the Clark Station will be utility owned and can be acquired without competitive bidding. This assumes that the cost information introduced in the ERP proceeding demonstrates that such a project can be acquired consistent with the public interest.

21. Third, since the Commission has already determined that 42 MW of replacement capacity is needed, we clarify that the standard for granting a CPCN will be met once Black Hills demonstrates to the Commission that a similarly-sized generation facility can be accomplished prudently and for reasonable rate impacts. This is the standard of review set forth in CACJA and is a standard that is compatible with the Commission's determination of a cost effective resource plan pursuant to the ERP Rules.

D. Requests for Clarification

1. 2013 and 2014 RES Plan

22. In its 2013-2014 RES Compliance Plan, Black Hills proposed to use the unsubscribed capacity from its 2011 and 2012 onsite solar programs to continue the same program into 2013 and to develop a community solar garden program in 2014.

In its RRR, Black Hills points out that when the Commission dismissed the Application, it eliminated the Company's ability to continue offering its onsite solar program after December 31, 2012.

23. Black Hills' RRR indicates that the Company is prepared to address in its upcoming ERP Application filing, its "status" with respect to future compliance with the RES within the 2 percent retail rate impact under § 40-2-124(1)(g), C.R.S. However, the Company asks the Commission to clarify whether Black Hills can also separately seek approval to roll its unsubscribed capacity from its 2011 and 2012 solar programs into a program for 2013 and 2014.

24. On November 19, 2012, Black Hills filed an application in Docket No. 12A-1207E for approval to do exactly that. At the November 28, 2012 Commissioners' Weekly Meeting, we shortened the notice and intervention period for that new proceeding. Decision No. C12-1369-I, mailed November 28, 2012.

25. It appears that Black Hills' request for relief concerns an action already taken. Nonetheless, we find good cause to grant Black Hills' request to clarify that the Company may file an application, as it has already done in Docket No. 12A-1207E, for approval of the continuation of its onsite solar program beyond December 31, 2012. We also reiterate our expectation in Decision No. C12-1223 that Black Hills will address in its next ERP Application filing its plans to comply with the RES during the ten-year RES planning period and to explain how those plans are affected by the cap on the retail rate impact.

2. Requests for Waivers

26. In its RRR, Black Hills points out that in Decision No. C12-1223 the Commission did not address the substance of certain other requested waivers when the Application was dismissed without prejudice.

27. Black Hills states that there will be a few rules with which the Company may not be able to comply when it files its ERP Application. Black Hills therefore seeks clarification on whether it can again seek the same waivers when it files its ERP Application or whether the Commission denied all of the requested waivers on the merits.

28. The Motion for Waivers contained three requests that were not substantively addressed by Decision No. C12-1223. First, Black Hills sought not to provide electric energy and demand forecasts by customer class, an econometric forecast, and allocations of annual system losses to the transmission and distribution components of its system. Second, the Company sought not to provide costs associated with its contingency plans. Third, Black Hills asked the Commission to determine that an Independent Evaluator would be needed only in Phase II and only if the Commission approved the Company's proposed competitive solicitation for "Section 123 resources."

29. With respect to those three waiver requests, we clarify that Black Hills may seek similar waivers concerning its ERP Application. We make no finding regarding the merits of these potential requests and will consider them appropriately in the Company's future ERP proceeding.

3. Pueblo Units 5 and 6

30. In Docket No. 11A-226E, Black Hills applied for a CPCN for an LMS100 natural gas-fired generation unit to be located at its Pueblo Airport Generation Station. Black Hills supported the need for the unit as replacement capacity for three resources: 42 MW for its Clark Station; 29 MW for its Pueblo units 5 and 6, which the Company sought to retire; and 18 MW for the expired Sunflower Swap, a contract that provided firm capacity and energy through the end of 2012.

31. Decision No. R11-1344, issued in Docket No. 11A-226E on December 14, 2011, described in detail Pueblo units 5 and 6. The decision explained that Black Hills was troubled about the continued operation of the units due to reliability concerns. Decision No. R11-1344, at ¶ 242. The decision also stated that, given the significant capital cost involved, there was “no suggestion that Black Hills should take steps to extend the life of either Pueblo 5 or Pueblo 6.” *Id.*, at ¶ 106. The decision further stated that, despite the Company’s reservations about the reliability of the units, Black Hills acknowledged it could propose the retirement of Pueblo 5 and 6 in its next ERP and wait until new resources resulting from that plan are acquired before retiring these units. *Id.*, at ¶ 107.

32. In light of the Company’s concerns about the reliability of the units, and given that Black Hills was required to file an ERP in short order, the Commission stated in Decision No. C12-0380 (the decision on exceptions to Decision No. R11-1344) issued April 13, 2012, that the upcoming ERP docket would afford the Company, the Commission, and other stakeholders further occasion to explore the merits of retiring Pueblo units 5 and 6. Decision No. C12-0380, at ¶ 47.

33. Black Hills stated in its Application filing, however, that the Company was not proposing to retire Pueblo 5 and 6 in this ERP. By Decision No. C12-1223, the Commission determined that one of the reasons for dismissing the application was that Black Hills failed to comply with Decision No. C12-0380 due to its lack of consideration of the retirement of Pueblo units 5 and 6.

34. In its RRR, Black Hills lists the information regarding Pueblo 5 and 6 that the Company provided in its ERP, and then specifically asks the Commission to clarify whether it concurs with the Company’s assessment that paying for a more detailed life extension

assessment for Pueblo units 5 and 6 would be imprudent. Black Hills further asks the Commission to specify what additional information the Commission wants in the ERP Application regarding Pueblo units 5 and 6 “beyond the CPCN requirement in the rules for replacement capacity.”

35. As an initial matter, we decline to enter a finding on the need for a more detailed life extension assessment for these units. We simply do not have enough information to make such a determination, since the Application was dismissed at an early stage. In addition, we conclude that Black Hills has the obligation of presenting evidence that supports its plan either to run Pueblo 5 and 6 as existing resources during the resource acquisition period or to retire Pueblo 5 and 6 at some point during that timeframe.

36. With respect to the Company’s request that we identify the specific information that should be contained in the ERP Application concerning Pueblo units 5 and 6, we instruct Black Hills to address the expected reliability of Pueblo units 5 and 6 during the proposed resource acquisition period, whether those units should be retired during the resource acquisition period, and how a decision on their retirement would affect the resource need determined for the resource acquisition period. One purpose of an ERP proceeding is to examine whether an electric utility has sufficient resources to meet its load requirements reliably in the coming years. While the focus of an ERP is often on the procurement of new utility resources, the assessment of a utility’s existing resources is no less important to the ERP process.

4. Sunflower Swap

37. As discussed above, Black Hills supported its request for a CPCN for an LMS100 as replacement capacity for the expired Sunflower Swap. Because the CPCN was denied, the Commission instructed Black Hills by Decision No. C12-0380 to address the best approach for

replacing the Sunflower Swap in its ERP “if and as necessary.” Black Hills’ ERP filing, however, made no mention of the Sunflower Swap.

38. Black Hills explains in its RRR that the Company is not relying on the Sunflower Swap for either energy or capacity because the contract has long ago expired. The Company further states that because the 18 MW was not considered an existing utility resource (under Rule 3607), the expired contract was not a factor in the determination of the resource need (under Rule 3610).

39. Because the Company previously sought to replace the 18 MW of the contract without all-source competitive bidding on nearly an MW-per-MW basis, an explanation of the treatment of the Sunflower Swap along the same lines as in the RRR would have satisfied our needs had it been in the Application filing. We therefore instruct Black Hills to state explicitly in its ERP Application whether the Company intends to replace the Sunflower Swap capacity by using an alternative form of resource acquisition under Rule 3611.

5. Filing Deadline

40. Finally, Black Hills states in its RRR that it will not be able to comply with the filing deadline for its next ERP Application of January 18, 2013. The Company explains that it needs additional time to make the necessary updates and revisions to its filing. Black Hills suggests a process whereby it would file a notice with the Commission as soon as the Company determines when filing the ERP Application could be accomplished. Black Hills “anticipates that the extension will be for less than 90 days.”

41. Based on Black Hills’ expectation that an additional 90 days should suffice to make the updates and revisions required by Decision No. C12-1223, we conclude that a better approach would simply be to set a new deadline of May 1, 2013 for the ERP Application.

II. ORDER

A. The Commission Orders That:

1. Decision No. C12-1223 is affirmed and clarified, consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration filed on November 14, 2012 by Black Hills/Colorado Electric Utility Company, LP (Black Hills) is granted, in part and denied, in part, consistent with the discussion above.

3. The Motion to Strike and Limited Petition for Leave to Respond filed by the Colorado Independent Energy Association on November 19, 2012 are denied, consistent with the discussion above. Its Response to the Motion for Stay is moot and thus is not considered.

4. Black Hills shall file a new application addressing its electric resource plan and its renewable energy standard compliance plan on or before May 1, 2013, consistent with the discussion above.

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

6. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 5, 2012.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners