

Decision No. C25-0583-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 25A-0255E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC
DOING BUSINESS AS BLACK HILLS ENERGY FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO CONSTRUCT A 50 MW BATTERY STORAGE AND
OTHER FACILITIES PURSUANT TO COMMISSION DECISION NOS. C24-0634 AND
C24-0837.

**INTERIM COMMISSION DECISION REFERRING
MATTER TO AN ADMINISTRATIVE LAW JUDGE**

Issued Date: August 7, 2025
Adopted Date: July 30, 2025

I. BY THE COMMISSION

A. Statement

1. On June 12, 2025, Black Hills Colorado Electric, LLC (“Black Hills” or the “Company”) filed an Application for a Certificate of Public Convenience and Necessity (“CPCN”) to Construct a 50 MW Battery Storage and Other Facilities Pursuant to Commission Decision Nos. C24-0634 and C24-0837 (“Application”).

2. The Application was deemed complete on July 31, 2025, by operation of the Commission’s rules under § 40-6-109.5, C.R.S.

3. By this Decision, we refer the matter to an Administrative Law Judge (“ALJ”).

B. Discussion**1. Black Hills' Application**

4. Through the Application, Black Hills seeks to own and operate the Pueblo Battery Resource ("PBR") to be located at the Company's Pueblo Airport Generating Station. The Company will acquire the facility pursuant to a Build-Transfer Agreement ("BTA") between Black Hills and a third-party developer. Black Hills states that the project is one of the three new utility resources in the portfolio the Commission approved for the Company's recent Electric Resource Plan ("ERP") in Proceeding No. 22A-0230E. Black Hills claims that the Company's proposed ownership of the PBR is pursuant to the standards set forth by the Commission in Decision Nos. C24-0634 and C24-0837 from that earlier proceeding.

5. Black Hills specifically asks for: (1) a CPCN to own and operate the PBR; (2) a presumption of prudence finding for the acquisition cost of the PBR; (3) approval to avoid Allowance for Funds Used During Construction ("AFUDC") payments by modifying cost recovery to allow recovery of Construction Work In Progress ("CWIP"); (4) approval to increase, up to a cap, the baseline for the associated Cost-to-Construct Performance Incentive Mechanism ("CtC PIM"), consistent with the terms the Company and the developer agreed to in the BTA due to changes in federal law that could impact the final purchase price; (5) a finding that no operational PIM and no emissions PIM is necessary or appropriate for the PBR; and (6) approval of the proposed cost recovery mechanism for the annual revenue requirement for the project (*i.e.*, through the Energy Cost Adjustment, where each quarter the Company will compute a forecasted revenue requirement and a true-up using actual cost, both subject to the annual prudence review proceeding).

6. The Application summarizes the Commission's directives and findings related to the PBR in its recent Phase II decisions. For example, Black Hills states that the Commission clarified the parameters of the CtC PIM for the project but deferred certain PIM issues to this later CPCN proceeding, such as "the details of how force majeure events and changes in federal law impact the CtC PIM." According to Black Hills, recent changes in federal law, such as the imposition of additional tariffs, directly increase the cost of project components of the project and thus will warrant adjustments to the CtC PIM.

7. As to an operations PIM, Black Hills claims that the Commission has already determined that the PBR is a "capacity resource" such that the Commission may decline to subject the project to an operations PIM. Nevertheless, the Commission deferred to this CPCN proceeding the decision about whether any operations PIM should or could apply. Black Hills also notes that the Commission rejected the Company's proposed emissions PIM in its recent ERP proceeding and instead directed the Company to propose a revised emissions PIM in the follow-on CPCN proceeding.

8. The Application goes on to explain that the BTA requires progress payments from Black Hills to the project developer. Black Hills states that it can reduce the overall acquisition cost of the PBR by avoiding AFUDC payments, but to avoid AFUDC payments, the Company requests that the Commission grant a modification of the approved cost recovery to allow the Company to recover CWIP.

9. Black Hills filed the Application with supporting Direct Testimony of two witnesses.

10. Black Hills also filed concurrently with the Application a Motion for a Protective Order Affording Extraordinary Protection ("MEP"). The Company seeks to restrict access to:

(1) negotiated commercial contract terms and conditions that are highly sensitive to the Company and its vendors; (2) pricing information associated with those commercial contracts or other information that could be used to derive cost figures; (3) any information that is considered highly confidential information pursuant to a protective order in the related ERP proceeding; and (4) other disclosures of the same categories of information, in whatever form or variation the information may be produced in this Proceeding.

11. Finally, Black Hills requests that an expedited decision be made on the Application such that an “initial decision” is issued by December 15, 2025. Black Hills explains that in the BTA contract, the developer has required a final Commission decision by February 15, 2026. The proposed December 15, 2025 deadline is thus intended to accommodate exceptions to a Recommended Decision or an application for rehearing, reargument, or reconsideration of a final Commission decision.

2. Interventions and Requests for Hearing

12. On July 3, 2025, the Colorado Office of the Utility Consumer Advocate (“UCA”) filed a Notice of Intervention as a Matter of Right. UCA requests a hearing in this matter. While UCA lists areas of interest that are standard in CPCN proceedings, UCA is particularly interested in the potential impact of federal law changes on the purchase price of the PBR. UCA does not provide a response to Black Hills’ request for an expedited decision.

13. On July 18, 2025, the Trial Staff of the Colorado Public Utilities Commission (“Trial Staff”) filed a Notice of Intervention as of Right. Trial Staff also request a hearing in this matter. In addition to reviewing Black Hills’ construction plans, schedule, project management, and other elements of the Application filing, Trial Staff seeks to examine: (1) the consistency between the Application and the PBR as bid into the ERP; (2) the impacts on the project from

recent federal actions such as the Reconciliation Bill and tariffs; (3) the proposed CtC PIM and whether it is consistent with previous Commission decisions; (4) Black Hills' request not to establish an operational PIM or an emissions PIM; (5) the proposed accounting treatment for CWIP rather than the AFDUC; and (6) the proposed reporting and communications regarding the PBR. Staff also does not provide a response to Black Hills' request for an expedited decision.

C. Findings and Conclusions

14. Pursuant to Rule 1303(c)(IV) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, the Application automatically deemed complete on July 31, 2025, for the purposes of § 40-6-109.5, C.R.S.

15. We find good cause to set the Application for hearing.

16. We refer this matter to an ALJ. The ALJ will set a hearing date and establish other procedures by separate decision(s). The ALJ will also rule on the MEP.

17. The Commission rendered Decision Nos. C24-0634 and C24-0837 in Black Hills' recent ERP proceeding after conducting an *en banc* evidentiary hearing.

18. Based on those decisions and the record in Proceeding No. 22A-0230E, we agree with Black Hills regarding the need for a timely decision in this Proceeding and ask the ALJ to develop a procedural schedule that meets the Company's requested deadlines. As noted in Trial Staff's intervention, recent federal actions may have substantial impacts on the cost of the PBR and there is a real cost risk associated with delay.

19. Also based on the record in the ERP, the purpose of the CtC PIM is to mimic the construction and operational risks that project developers routinely face in their bids offering a purchased power agreement ("PPA").¹ Accordingly, the Build Transfer Price for the CtC PIM is

¹ Decision No. C24-0634, issued September 4, 2024, Proceeding No. 22A-0230E, ¶ 2, p. 3.

the dollar amount that appears on line 13 on page 18 of the Direct Testimony of Black Hills witness Michael Harrington.² In addition, under a BTA structure, the transfer of a project to utility ownership occurs at substantial completion. As such, the cost and risk of construction and construction finance is on the third-party developer bidder and Black Hills as the project buyer; it is not appropriate to add these costs to the CtC PIM baseline established in Proceeding No. 22A-0230E.

20. We further agree with Mr. Harrington's characterization that the legal standard for any adjustment of the CtC PIM away from the baseline established in Proceeding No. 22A-0230E is a high bar and requires an ALJ finding of force majeure as currently defined in the model purchased power agreement ("PPA") approved in the ERP proceeding.³ Said another way, the ALJ will need to determine if the facts and circumstances surrounding this situation would be sufficient to support a force majeure supported adjustment of the CtC PIM, parallel to an offtake price adjustment for a project developer under the model PPA.

21. Finally, the ALJ should note that under the CtC PIM, only 25 percent of the cost and risk is assigned to Black Hills and that is further subject to a 5 percent deadband.⁴ Given that risk allocation, we struggle to see the merits in Black Hills' proposal to essentially obtain an interest free loan through a CWIP mechanism. The principal purpose of the CtC PIM is to protect customers by shifting appropriate risks to the utility and the project bidder.

² Hrg. Ex. 101 Harrington Direct, p. 18, l. 13.

³ Hrg. Ex. 101 Harrington Direct, p. 15, ll. 1-6.

⁴ Decision No. C24-0837, issued November 14, 2024, Proceeding No. 22A-0230E, ¶ 35, pp. 14-15.

II. ORDER**A. It Is Ordered That:**

1. The Application for a Certificate of Public Convenience and Necessity to Construct a 50 MW Battery Storage and Other Facilities Pursuant to Commission Decision Nos. C24-0634 and C24-0837 filed by Black Hills Colorado Electric, LLC on June 12, 2025, is referred to an Administrative Law Judge (“ALJ”) for disposition.

2. The assigned ALJ shall set a hearing date and establish other procedures by separate Decision(s).

3. This Decision is effective immediately upon its Issued Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
July 30, 2025.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners