

Decision No. C20-0886

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0082E

IN THE MATTER OF THE VERIFIED APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE HIGH POINT SUBSTATION PROJECT.

**COMMISSION DECISION DENYING EXCEPTIONS TO
RECOMMENDED DECISION NO. R20-0725**

Mailed Date: December 11, 2020

Adopted Date: December 9, 2020

I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission denies the Exceptions to Recommended Decision No. R20-0725 (Exceptions) that Public Service Company of Colorado (Public Service or Company) filed on November 2, 2020.

B. Background

2. On March 2, 2020, Public Service filed its Application for a Certificate of Public Convenience and Necessity (CPCN) for the High Point Substation Project (Application). The High Point Substation Project involves the High Point Distribution 230/13.8 kV, 50 Mega Volt Ampere (MVA) Substation and approximately 3.5 miles of new 230 kV double-circuit transmission line. Public Service requests that, in granting the CPCN, the Commission also: (a) grant a presumption of prudence for the \$28.3 million estimated costs of the Project, plus or minus a 20 percent contingency; and (b) make specific findings with respect to the reasonableness of the noise and magnetic field levels that result from operating the Project.

3. The 3.5 miles of new 230 kV double-circuit transmission line will energize the High Point Substation by tapping into the existing Spruce-Green Valley 230 kV transmission line. This transmission line will be built with double circuit self-support steel poles with a galvanized protective coating and will range from 85 feet to 130 feet above ground line.¹ Public Service asserts that the proposed High Point Substation is necessary to serve new anticipated load growth. The Company intends to construct the proposed High Point Substation approximately four miles south-southwest of the Denver International Airport, in Aurora, Colorado. Public Service notes that several large developments are being planned for this area, including Peña Station, High Point, Painted Prairie, Harvest Mile, Porteos, and Aurora Highlands.²

4. While the total estimated cost is \$28.3 million plus or minus a 20 percent contingency, the Company keeps the precise cost components of the High Point Project confidential. Public Service indicates that this confidentiality helps protect its negotiating power when acquiring the necessary land rights for the Project:

The Company is submitting the cost components confidentially as it is still in negotiations with the Site landowner and has not yet completed land rights acquisition for the transmission tap line, and thus hopes to maximize its negotiating power. The Company is also submitting all cost components as confidential so that a party cannot back-out the land cost estimates from the total Project cost estimate.³

5. On April 2, 2020, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention of Right. Similarly, on April 6, 2020, Trial Staff of the Commission (Staff) filed its Notice of Intervention as of Right. On April 15, 2020, the Commission referred this matter by minute order to an Administrative Law Judge (ALJ).

¹ Hearing Exhibit 101, Direct Testimony of Betty Mirzayi at p. 17.

² *Id.* at 12.

³ *Id.* at 41.

6. On September 3, 2020, the ALJ held an evidentiary hearing via video conferencing, and on October 12, 2020, the ALJ issued the Recommended Decision. The Recommended Decision notes that all parties to the proceeding agree that the CPCN for the High Point Project should be granted and that the noise and electromagnetic field levels associated with the Project should be deemed reasonable.⁴ In addition, no parties contest the cost estimates of the High Point Project or question whether public convenience and necessity requires granting the Company's application.⁵

7. Ultimately, the ALJ granted the CPCN, finding that the Project is necessary to support load growth and that the expected maximum magnetic field and noise levels are reasonable and require no further mitigation or prudent avoidance measures.⁶ However, the ALJ denied Public Service's request for a presumption of prudence for the estimated costs of the Project.⁷ Moreover, the ALJ reduced the Company's requested contingency from 20 percent down to eight percent.⁸ The ALJ reasoned that the eight percent contingency, together with the confidential risk reserve amount already included in the estimated \$28.3 million, results in a "total contingency" that is reasonable based on industry standards and past Commission practices.⁹ Thus, the ALJ approved the CPCN with an estimated cost of \$28.3 million plus or minus an eight percent contingency and denied the requested presumption of prudence.¹⁰

⁴ Recommended Decision at p. 6.

⁵ *Id.*

⁶ *Id.* at 10.

⁷ *Id.* at 15.

⁸ *Id.* at 11-12.

⁹ *Id.*

¹⁰ *Id.* at 15.

C. Public Service's Exceptions

8. Public Service's only request in its Exceptions is for the Commission to amend the Recommended Decision to increase the contingency from eight percent to 20 percent.¹¹ Public Service essentially argues that the Recommended Decision "improperly conflates risk reserve and contingency into a 'total contingency' concept."¹² The Company argues that risk reserve and contingency are two separate concepts and that the funds reserved for the risk reserve cannot also be included in the contingency. From this premise, the Company asserts that an eight percent contingency is unsupported by the record.

9. Public Service asserts that the Recommended Decision's rejection of the risk reserve is inconsistent with Decision No. C20-0648, the Commission's recent decision granting a CPCN in Consolidated Proceedings Nos. 19A-0728E and 20A-0063E.¹³ The Company notes that in Decision No. C20-0648, the Commission approved a revised Settlement Agreement with both a risk reserve and a contingency.¹⁴ The Company goes on to assert that "Staff, OCC, and Public Service unanimously agree, risk reserve and contingency are distinct concepts that should not be conflated into an oversimplified 'total contingency' category."¹⁵

10. Regarding the difference between risk reserve and contingency, Public Service argues that a "[r]isk reserve accounts for anticipated risks related to specific components of a project—or 'known unknowns'—and is incorporated into the cost estimate."¹⁶ Public Service states that it includes risk reserve to account for numerous construction risks such as construction

¹¹ Exceptions at p. 1.

¹² *Id.* at 16.

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

delays, problems with material supplies (*e.g.*, delivery timing or quality issues), weather related issues, licensing and permitting issues unique to the location, fluctuations in equipment prices, or unforeseen circumstances that change the project scope.¹⁷ Thus, the Company assigns a risk reserve amount to specific cost components based on the Company's assessment of identified risks.

11. On the other hand, Public Service states that a "contingency represents the potential variation of actual costs from the Company's cost estimate" and is applied to the total cost estimate based on the "unknown unknowns" that might exist given the amount of engineering work that has not yet been done.¹⁸ As more work is completed (*e.g.*, project design, procurement, contract bid and award), the cost estimate becomes more refined and the contingency range shrinks.¹⁹

12. Public Service notes that "given the level of project definition for the High Point Project and the Company's experience with similar projects, Public Service determined the actual cost of the Project will likely be within 20 percent of the \$28.3 million cost estimate."²⁰ Although the Company would generally assign a 30 percent contingency for the High Point Project based on the level of completed engineering work, the Company states that a 20 percent contingency is appropriate given its Transmission Asset Management (TAM) Estimating Procedures and its experience with the developer that owns the preferred parcel of land for the substation.²¹

13. Building on its assertion that a risk reserve and contingency are two separate concepts, Public Service argues that the Recommended Decision's adoption of an eight percent

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 9-10.

²⁰ *Id.* at 11.

²¹ *Id.*

contingency is unsupported by the record and disregards the Company's evidence regarding its TAM Estimating Procedures.²² Public Service asserts that adoption of an eight percent contingency "is an implicit finding," unsupported by the record, that the Company's cost estimates are more refined than what Public Service represents. The Company argues that the Recommended Decision "does not address the Company's evidence regarding the level of refinement and accuracy of its cost estimate for the Project."²³

14. To further support its argument that the record does not support an eight percent contingency, Public Service notes that the Recommended Decision rejects the rationale that Staff used to reach an eight percent contingency.²⁴ Staff based its eight percent contingency on the ASTM E2516-11 Standard Classification to Cost Estimate Classification System (ASTM Standards), but that the ALJ was "not persuaded by Staff's arguments that the ASTM Standards are an appropriate criterion to determine the proper contingency or that Staff properly applied those ASTM Standards in this particular case."²⁵ Public Service argues that rejecting the ASTM Standards leaves the Company's TAM Estimating Procedures, which support a 20 percent contingency, as the "sole meritorious cost estimation process in the record."²⁶ Accordingly, Public Service asserts that the 20 percent contingency range resulting from the Company's TAM Estimating Procedures is the only conclusion that the record supports.

15. Finally, Public Service states the eight percent contingency "improperly penalizes the Company for filing its CPCN application when it did."²⁷ The Company argues that by adopting

²² *Id.* at 11-12.

²³ *Id.* at 12.

²⁴ *Id.* at 13.

²⁵ *Id.* (quoting Recommended Decision at ¶ 60) (internal quotations omitted).

²⁶ *Id.* at 15.

²⁷ *Id.* at 12.

an eight percent contingency, the Recommended Decision “tacitly suggests” that the cost estimate for the Project should be more refined. Public Service asserts that achieving such a high level of refinement would require the Company to file its CPCN application much later in the development process, “which is impracticable given the regulatory timeframe for Commission consideration of a CPCN application.”²⁸

D. Staff’s Response

16. On November 12, 2020, Staff filed a Response opposing Public Service’s Exceptions.

17. In its Response, Staff asks the Commission to deny Public Service’s Exceptions. First, Staff rebuts the Company’s assertions that the ALJ failed to address the distinction between a risk reserve and a contingency.²⁹ Staff notes that the Recommended Decision expressly acknowledges the Company’s arguments regarding “known unknowns” and “unknown unknowns”, but finds them unpersuasive.³⁰

18. Staff also disagrees with Public Service’s argument that the Recommended Decision’s eight percent contingency is unsupported by the record.³¹ Staff notes that the Recommended Decision states that the approved total contingency, which includes the risk reserve, is “reasonable based on industry standards and past Commission practices.”³² Staff argues that the reference to past Commission practices tracks the Commission Decision in Consolidated

²⁸ *Id.*

²⁹ Response at p. 2.

³⁰ *Id.* at 1-2 (citing Recommended Decision at pp. 10-11).

³¹ *Id.* at 2.

³² *Id.* (quoting Recommended Decision at p. 12) (internal quotations omitted).

Proceeding Nos. 19A-0728E and 20A-0063E in which the Commission “rejected the Company’s proposed 20% contingency in favor of a smaller, 10% contingency.”³³

E. Findings and Conclusions

19. We reject Public Service’s Exceptions and adopt the Recommended Decision without modification. Despite Public Service’s assertions, we find no material distinction between a risk reserve and a contingency for purposes of establishing an appropriate cost estimate in this proceeding. Rather, it is more appropriate to look at both the risk reserve and contingency together as a “total contingency.” In this context, the record supports the Recommended Decision’s total contingency, which includes both the confidential risk reserve and an eight percent contingency.

20. Public Service’s argument that the Recommended Decision’s “total contingency” concept is inconsistent with Decision No. C20-0648 that the Commission recently issued in Consolidated Proceedings Nos. 19A-0728E and 20A-0063E is unavailing. Although Decision No. C20-0648 did approve a contingency and a risk reserve, it did so in the context of a settlement agreement, which by its terms is not intended to have precedential value.³⁴ Indeed, when Public Service initially argued that the ALJ should grant a presumption of prudence, the Company pointed out that “the Commission is not bound by its prior decisions or by *stare decisis*.”³⁵ In addition, in the Consolidated Proceedings, Public Service initially requested a contingency of 20 percent but later entered a settlement agreement containing a ten percent contingency and a six percent risk reserve.³⁶ The facts in this case are materially different.

³³ *Id.* In Decision No. C20-0648, Public Service initially requested a 20 percent contingency. (Decision No. C20-0648 at p. 5). However, Public Service and Staff reached a settlement agreement in which this contingency was reduced to ten percent. (Decision No. C20-0648 at p. 7). The Commission ultimately approved a revised settlement agreement that contained a ten percent contingency and a six percent risk reserve. (Decision No. C20-0648 at p. 11).

³⁴ Proceedings Nos. 19A-0728E and 20A-0063E, Settlement Agreement at p. 8.

³⁵ Public Service Statement of Position at p. 14.

³⁶ Decision No. C20-0648 at pp. 5, 11.

21. Another distinguishing feature of the current matter is that in Consolidated Proceedings, the main disputed issue was whether the Commission should grant a presumption of prudence.³⁷ There was no specific challenge that Public Service's contingency together with its risk reserve resulted in an excessive total contingency. In this case, however, Staff essentially makes this very argument.³⁸ Despite the Company's assertion that Staff, the OCC, and Public Service "unanimously agree" that the risk reserve and contingency are distinct concepts, Staff ultimately combines the risk reserve and contingency to calculate a total contingency and argues that the total contingency should be reduced.³⁹

22. Public Service's explanation regarding the differences between risk reserve (known unknowns such as possible construction delays) and contingency (unknown unknowns based on the amount of engineering work that has not yet been done) fails to convince us that the ALJ erred in considering both as a total contingency. In CPCN proceedings, the Commission is called upon first and foremost to determine whether "the present or future public convenience and necessity require, or will require, the [proposed facilities]."⁴⁰ The anticipated cost to construct the proposed facilities is a relevant factor in determining necessity, and Commission Rule 3102 requires detailed cost estimates in every CPCN proceeding. The analysis of costs in a CPCN proceeding necessarily involves estimations. During the CPCN proceeding and the actual construction process, circumstances will result in higher or lower costs. This justifies the practice of CPCN applicants

³⁷ Decision No. C20-0648 at p. 12.

³⁸ Hearing Exhibit 400C, Confidential Answer Testimony of Adam Gribb at p. 14.

³⁹ *Id.* at 14-16. For its part, the OCC points to the risk reserve and contingency as support for its position that there is too much uncertainty to grant a presumption of prudence. (OCC Statement of Position, 17-18). The OCC notes that "[w]ithout the presumption of prudence, the 'known unknowns' of risk reserve and the 'unknown unknowns' of contingency simply provide a reference for the Commission to better understand costs." (OCC Statement of Position at page 18).

⁴⁰ § 40-5-101(1)(a), C.R.S.

providing a cost estimate as well as a projection of how much the final costs might vary (plus or minus) from the estimate. For purposes of determining the necessity of a proposed project, however, it is immaterial whether the final costs are projected to vary from the cost estimate because of an “unknown unknown” or a “known unknown.” The estimated cost of the project plus projected variance is what we consider when determining whether to grant the CPCN.

23. Public Service’s remaining arguments fail because they are premised on the Company’s position that the risk reserve and contingency cannot be considered together. In particular, Public Service asserts that the Recommended Decision’s eight percent contingency disregards the Company’s evidence regarding its TAM Estimating Procedures, which support the Company’s proposed 20 percent contingency, and that the Recommended Decision tacitly suggests that the cost estimate should be much more refined.⁴¹ Similarly, Public Service argues that after rejecting the ASTM Standards, the Company’s TAM Estimating Procedures is the only rationale the record supports.

24. However, the Recommended Decision does not adopt a total contingency of eight percent. Rather, the Recommended Decision adopts a total contingency that is the sum of the eight percent contingency *and* the confidential risk reserve.⁴² The record supports this total contingency, and Public Service’s arguments to the contrary fail.⁴³ Conversely, Public Service has not met its burden of justifying a total contingency that is the sum of the confidential risk reserve and the

⁴¹ Exceptions at pp. 11-12.

⁴² Recommended Decision at pp. 11-12.

⁴³ The confidentiality of the specific cost components constrains us from further describing how the record supports the total contingency.

Company's requested 20 percent contingency.⁴⁴ Consequently we deny Public Service's exceptions.

II. ORDER

A. It is Ordered That:

1. The Exceptions to Recommended Decision No. R20-0725 that Public Service Company of Colorado filed on November 2, 2020, are denied, consistent with the above discussion.

2. 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 Decision.

3. This Decision is effective upon its Mailed Date.

⁴⁴ It is worth noting that although the estimated cost of the High Point Project and its contingency will be used as a reference point during the Company's next base rate case, this does not create a "hard cap." Ultimately, Public Service will have the opportunity to recover all costs that it reasonably and prudently incurs to construct the High Point project. *See* Recommended Decision at pp. 13-15.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 9, 2020.**

(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

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners