

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16A-0757E

IN THE MATTER OF THE PETITION OF BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP FOR A DECLARATORY RULING THAT NO COMMISSION AUTHORIZATION IS REQUIRED UNDER C.R.S. § 40-5-105 TO TRANSFER PUEBLO WATER RIGHTS AND WATER CONVEYANCE FACILITIES, OR, IN THE ALTERNATIVE, APPLICATION FOR AUTHORIZATION TO TRANSFER PUEBLO WATER RIGHTS AND WATER CONVEYANCE FACILITIES.

INTERIM DECISION REQUIRING FILING

Mailed Date: December 13, 2016

Adopted Date: December 7, 2016

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I. BY THE COMMISSION

A. Statement

1. This Decision sets forth three questions regarding the proposed transfer of water rights that we direct Black Hills/Colorado Electric Utility Company, LP (Black Hills or

Company) to answer in a filing to be made no later than one week after the mailed date of this Decision.

B. Discussion

2. On October 6, 2016, Black Hills filed a petition for declaratory order or, in the alternative, an application for authorization to transfer assets. Black Hills seeks to transfer certain water rights and water conveyance facilities associated with the decommissioned Pueblo Units 5 and 6 generating units (Pueblo 5 and 6) to the Pueblo Board of Water Works (BOWW) and the City of Pueblo (City).

3. In relevant part, § 40-5-105(1), C.R.S., requires that the assets of a public utility may be sold, assigned, or leased as any other property, “but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe; except that this section does not apply to assets that are sold, assigned, or leased: (a) in the normal course of business....”

4. Black Hills owns the water rights and conveyance facilities associated with Pueblo 5 and 6. Through various Commission proceedings, Pueblo 5 and 6 are being decommissioned. Black Hills states that the water rights and water conveyance facilities are not currently being used by Black Hills and it proposes to transfer the rights and conveyance facilities, as a donation, to BOWW and the City through quit claim deed and bill of sale.

5. Black Hills claims that the transfer should be deemed in the normal course of business and, therefore, no application to authorize the transfer is required pursuant to § 40-5-105, C.R.S. However, Black Hills acknowledges that there is uncertainty as to whether the proposed transfer is in the normal course of business; therefore, Black Hills provides information to decide the matter as an application seeking approval of the proposed transfer.

6. On October 28, 2016, we noticed the Company's October 6, 2016 filing as an application that includes a request for a declaratory order. We also established a shortened notice and intervention period where requests for interventions were due no later than November 14, 2016.

7. On November 14, 2016, the City and BOWW filed jointly a request for intervention in this matter. The City and BOWW support the granting of the Company's request.

8. No other interventions were filed.

C. Conclusion and Findings

9. Before we determine whether to grant Black Hills' request for authority to transfer the water rights to BOWW, we require additional information from the Company about the value of the proposed donation. The Company's fair market value estimate of \$280,000 may represent potential funds available for the direct benefit of Black Hills' customers.

10. We therefore direct the Company to answer the following questions.

11. First, how is the necessary flow currently maintained through the Historic Arkansas Riverwalk Project and at what cost?

12. Second, how did non-consumptive water rights satisfy the plant's cooling and condensing requirements, which may have been water consumptive, during the operation of Pueblo 5 and 6?

13. Third, what means other than donation might the disposition of the properties result in direct assistance to Black Hills' ratepayers?

14. Black Hills shall file responses to these questions no later than 5:00 p.m. on December 20, 2016.

II. ORDER

A. It Is Ordered That:

1. Consistent with the discussion above, Black Hills/Colorado Electric Utility Company, LP shall file responses to the question related to the water rights proposed to be transferred to the Pueblo Board of Water Works no later than December 20, 2016.

2. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 7, 2016.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

Commissioners

COMMISSIONER FRANCES A. KONCILJA
DISSENTING.

III. COMMISSIONER FRANCES A. KONCILJA DISSENTING:

1. After approving, over the last five years, rate increases sought by Black Hills/Colorado Electric Utility Company, LP (Black Hills) that have resulted in the residents of southern Colorado paying some of the highest electric rates in the United States,

the Commission now decides to delay, impede, and burden (with more regulatory process) the request by Black Hills (supported by the Pueblo Board of Waterworks (BOWW) and the City of Pueblo (City) to transfer, at no cost, non-consumptive water rights valued at \$280,000¹ to BOWW and to transfer to the City certain water facilities, again at no cost. Black Hills has represented that both of these assets have been fully depreciated and are carried on its books at zero.²

2. Rather than congratulating Black Hills, the BOWW, and the City for expeditiously entering into an agreement that appears to be a win for all parties, including the rate payers, the majority of the Commission requests answers to questions that I believe are irrelevant and the responses will likely cause Black Hills and ratepayers to incur costs.³

3. Responses to the questions posed by the Commission in this Decision do not protect ratepayers as I explain below:

Question No. 1:

How is the necessary flow currently maintained through the Historic Arkansas Riverwalk Project (HARP) and at what cost?

My concern--why is the cost of flow of water through HARP of significance to this transfer? The Commission has previously authorized the decommissioning of Pueblo Units 5 and 6 generating units (Pueblo 5 and 6).

¹ Black Hills obtained, and I assume the ratepayers have or will pay, for an appraisal of these conditional non-consumptive water rights which was conducted by Front Range Ag Appraisal, LLC and is dated December 29, 2015 (Appraisal). Thus the Appraisal is less than 12 months old.

² See direct testimony of Richard D. Holland, Senior Tax Manager of Black Hills Service Company.

³ I appreciate that Commissioner Vaad withdrew his original request at the December 7, 2016 hearing that the Commission require Black Hills to submit another "more recent" appraisal with a date of 2016, because a second appraisal could likely be a cost passed onto ratepayers and the Front Range Appraisal is not yet one year old. I also appreciate that Commissioner Vaad, at the December 7th hearing referred to my suggestion, made at the November 30, 2016 adjudication of Black Hills' Phase 1 rate case to appoint a Special Master pursuant to Colorado Rule of Civil Procedure 53 to investigate the ongoing problems that Black Hills has with low-income rate payers (a suggestion rejected in the Phase I rate case--to be considered at a later date) and then suggested on December 7th that the Commission appoint a Special Master with respect to this transfer. However, there is no need for a Special Master with respect to this transfer and I have no idea what a Special Master would do with respect to this transfer. Again, I am happy that request has been abandoned.

Black Hills has represented they are not currently using the non-consumptive water rights and or the water facilities.

Question No. 2

How did non-consumptive water rights satisfy the plant's cooling and condensing requirement, which may have been water consumptive, during the operation of Pueblo 5 and 6?

My concern--why is this analysis, after the Commission has already approved the decommissioning relevant to this transfer? If, in fact, the past operation of Pueblo 5 and 6 consumed more water as the result of evaporation than Black Hills flowed back into the river, this information would likely lead to a liability to Black Hills which would likely be passed on to the ratepayers. Obtaining this information may well be costly.

Question No. 3

What means other than donation might the disposition of the properties result in direct assistance to Black Hills' ratepayers?

It seems obvious that non-consumptive water rights and the water facilities, which Black Hills is no longer using because the Commission approved the decommissioning of Pueblo 5 and 6, should be sold or donated. The Appraisal included three different models to establish the value of these non-consumptive water rights and concluded that the value was \$280,000. Any increased sale price would have to be substantial in order to be revenue neutral to the \$280,000 tax deduction that Black Hills will be entitled if the transfer proceeds as a donation as structured. Further, under the original documents, the City and BOWW have rights of first refusal as to these rights. Thus, even if another purchaser might pay a bit more for these non-consumptive contingent water rights and water facilities, and BOWW or the City elected to trigger the first right of refusal, that would likely cost the City or BOWW, additional money to purchase the rights and Black Hills would not receive a federal tax deduction. If the majority is concerned that BOWW and the City are to be the recipients of these transfers, as opposed to all of the ratepayers, then the Commission should pose that question. However, I think the answer to that question is obvious. Because the Commission has not approved and included in rate base the final cost of the decommissioning of Pueblo 5 and 6, all rate payers, not just the Pueblo ratepayers, will likely receive a benefit from this tax deduction once the final net costs for decommissioning Pueblo 5 and 6, are presented by Black Hills in their next rate case.

4. These questions and the delay are red-herrings. There are much more important steps the Commission should take to protect rate payers in southern Colorado—to review the indirect costs which Black Hills is imposing on ratepayers which likely exceed \$5 million a year

for both the LM6000 and the Pueblo Airport Generating Station facilities and to deal with the tsunami that will likely occur in 2020 and 2023 when Black Hills must refinance hundreds of million dollars of debt—the assignment of which the Commission approved on a consent proceeding with no hearing.

5. Thus I dissent from the majority decision and would allow these transfers, to which no one has objected, to proceed expeditiously and in this calendar year.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Commissioner