

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 20AL-0380G

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IN THE MATTER OF ADVICE LETTER NO 3 FILED BY BLACK HILLS COLORADO GAS, INC. DOING BUSINESS AS BLACK HILLS ENERGY TO REVISE THE GENERAL RATE SCHEDULE ADJUSTMENT (“GRSA”) THAT WILL INCREASE THE BASE RATES FOR ALL RATE SCHEDULES EFFECTIVE OCTOBER 12, 2020.

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**COMMISSION DECISION DENYING RRR BY  
UPHOLDING DECISION NO. C21-0103.**

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Mailed Date: March 26, 2021  
Adopted Date: March 24, 2021

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

1. By this Decision, we deny Black Hills Colorado Gas, Inc., doing business as Black Hills Energy's (Black Hills or Company) Application for Rehearing, Reargument or Reconsideration (RRR) and uphold our Decision No. C21-0103, issued February 25, 2021, therefore denying the Company's RRR of Commission Decision No. C21-0004, issued January 6, 2021. We find good cause exists to reject Black Hills' Phase I Rate Case filing in this Proceeding as contrary to the Commission's Phase II filing directive in Decision No. C20-0372 in Proceeding No. 19AL-0075G on May 10, 2020. In Proceeding No. 19AL-0075G, we require Black Hills to file its long-delayed Phase II case within 60 days of that Decision. We nonetheless urge Black Hills, at its option, to file as soon as possible, a new Phase I Gas Rate Case utilizing the test year from the original Advice Letter filing in this Proceeding updated with additional 2020 information. We leave it to the Company's discretion to file this new Phase I Gas Rate Case with a new Phase II case in order to properly allocate costs in a timely manner or to propose a new Phase II filing no later than 30 days from the effective date of a final Commission Decision in the new Phase I proceeding.

**B. Background**

2. On September 11, 2020, Black Hills filed Advice Letter No. 3 and accompanying direct testimony proposing to implement General Rate Schedule Adjustment (GRSA) riders that would increase base rates for all Black Hills natural gas customers in Colorado — a new Phase I Rate Case. According to the Company, its 2020 Phase I Rate Case was intended to recover a substantial increase in costs associated with rate base investments made by the Company since July 1, 2018 that have not yet been included in the development of rates. Additionally, Black Hills filed an application in Proceeding No. 20A-0379G requesting authorization to implement a

new System Safety and Integrity Rider (SSIR) as part of its Colorado PUC Gas Tariff and to implement under the SSIR an At-Risk Meter Relocation and Customer-Owned Yard Line Replacement Program.

3. Black Hills maintained that the result of the last Phase I Gas Rate Case caused it to file the new 2020 Phase I rate review and SSIR application. Black Hills claims it made these individual filings to limit the complexity of the filings and to address the concerns raised in the previous Phase I proceeding. Black Hills goes on to argue that the revenue deficiency in the present Phase I Gas Rate Case is driven in large part by the Company's inability to recover in its rates \$35.3 million in capital additions placed in service from July 1, 2018 through December 31, 2018 and to implement its proposed Distribution System Integrity Rider (DSIR).

4. Black Hills argued the Commission disallowed its proposed inclusion of those capital additions in the 19AL-0075G proceeding because Black Hills' *pro forma* capital additions adjustment violated the matching principle, and the Commission ordered the Company to address the deficiencies in its DSIR proposal and refile for approval within six months of Decision No. C20-0372 in Proceeding No. 19AL-0075G. According to Black Hills, approval of the DSIR in the previous Phase I rate case would have permitted the Company to begin recovering costs associated with approximately \$36 million of system safety and integrity investments placed in service in 2019 and 2020.

5. Subsequent to the filing of its Phase I Gas Rate Case here, Black Hills filed its Motion for Variance (Motion) on November 6, 2020 in Proceeding No. 19AL-0075G. In that Motion, Black Hills sought to extend the date for its Commission-ordered Phase II filing to a date no later than six months from the date new rates go into effect in this Phase I Gas Rate Case.

6. By Decision No. C21-0004, issued January 6, 2021, the Commission rejected Black Hills' Phase I Gas Rate Case. It was determined that a new Phase I Gas Rate Case proposing manifold GRSAs without a Phase II rate analysis occurring for more ten years would preclude the Commission from determining whether the resulting rates are just and reasonable as required under § 40-3-101(1), C.R.S. Rather, we found the best course of action was to reject Advice Letter No. 3 and permanently suspend the attached tariffs.

**1. Black Hills' RRR**

7. On January 26, 2021, Black Hills filed its RRR. Black Hills' filing essentially blends arguments regarding Decision No. C21-0004 in this Proceeding with Decision No. C21-0005 in Proceeding No. 19AL-0075G on January 6, 2021. Nonetheless, we determine which arguments are applicable to which Proceeding and address them accordingly. In this Decision, we discuss Decision No. C21-0004.

8. Black Hills sought RRR because, as it argues, the Commission exceeded its power under the Public Utilities Law to reject its Phase I gas rate case filing made on September 11, 2020. According to Black Hills, the Commission exceeded its power under § 40-3-104, C.R.S. In addition, the Company maintains the Commission's actions violated procedural due process by depriving Black Hills of its statutory rights without providing it with any advance notice or any opportunity to be heard.

9. Black Hills contends the "file and suspend" regulatory scheme established under the Public Utilities Law provides certain procedural safeguards that protect the utility's right to make rate filings. It is the Company's position the Commission's action rejecting its Phase I rate filing in Decision No. C21-0004 circumvents these safeguards, violates Black Hills' statutory rights, and therefore exceeds the limits of the Commission's authority under the law. To rectify

this legal error, Black Hills proposes the Commission rescind Decision No. C21-0004 and reinstate the Phase I Gas Rate Case in this Proceeding.

10. Black Hills states there is no reason the Company's Phase I rate filing and a new Phase II rate filing cannot coexist. The Company posits the Commission can (and previously has) entertained simultaneous but separate Phase I and Phase II rate cases filed by the same utility. The Phase I rate case in Proceeding No. 20AL-0380G and the new Phase II rate case that will be filed on or before March 8, 2021, are not mutually exclusive proceedings in Black Hills' belief, and can go forward at the same time either independently or on a consolidated basis. As to concerns regarding "pancaking" GRSAs, the Company asserts the stacking or "layering" of GRSAs resulting from consecutive Phase I rate decisions is a relatively common occurrence that the Commission has approved in the past. Additionally, the Phase I rate riders ultimately approved in Proceeding No. 20AL-0380G, if reinstated, would only be in effect a few months before being replaced by permanent Phase II rates. Black Hills believes this should adequately address both of the Commission's concerns stated in Decision No. C21-0004. Black Hills states it is willing to work with the parties in this Proceeding as well as Proceeding No. 19AL-0075G to minimize the time between the effective dates of the resulting Phase I riders and final Phase II rates.

11. Citing § 40-6-111(3), C.R.S., it is the Company's contention that the Commission's power to reject a rate or other tariff filing is expressly limited to those circumstances in which the utility's filing does not contain the information, or is not published, filed, and posted in the form or manner required by the Commission's rules and regulations.

12. According to Black Hills, the Commission cannot rely on its conclusion that the Phase I rate filing is contrary to the Commission's Phase II filing directive in Decision

No. C20-0372 in Proceeding No. 19AL-0075G as a basis to reject the Company's Phase I rate filing because, even if the new Phase I filing were inconsistent with the Phase II filing directive in Decision No. C20-0372, this is not a form requirement prescribed by regulation.

13. Black Hills also argues that the rejection of its Phase I Gas Rate Case filing violated procedural due process by depriving it of its statutory rights without providing it with proper notice and an opportunity to be heard before dismissing the Advice Letter filing. Black Hills states it was not on notice that the Commission was considering rejecting the Phase I Gas Rate Case and was never provided an opportunity to be heard prior to the Commission's action. In addition, the Company states the Commission's rejection of its Phase I Gas Rate Case filing is not supported by any Commission policy or precedent and in fact, the Commission has previously heard separately filed Phase I and Phase II rate cases.

14. Black Hills proposes what it deems a "reasonable resolution" to the procedural maze it has created. It believes it reasonable for the Commission to rescind Decision No. C21-0004, reinstate Proceeding No. 20AL-0380G, and allow Black Hills to file a separate Phase II case based on the revenue requirements proposed in that case. Black Hills states it will file a new Phase II rate case within 60 days of the effective date of Decision No. C21-0005 as directed in that decision. Black Hills also requests clarification that its filing of a Phase II rate case based on updated revenue requirement studies proposed in Proceeding No. 20AL-0380G will be accepted as in compliance with the Commission's Phase II filing directive in Proceeding No. 19AL-0075G.

15. Notably, Black Hills dedicates a portion of its RRR criticizing the Commission's decisions in the 19AL-0075G Phase I Gas Rate Case. After enumerating the result of decisions in Proceeding No. 19AL-0075G in which the Commission upheld the Administrative Law Judge's

Recommended Decision (R19-1033, issued December 27, 2019),<sup>1</sup> the Company concludes that its currently effective rates approved in Proceeding No. 19AL-0075G were insufficient to allow it to be fairly compensated for its costs of providing service, as the revenues generated by those rates do not provide sufficient revenues to cover Black Hills' expenses, to provide for a return on and a return of the Company's investments, including the costs necessary to service its debts.<sup>2</sup> Yet, Black Hills did not appeal that decision.

16. Black Hills raised several legal arguments in its RRR as well. In its first legal argument, the Company claims the Commission's power to reject a utility's rate filing made pursuant to § 40-3-104, C.R.S., is limited to filings that are deficient in informational content, or in the form or manner published, filed, and posted as prescribed by the Commission rules.

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<sup>1</sup> Black Hills notes at p. 10 of its Application for RRR: "In Decision No. C20-0372, mailed on May 19, 2020, the Commission granted in part and denied in part exceptions to Recommended Decision No. R19-1033 (the "Recommended Decision"). The Recommended Decision concluded that the evidentiary record was sufficiently developed to allow the ALJ to decide the Phase I issues raised in the proceeding, but not sufficiently developed to allow the ALJ to find and conclude that the Company's proposals regarding base rate area consolidation and all other Phase II issues, the DSIR, and construction allowances would yield just and reasonable rates and were in the public interest. Accordingly, the ALJ in his Recommended Decision recommended that the Commission resolve only the Phase I issues, deny the Company's proposed consolidation of base rate areas, and summarily dismiss BHCG's remaining Phase II requests, the DSIR, and its proposed construction allowances. In Decision No. C20-0372, the Commission granted in part and denied in part the exceptions filed by BHCG and other parties regarding various Phase I issues, upheld the ALJ's denial of the Company's remaining requests and ordered BHCG to file the following:

(1) a compliance advice letter and revised tariff sheets to implement revised General Rate Schedule Adjustment ("GRSA") riders for each of the Company's existing base rate areas reflecting the Commission's rulings on Phase I issues and other required tariff changes consistent with the final determinations reflected in the Recommended Decision and Decision No. C20-0372;

(2) a new advice letter and proposed tariff sheets initiating a Phase II rate review within six months of the date of Decision No. C20-0372, or by November 19, 2020;

(3) a revised DSIR tariff within six months of the decision; and

(4) new construction allowances no later than 30 days after a final Commission decision in the Phase II rate case ordered by this decision.

(Footnotes omitted)

<sup>2</sup> Application of Black Hills Colorado Gas, Inc. for Rehearing, Reargument or Reconsideration, filed January 26, 2021 at p. 9.

According to Black Hills, this limitation on the Commission's power is provided in the language of § 40-6-111(3), C.R.S.

17. Secondly, the Company argues that in rejecting Black Hills' Phase I rate filing, the Commission deprived Black Hills of its statutory rights without due process of law, by not providing it with notice and an opportunity to be heard before taking action in Decision No. C21-0004.

18. Finally, Black Hills contends the Commission's action in rejecting the Company's Phase I rate filing is inconsistent with past Commission practices and established policies.

19. While we stated in Decision No. C21-0004 and Decision No. C21-0005 we were not persuaded by the policy and legal arguments Black Hills raised in its RRR filing, we nonetheless found it appropriate to move these two matters toward an acceptable resolution in a sensible and rational manner. Consequently, we found it appropriate to grant Black Hills' RRR in part through a two-step process.<sup>3</sup>

20. First, we requested that parties to the proceeding file responses to Black Hills' RRR in this Proceeding.<sup>4</sup> We set a period of no more than seven days from the effective date of Decision No. C21-0004 for those responses to be filed. Upon receipt of those responses, we determined a hearing was necessary to allow the Company an opportunity to respond as it deemed appropriate.<sup>5</sup>

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<sup>3</sup> See, *Snell v. Public Utilities Commission*, 114 P.2d 563 (1941) (in passing upon an application for rehearing, the permissible affirmative action of the commission does not go further than to grant or deny the application). Allowing additional hearing on our Decision, we found it appropriate to follow the directives of *Snell*.

<sup>4</sup> While Commission Rule of Practice and Procedure 4 *Code of Colorado Regulations* 723-1-1506(b) does not permit responses to RRR, we waived that Rule and permitted parties to respond here as part of our grant of Black Hills' RRR to set a hearing on the matter.

<sup>5</sup> Under the findings of *Snell v. PUC supra*, this two-part process provided Black Hills with notice of any alteration of our previous orders and provided an opportunity for the Company, as well as the parties to the Proceeding, to be heard.



21. Responses pursuant to Decision No. C21-0004 were filed by Commission Staff (Staff), the Colorado Office of Consumer Counsel (OCC), Energy Outreach Colorado (EOC), and AM Gas Transfer Corporation (AM Gas).<sup>6</sup>

## **2. Parties' Responses to Black Hills' RRR**

### **a. Staff**

22. Staff proposed that if the Commission chooses to adopt Black Hills' suggestion to reinstate the Phase I case in Proceeding No. 20AL-0380G, it should add the additional 130 days to the proceeding so that rates do not inadvertently go into effect as of February 9, 2021. Upon extending the suspension period an additional 130 days to June 19, 2021, Staff then proposes an extremely expedited procedural schedule as follows: Answer Testimony due the week of April 12; Rebuttal/Cross Answer Testimony due the week of April 19; Dispositive Motions/Settlements due the week of April 16; an Evidentiary Hearing *en banc* the week of May 3rd; Closing Statements of Position Due the week of May 17; Commission deliberations the week of May 31st; and a Commission Decision sometime during the week of June 14. In order to meet the tight deadlines, Staff proposes requiring all parties to respond to discovery within three calendar days and order Black Hills to immediately update and respond to all discovery pending on December 16, 2020, the date of the weekly meeting at which it was decided to reject the Phase I gas rate case.

23. Staff urges the Commission order Black Hills to file a Phase II rate review by close of business on March 11, 2021 (or as quickly as possible after that date) during its March 10, 2021 Commissioners' Weekly Meeting. Staff asserts this would allow the Commission to hold its hearing on the responses to Black Hills' RRR after the parties have had an opportunity

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<sup>6</sup> Staff and OCC also filed responses in Proceeding No. 19AL-0075G pursuant to Decision No. C21-0005).

for a high-level review of the Company's Phase II rate filings. Staff concludes if the Commission proceeds in this fashion, it stands to receive better feedback from the parties during its hearing on the various RRR responses being filed.

24. Staff goes on to state the Commission should not, at this time, consider whether it ought to combine a Phase I and Phase II gas proceeding. Black Hills still has not given the Commission the necessary information to make a fully informed decision. According to Staff, no party except Black Hills even knows what the Phase II case will propose because the Company has yet to initiate it. Even after Black Hills files its Phase II, the Commission ought to refrain from considering Phase I and II consolidation until after interested parties have had an opportunity to intervene in the Phase II in Staff's opinion.

**b. EOC**

25. EOC argues Black Hills' review of Commission precedent of past Phase I and II filings and use of GRSAs in its RRR serves to reinforce the need to eliminate or significantly limit the use of GRSAs as the fallback ratemaking tool, and instead should require utilities to file Phase I and II filings in conjunction or, if staggered, in very close proximity. This review serves to further support the finding in Decision No. C21-0005 that: "The new Phase I filing proposing compounded GRSAs, without a Phase II rate analysis for over ten years, would not allow the Commission to determine whether the resulting rates are just and reasonable as required under § 40-3-101, C.R.S."<sup>7</sup>

26. EOC notes Black Hills' proposal to reinstate the dismissed Phase I filing in Proceeding No. 20AL-0380G and file a new Phase II case based on the revenue requirement

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<sup>7</sup> Decision No. C21-0005 at ¶ 13.

based in that case (a proposed year-end Test Year ending December 31, 2020). While EOC does not necessarily oppose the proposal, it clarifies several aspects.

27. EOC suggests that if the Commission takes a staggered Phase I and Phase II approach, it requests that an interim GRSA should not be in place for more than six months between the Phase I and Phase II cases, and preferably a much shorter timeframe. Further, a procedural schedule in a revived Proceeding No, 20AL-0380G should give parties a reasonable opportunity to get back up to speed in the case. EOC stresses the Commission and the Company should be mindful of the timing of any approved rate increase, in the midst of extremely trying times for so many Coloradoans during this pandemic and economic recession. EOC takes the position that any rate hikes that would take effect mid-heating season should be rejected.

**c. AM Gas**

28. Given the settlement of most issues between AM Gas and Black Hills, AM Gas states it is amenable to extending the deadline for the filing of the next phase II proceeding, as long as it is not put off beyond June 2021. AM Gas argues the Commission should proceed with Black Hills in the manner that is most efficient for stakeholders. Black Hills should be permitted to reinstate its Phase I Gas Rate proceeding, and its Phase II case should follow shortly thereafter.

29. AM Gas concludes the parties should not be subjected to a Phase II rate proceeding followed by a Phase I case, followed by yet another Phase II case. Nor should parties be subjected to another combined Phase I and Phase II case. While the case filed by Black Hills in this proceeding contained issues that made it hugely complex, it was in part the complicated nature of combined cases that led to what has become a saga.

**d. OCC**

30. The OCC's proposed path forward is for the Commission to direct Black Hills to file a combined Phase I and Phase II gas rate case no earlier than 45 days after the Commission issues a Decision following completion of the Commission's two-step process or the filing of Responses and the Hearing. The Phase II rate case should be based on updated revenue requirement studies proposed in the Phase I filing portion of the combined Phase I and II filing.

31. The OCC asserts its path forward will eliminate the need for an initial Phase II case to transform the GRSAs from Proceeding No. 19AL-0075G and then a second Phase II case to transform the GRSAs from Proceeding No. 20AL-0380G. It is an efficient use of the parties' time, resources, and money, as well as that of the Commission, to only have one Phase II Proceeding, and such a path forward will effectively roll all GRSAs into base rates.

32. The OCC states its rate case proposal is supported by numerous factors. First, the OCC's proposal would prevent the use of stale data from a historic test year for the 12-month period ending June 30, 2018 that would occur if the results and revenue requirement from Black Hills' 2019 gas rate case (Proceeding No. 19AL-0075G) is used. As reflected in Paragraph No. 6 of Decision No. C21-0103, "By Decision No. C21-0004, issued January 6, 2021, the Commission rejected Black Hills['] Phase I Gas Rate Case. It was determined that a new Phase I Gas Rate Case proposing compounded GRSAs without a Phase II rate analysis for over ten years would not allow the Commission to determine whether the resulting rates are just and reasonable as required under § 40-3-101, C.R.S." The OCC believes its combined rate case proposal will further eliminate the usage of compounded GRSAs, the use of data that is roughly three years old for Phase II cost allocation purposes, and the likelihood of pancaking of rate cases, such as the Phase II case required by 19AL-0075G, the current Phase I represented by the current

20AL-0380G, and then followed by another Phase II case to design rates following the 20AL-0380G case since the Phase II rate design using 19AL-0075G data will be roughly four years old.

33. The OCC argues Black Hills delayed filing a Phase II gas rate case for a very long time – roughly a decade – and a delay in converting the recent GRSAs from Proceeding No. 19AL-0075G to base rates will not harm ratepayers because an overall negative revenue requirement (revenue surplus) was approved by the Commission in Proceeding No. 19AL-0075G and the net GRSAs to the three Black Hills base rate areas were negative. This artificially decreased the Service and Facilities charge - the fixed portion of ratepayers' bills.

34. OCC also notes that if the Commission reinstates the Phase I case, as proposed by Black Hills, certain procedures should be adopted due to the compressed timeframe and to ensure due process for all parties, such as establishing shortened response time for all discovery responses and a requirement that Black Hills update all previous discovery responses in the dismissed proceeding within ten days after a decision is issued following the Hearing in the two-step process.

35. On March 15, 2021, we issued Interim Decision No. C21-0156-I setting a hearing in the matter for March 16, 2021.

36. At the scheduled date and time the hearing was held. Appearances were entered by Black Hills, Staff, OCC, EOC, AM Gas, and Bachelor Gulch Village Association.

37. Black Hill stated there was no consensus on a path forward, but the Company agreed with Staff to reinstate this Phase I Gas Rate Case proceeding. Black Hills argued the Commission overstepped its authority by dismissing the Phase I case. However, the Company recommended the Commission reinstate the Phase I and suspend the Advice Letter filing for an

additional 130 days. In turn, Black Hills proposes moving the effective date of its Advice Letter filing out an additional 43 days.

38. By bench order issued at the Commission's Weekly Meeting of March 17, 2021, we discussed the options presented at the hearing and through the parties' filings. We concluded that the best approach forward would be conducting an entirely new Phase I rate case utilizing updated test year data from the previous Phase I filing here, with either a combined Phase II rate case or a staggered Phase II case filed during the pendency of the Phase I case or shortly after a final decision on the Phase I case. We then requested additional comments from the parties to the options we discussed, to be due by March 19, 2021.

39. In response, the Commission received responses from Black Hills, OCC, Staff, and EOC.

40. Black Hills argued against a new Phase I/Phase II filing since it would increase costs by all parties including the Commission. According to the Company, a new filing would require ground up development of a whole new revenue requirement for each of its gas rate areas based on analyses of financial results from calendar year 2020 and incorporating accounting, out-of-period, known and measurable, regulatory and other *pro forma* adjustments to produce revenue requirement studies. The Company estimates it would take six months to update its Class Cost of Service Studies (CCOSS).

41. However, Black Hills believes its proposal of reinstating this Phase I case would avoid two Phase IIs. Despite the Company's complaint that it would need significant time to update its CCOSS, it nonetheless indicates it would be able to turn around a Phase II based on a revenue requirement in this Proceeding within three weeks from issuance of a Commission Decision to file a Phase II.

42. In Attachment A to its pleading, Black Hills proposes a plan in which it would accept Commission adoption of some sort of refund condition as applied to provisional rates (“mutually agreeable” rates can be agreed to in a timely manner). Black Hills does not see a realistic path forward using interim rates if it has to file a new Phase I or combined Phase I and Phase II Gas Rate Cases since statutory provisions for interim rates would not apply until after a new rate case filing is made, pursuant to §§ 40-6-111(1)(d) and (2)(a)(II), C.R.S. Even if a workable process could be negotiated for Black Hills to file a new Phase I and Phase II, Black Hills states unequivocally it will still appeal the earlier rejection of its Phase I Gas Rate Case.

43. Black Hills believes that should it prevail on its appeal of the dismissal of its Phase I case, it would be entitled to be placed into the same position it would have been but for the Commission’s action in rejecting its rate case. The Company also takes the position that § 40-6-111, C.R.S., would require that the originally filed GRSA rates would become the lawful rates effective February 9, 2021 and would remain in effect until replaced by revised base rates.

44. EOC prefers a combined Phase I/Phase II rate case, or a staggered Phase I and Phase II. However, EOC believes a complete or partial consolidation of Black Hills’ rate base areas is appropriate to mitigate rate impacts on lower income households. EOC does not support interim rates for the Company due to increases in rates to customers.

45. EOC notes that any delay in the implementation of rate cases here is due to Black Hills’ own strategic decision to avoid the Commission’s directive to timely file a Phase II Gas Rate Case in Proceeding No. 19AL-0075G.

46. Staff believes a combined Phase I and Phase II is a viable solution to the “procedural tangle” caused by the Company between the two proceedings. However, Staff states that Black Hills should retain discretion over the test year choice for the combined filing. Staff

goes on to state that the Commission should determine the test year after the parties have a chance to review Black Hills' filing and offer their analyses and test year recommendations.

47. Further, Staff argues the Commission should issue a new date by which Black Hills must file a Phase II rate case with or without a Phase I included in the 19AL-0075G proceeding. Additionally, Staff agrees with EOC that no interim rates should be awarded to the Company and are not justified pursuant to § 40-6-111(1)(d), C.R.S., as Black Hills has made no showing of need for interim rates. Staff takes the position that there is no legal basis for granting interim rates in exchange for Black Hills' agreement to give up on its Phase I case and file a new combined Phase I and Phase II Gas Rate Case.

48. Staff concludes that a combined Phase I and Phase II would solve or otherwise make moot the procedural and due process concerns surrounding the dismissed Phase I case here and the as of yet filed Phase II case in Proceeding No. 19AL-0075G.

49. The OCC continues to advocate for a combined Phase I and Phase II proceeding but with the Commission hearing the matter *en banc*, since this would save approximately 90 days and eliminate the need for exceptions and a decision on exceptions. In addition, OCC clarifies its proposal that Black Hills should be directed to file a combined Gas Rate Case no earlier than 45 days after the Commission issues a Decision following completion of the Commission's two-step process was intended to benefit Black Hills. The intent was to ensure the Company was not directed to file the combined case in a timeframe that was unduly burdensome while the Commission's two-step process took place. However, OCC withdraws this suggestion and agrees the Company should be permitted to file the Combined Phase I and Phase II proceeding as soon as practicable. Additionally, OCC argues parties should not be permitted to introduce new issues or relitigate issues that were fully addressed and determined in Proceeding



No. 19AL-0075G in order to ensure a swift and clean resolution to the issues before the Commission and avoid the “quagmire that has arisen from other recent Black Hills rate filings.”<sup>8</sup>

50. In order to mitigate as many problems as possible, OCC proposes the Commission require Black Hills to timely update all previous pertinent discovery responses in the Phase I proceeding here so that parties will not be required to re-seek discovery to those issues. OCC also proposes shortening response time to discovery to additionally expedite the case.

51. OCC sees benefits to its proposal in that it will eliminate the need for an initial Phase II in order to transform the GRSAs from Proceeding No. 19AL-0075G and then conduct a second Phase II to transform the GRSAs from this proceeding. OCC states it is a more efficient use of all parties’ time to have only one Phase II proceeding. This will also result in savings to ratepayers by reducing rate case expenses significantly.

52. OCC also argues that this path forward would also avoid the use of stale data from a historic test year for the 12-month period ending June 30, 2018 that would occur if the result and revenue requirement from Black Hills’ 2019 gas rate case in Proceeding No. 19AL-0075G is used to set the rate in a Phase II case.

53. OCC also expresses due process concerns by reinstating this dismissed Phase I case. It argues that reinstating the Phase I case with an expedited procedural schedule is not feasible given the numerous calendar conflicts caused by procedural schedules already set by the Commission in numerous cases.

54. The OCC also opposes allowing interim rates. The OCC states the circumstances of this Proceeding, the resulting delayed timelines, and the procedural chaos in this Proceeding

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<sup>8</sup> OCC’s Response to Commissioners’ Questions at p. 5.

are of Black Hills' making. The Company should not be rewarded for its inability to file appropriately scaled, scoped, and vetted rate cases.

55. AM Gas prefers a staggered approach because the combined nature of 19AL-0075G led in significant measure to the protracted and unwieldy nature of this proceeding. AM Gas fears another combined case could also be unwieldy and so prefers a staggered Phase I and Phase II approach. AM Gas is also amenable to OCC's suggestion that Black Hills file a combined Phase I and Phase II as long as it is filed as soon as practicable.

## **II. FINDINGS AND CONCLUSIONS**

56. This proceeding, as well as Proceeding No. 19AL-0075G has caused us great consternation. We expressed our frustration at the flawed strategy Black Hills employed in its previous Phase I Gas Rate Case. We agree with the ALJ that the Black Hills' case was riddled with flaws that arose as a result of Black Hills' decisions and overall strategy. In Recommended Decision No. R19-1033 in Proceeding No. 19AL-0075G, the ALJ found the evidentiary record was substantially deficient in many areas and those deficiencies precluded the ALJ from finding and concluding that Black Hills' Phase II, DSIR and construction allowance proposals would yield just and reasonable rates, or whether such rates were in the public interest. Indeed, the first sentence of Recommended Decision No. R19-1033 at page 7 states: "[t]his proceeding has been flawed from the beginning. The flaws derive from decisions made by [Black Hills] before it filed this proceeding. The flaws have resulted in an inefficient and otherwise problematic result in this proceeding."

57. It appears the Company's flawed strategy has continued in this Proceeding as well. While a Phase II Rate Case was ordered in Proceeding No. 19AL-0075G after the final decision issued in the Phase I case, the Company chose to instead to file another Phase I case

here and subsequently seek a waiver of the Phase II filing requirement. This immediately put this proceeding and 19AL-0075G into disarray. It was not clear what the Company's intent appeared to be. At the least, it appeared it was the Company's intent to extend the GRSAs from the 19AL-0075G Phase I as far into the future as possible before submitting to a Phase II. So, once again, the burden was hoisted upon the Commission to make sense of what the Company proposed and untangle yet another procedural knot perpetrated by Black Hills.

58. In its first legal argument, the Company claims the Commission's power to reject a utility's rate filing made pursuant to § 40-3-104, C.R.S., is limited to filings that are deficient in informational content, or in the form or manner published, filed, and posted as prescribed by the Commission rules. According to Black Hills, this limitation on the Commission's power is provided in the language of § 40-6-111(3), C.R.S.

59. We find the Company's position without merit. To adopt Black Hills' conclusion would lead us to an absurd result.<sup>9</sup> Interpreting Black Hills' argument, when an advice letter is filed, the Commission is precluded, except in very limited procedural circumstances, to implementing rates no matter the circumstances.

60. Black Hills' position not only too narrowly reads the requirements of § 40-6-111, C.R.S., but also ignores the legislative edict of § 40-3-102, C.R.S., that requires the Commission to "adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state ...". Most

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<sup>9</sup> See, e.g., *Pearson v. 18<sup>th</sup> Jud. District Court*, 924 P.2d 515 (Colo. 1996). (Words and phrases found in statute are to be construed according to their familiar and generally accepted meaning.); *People v. Bowman*, 812 P.2d 725 (Colo. App. 1991) (when giving statutory language its plain and obvious meaning creates an absurd result, the intention of the framers will prevail over such interpretation).

importantly, Black Hills' interpretation ignores the provision of § 40-3-102, C.R.S., that requires the Commission "to do *all things*, whether specifically designated in articles 1 to 7 of this title, *or in addition thereto*, which are necessary or convenient in the exercise of such power ..." *Id.* (emphasis added) We find we have not overstepped our authority by dismissing Black Hills' Phase I rate case here under the circumstances presented. We were careful to ensure such dismissal was in accordance with the Public Utilities Laws as set forth in § 40-6-111, C.R.S., and § 40-3-102, C.R.S.

61. Secondly, the Company argues in rejecting Black Hills' Phase I rate filing, the Commission deprived Black Hills of its statutory rights without due process of law, by not providing it with notice and an opportunity to be heard before taking action in Decision No. C21-0004.

62. We wholly reject this argument. We have taken great pains to ensure the Company's due process rights are protected. As has been stated so many times to be almost axiomatic, an administrative body has the duty under the due process clauses of the U.S. and Colorado Constitutions to be fundamentally fair in the resolution of a legal dispute between an individual and a government entity where the individual is threatened with deprivation of a significant property interest.<sup>10</sup> "Due process is flexible and calls for such procedural protections as the particular situation demands."<sup>11</sup> The essence of procedural due process is fundamental fairness.<sup>12</sup> Due process requires at a minimum, notice, and the opportunity for a meaningful hearing before an impartial tribunal.<sup>13</sup> Three factors must be weighed in determining what

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<sup>10</sup> *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (1990) (*internal citations omitted*).

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id. citing, Matthews v. Eldridge*, 42 U.S. 319, 333, 348-49 (1971).

procedures are required by due process in a particular situation: (1) the importance of the individual interest at stake; (2) the weight of the governmental interest in retaining challenged procedures, including the interest in avoiding increased administrative and physical burdens; and (3) the risk of an erroneous deprivation of liberty or property through the procedures used and the degree to which proposed procedures will lessen risk of erroneous decision.<sup>14</sup>

63. We note again we took great pains to assure Black Hills had every opportunity to respond to our decision dismissing the Phase I case here. We allowed responses to its RRR filing; we conducted a hearing to allow the utility and the parties to the proceeding to opine on our decision and offer counter proposals; and finally, we allowed a second round of pleadings to respond to our proposal on how to move these matters forward in a reasonable and efficient manner to not only the Company, but for the parties and the Commission as well. We find no violation of the Company's due process rights here.

64. Finally, Black Hills contends the Commission's action in rejecting the Company's Phase I rate filing is inconsistent with past Commission practices and established policies.

65. Again, we find no merit in this claim. As is well known by all parties that participate in matters before the Commission, the doctrine of *stare decisis* does not apply to administrative decisions, especially in rate case proceedings, which are legislative in nature rather than judicial. The Commission is provided broad authority by the Colorado Legislature to craft decisions in each individual rate case based on the unique circumstances of each case. While Black Hills attempts to compare this matter favorably with other rate cases since concluded, as we noted above, the unique circumstances of this convoluted matter which the Company caused through its machinations required us to dismiss the Phase I case here.

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<sup>14</sup> *Id.*

66. What appears to be clear is that coursing through Black Hills' pleadings here is its extreme displeasure with the Commission's decisions in the 19AL-0075G Phase I filings. As stated above, in its RRR here, Black Hills concludes that its currently effective rates approved in Proceeding No. 19AL-0075G "are insufficient to allow it to be fairly compensated for its costs of providing service, as the revenues generated by such rates do not provide sufficient revenues to cover the Company's expenses, to provide for a return on and a return of the Company's investments, including the costs necessary to service its debts."<sup>15</sup>

67. Given that statement, it is apparent that rather than appeal the final Decision in Proceeding No. 19AL-0075G, which if that were truly the case one would expect an immediate appeal, Black Hills instead chose to file a new Phase I here instead of complying with its requirement to file a Phase II. A strategy that appears to be more a collateral attack on the Commission's decisions in Proceeding No. 19AL-0075G than anything else. But as indicated previously, we find ourselves once again attempting to untangle a procedural mess.

68. In doing so, we attempt to give the Company the benefit of the doubt and provide a path forward that is reasonable to Black Hills, allowing it to move towards recovering a revenue requirement that will be determined to be just and reasonable and in an expedited fashion as possible given the circumstances. However, we also weigh the result on its ratepayers and attempt to formulate a strategy that reduces the burden on them. We are grateful to all the parties for their input. Their cogent and rational discussions and suggestions have assisted us enormously in reaching a conclusion as to how to proceed.

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<sup>15</sup> RRR at p. 9.

69. Therefore, we deny Black Hills' RRR and uphold our decision dismissing the Phase I Gas Rate Case in this Proceeding. Nonetheless, we offer two solutions to the Company that we find accommodating and reasonable.

70. The Company may file a new stand-alone Phase I Gas Rate Case as soon as practicable. However, since Black Hills represented in the hearing on this matter that it was three weeks away from completing a Phase II filing, we urge the Company to file a Phase II rate case combined with its Phase I filing or in a staggered sequence prior to the completion of the new Phase I rate case filing utilizing updated test year numbers from its denied Phase I case. Whether filed concurrently or staggered, the Phase II rate case would complement the new Phase I rate case.

### **III. ORDER**

#### **A. The Commission Orders That:**

1. The application for Rehearing, Reargument, or Reconsideration filed by Black Hills Colorado Gas, Inc., doing business as, Black Hills Energy (Black Hills) on January 26, 2021 is denied without prejudice consistent with the discussion above.

2. Black Hills may file a new Phase I Gas Rate Case at its earliest convenience using an updated test year number from the denied Phase I Gas Rate Case.

3. The 20-day time period in which to file an Application for Rehearing, Reargument, or Reconsideration begins on the effective date of this Decision.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
March 24, 2021.**

(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

ERIC BLANK

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JOHN GAVAN

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MEGAN M. GILMAN

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Commissioners