

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22AL-0483E

IN THE MATTER OF ADVICE LETTER NO. 834 FILED BY BLACK HILLS COLORADO ELECTRIC, LLC DOING BUSINESS AS BLACK HILLS ENERGY TO INCREASE THE TRANSMISSION COST ADJUSTMENT RIDER, TO BECOME EFFECTIVE JANUARY 1, 2023.

**COMMISSION DECISION GRANTING, IN PART, AND
DENYING, IN PART, EXCEPTIONS TO RECOMMENDED
DECISION NO. R23-0464 AND REQUIRING
COMPLIANCE FILINGS**

Mailed Date: September 6, 2023
Adopted Date: August 30, 2023

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

1. Through this Decision, the Commission addresses the exceptions filed to Recommended Decision No. R23-0464, mailed July 18, 2023, by Administrative Law Judge (ALJ) Aviv Segev (Recommended Decision).

2. Through Advice Letter No. 834-Electric (Advice Letter), Black Hills Colorado Electric LLC, doing business as Black Hills Energy (Black Hills or the Company) proposed to adjust its Transmission Cost Adjustment (TCA) set forth on Fourth Revised Sheet No. 10 in Colo P.U.C. No. 11 (Tariff Sheet), for effect January 1, 2023. The Recommended Decision approves the request for TCA cost recovery through the Advice Letter, finding the 2023 TCA is just and reasonable. The ALJ approves Black Hills' use of a 13-month average methodology to calculate the net plant component of the TCA rider as consistent with the approved methodology used in rate cases; finds Black Hills' 2022 end-of-year construction work in progress (CWIP) component to be reasonable and consistent with § 40-5-101(4), C.R.S.; and finds the Company's trued-up 2023 TCA revenue requirement to be appropriate. The Recommended Decision permanently suspends the tariff sheet filed by Black Hills pursuant to the Advice Letter, and orders Black Hills to make an advice letter compliance filing to modify the tariff sheet consistent with the findings and conclusions in the Recommended Decision.

3. Trial Staff of the Commission (Trial Staff) filed exceptions on August 7, 2023, pursuant to § 40-6-109(2), C.R.S., requesting the Commission reverse or modify portions of the Recommended Decision. Black Hills filed a response on August 14, 2023, opposing Trial Staff's exceptions and urging the Commission to uphold the ALJ's determinations on the issues that Trial Staff raises in its exceptions.

4. After considering the filed exceptions, the response thereto, and the evidentiary record in this Proceeding, the Commission grants, in part, and denies, in part, Trial Staff's exceptions, consistent with the discussion below. Through this Decision, we set aside portions of the Recommended Decision, as discussed below, and make new findings and conclusions. We permanently suspend the tariff sheets filed under the Advice Letter. To implement the approved changes to the Company's rates, Black Hills is ordered to file on not less than one business days' notice to the Commission, modified tariff sheets consistent with the Recommended Decision, as modified by this Decision.

B. Background

5. Through the Advice Letter, Black Hills explained its TCA recovers transmission-related costs that are incremental to the transmission-related investments already being recovered in base rates. Because Black Hills has not had an electric rate case in several years, the 2023 TCA filing represents the incremental transmission-related cost for the period January 1, 2016, through December 31, 2022. The proposed 2023 TCA was designed to collect \$12.3 million on an annual basis. In 2022, the Company incurred approximately \$26 million of incremental transmission-related investments: (1) increased plant in service of \$18.5 million and (2) increased end-of-year CWIP of \$7.5 million. Black Hills' TCA is not forward-looking; the 2023 TCA recovers costs incurred through 2022.

6. On November 29, 2022, Trial Staff filed a protest to the Advice Letter, arguing that certain projects whose costs would be recovered through the 2023 TCA are not construction or expansion of transmission facilities, but are instead capital projects associated with ongoing maintenance of the transmission system. Trial Staff argued the plain language of § 40-5-101(4)(a), C.R.S., allows TCA recovery only for the construction or expansion of transmission

facilities for which a certificate of public convenience and necessity (CPCN) has been granted or the Commission has determined no CPCN is necessary. Black Hills filed a response on December 8, 2022.

7. By Decision No. C22-0831, issued December 23, 2022, the Commission suspended the Tariff Sheets' effective date through May 1, 2023, and referred the matter to an ALJ for disposition. By Decision No. R23-0179-I, issued March 15, 2023, the ALJ further suspended the Tariff Sheets' effective date by 130 days to September 8, 2023.

8. Trial Staff is the only intervenor in this Proceeding.

9. The ALJ issued his Recommended Decision on July 18, 2023.

10. By Decision No. C22-0017, pursuant to § 40-6-109(2), C.R.S., the Commission stayed the Recommended Decision upon its own motion.

11. Trial Staff filed exceptions on August 7, 2023. Black Hills filed its response on August 14, 2023.

12. At its August 30, 2023 Commissioners' Weekly Meeting, the Commission conducted live deliberations on the exceptions, resulting in this Decision granting, in part, and denying, in part, Trial Staff's exceptions to the Recommended Decision.

C. Issues Raised in Trial Staff's Exceptions

1. Statutory Interpretation

a. Recommended Decision

13. The Recommended Decision contains a number of findings and conclusions regarding the interpretation of § 40-5-101(4), C.R.S. (the TCA statute). Ultimately, the ALJ concludes there is "no reason to reverse course with respect to the type of investments for which

TCA recovery is permitted pursuant to § 40-5-101(4).”¹ In support of this conclusion, the ALJ finds Trial Staff failed to provide compelling evidence to support its interpretation of the legislative intent behind Senate Bill 07-100 (the bill that enacted the TCA statute) and agrees with Black Hills that, had the legislature intended that only *new* construction and expansion be recoverable through the TCA, the statute would have clearly stated so.² The ALJ also finds the phrases “robust electric transmission system,” “reliability of electric power,” “continued availability,” “reliable electricity,” and “continually evaluate the adequacy of electric transmission facilities” that are used in the legislative declaration of Senate Bill 07-100 tend to show that more likely than not the legislature contemplated routine repair and replacement of transmission facilities was recoverable under the TCA rider authorized by the bill.³ The Recommended Decision thus rejects Trial Staff’s request that routine replacement and repair of existing transmission be removed from Black Hills’ TCA recovery.

b. Trial Staff’s Exceptions

14. Trial Staff urges the Commission to find the meaning of “construction and expansion of transmission facilities” as used throughout Senate Bill 07-100 and § 40-5-101, C.R.S., is limited to *new* construction or expansion of transmission facilities and does not include routine replacement and repair of transmission facilities.⁴ Trial Staff requests that the Commission find, under statute, rate regulated electric utilities are “entitled” to recovery of their authorized rate of return on the total balance of CWIP related to *new* construction and expansion of transmission facilities as of the end of the preceding year through their Commission-approved

¹ Recommended Decision ¶ 69.

² *Id.*

³ *Id.*

⁴ Trial Staff raised this same issue in Proceeding No. 22AL-0530E, Public Service Company of Colorado’s electric rate case. We addressed the issue there and came to a similar conclusion with respect to the meaning of § 40-5-101(4), C.R.S.

TCA but are not “entitled” to similar recovery for routine replacement and repair of existing facilities.

15. Trial Staff challenges the ALJ’s reliance on the legislative declaration, arguing only subsection (c) of the declaration provides actionable language, while subsections (a) and (b) merely provide generic policy statements from the legislature about Colorado’s electric system and its belief in the importance of a robust electric transmission system. These policy statements, Trial Staff argues, simply provide the narrative introduction necessitating the legislative action. Trial Staff argues, in contrast, use of the word “therefore” in subsection (c), and the instructional language, “should continually evaluate,” provide the legislative directive to action. Trial Staff concludes the declaration clearly conveys that the intent of the bill was to encourage utilities to promptly and efficiently improve their transmission to meet Colorado’s existing and future electric needs.

16. Trial Staff argues, when Senate Bill 07-100 was passed, the legislature was focused on: (a) identifying the best areas in the state with clean energy resources but a lack of adequate transmission facilities;⁵ (b) developing plans for the construction and expansion of transmission facilities to deliver energy from these areas;⁶ and (c) providing incentives or “encouragement” to utilities in the form of early cost recovery to complete the construction and expansion of transmission facilities to deliver energy from these areas.⁷

17. Trial Staff maintains it “is implausible” the legislature intended the ordinary churn of replacement of equipment that failed or reached the end of its useful life would require cost

⁵ Trial Staff SOP, p. 10 (citing § 40–2–126(2)(a)).

⁶ *Id.* (citing § 40–2–126(2)(b)).

⁷ *Id.* (citing § 40–5–101(4)).

recovery incentives.⁸ Pointing to Black Hills’ testimony that concedes utilities already have an obligation to provide safe and reliable electricity, Trial Staff reasons that utilities thus already have an incentive to make routine replacement and repair of deteriorating transmission in order to maintain reliability.⁹ Trial Staff concludes it is irrational to conclude the legislature intended to provide incentives and expedited recovery for investments that a utility already has the obligation to make.

18. Trial Staff also argues that how the same terms, “construction” and “expansion,” are used elsewhere in Senate Bill 07-100 demonstrates the legislature intended to exclude repair- and replacement-type projects when it used those terms to describe the rate adjustment mechanism codified at § 40-5-101(4), C.R.S. Trial Staff points to section 2 of the bill, which requires utilities to identify energy resource zones (ERZs) (areas where transmission constraints hinder the delivery of electricity or the development of new generation).¹⁰ Trial Staff concludes the phrase “construction and expansion of transmission facilities,” as used in this section, refers to *new* construction and expansion designed to move power from new generating projects to load centers, clearly excluding replacement of existing failed equipment or replacing facilities at the end of their useful life. Trial Staff makes a similar argument that the pre-existing statutory language in § 40-5-101, C.R.S., concerning CPCNs, also uses these terms, and in this context, they clearly refer to *new* construction and expansion because CPCNs are not required to merely replace failing equipment or for facilities that have reached the end of their useful life.

⁸ *Id.*, p. 7.

⁹ *Id.* (citing Hrg. Trans., p. 17:5–9 (Harrington)).

¹⁰ *Id.*, p. 8 (citing § 40–2–126(1)(a), C.R.S.).

c. Black Hills' Response

19. Black Hills urges the Commission to reject Trial Staff's interpretation and uphold the ALJ's findings on the statutory interpretation issue. Black Hills contends, while the development of transmission to serve renewable energy is undoubtably one purpose of § 40-5-101(4), C.R.S., Trial Staff's analysis ignores the other purposes explicitly set forth by the legislature. Black Hills points to the three legislative declarations in Senate Bill 07-100, arguing the legislature declared it is "critical" that the transmission system should be "robust" and "reliable," and thus utilities should "continually evaluate the adequacy of electric transmission facilities" and "be encouraged to promptly and efficiently improve such infrastructure" to meet the state's "existing" and "future" energy needs. Black Hills concludes this language nowhere suggests Trial Staff's limited approach that encourages only new or enhanced infrastructure. Black Hills argues a transmission system cannot be "robust" and "reliable" if its facilities are not "continually evaluate[d] [for] adequacy" and routinely repaired and replaced if they are not adequate. Black Hills adds, the legislature's encouragement to utilities "to promptly and efficiently improve such infrastructure" as required to meet the state's "existing" and "future" energy needs sets forth an expectation that existing energy needs may be addressed by improving existing transmission facilities. Black Hills objects that Trial Staff seeks to add the word "new" to the statute, which the ALJ properly rejected. Black Hills argues the legislature used the word "new" in some sections of § 40-5-101, C.R.S., but did not use that term in subsection (4).

20. Black Hills maintains the Commission has already interpreted § 40-5-101(4), C.R.S., finding utilities should receive recovery of "all incremental investment," and should refrain from making a new interpretation at this time.¹¹ Black Hills states, since that ruling, the

¹¹ Referencing Proceeding No. 07A-339E, Decision No. C07-1085 at ¶ 19 (issued Dec. 24, 2007).

Company has consistently presented these costs in its TCA recovery advice letter filings in order maintain and enhance the reliability of the transmission system, and the Commission has consistently allowed for such recovery.

21. Black Hills adds that its Commission-approved TCA tariff language is consistent with past Commission decisions approving its TCAs.

d. Commission Findings and Conclusions

22. While we reject Trial Staff's argument that § 40-5-101(4), C.R.S., limits the meaning of the terms on the tariff sheets that comprise Black Hills' TCA and thus alters the way the TCA rate is calculated, we are persuaded by Trial Staff's advocacy in this Proceeding that it is necessary to modify Black Hills' TCA beginning with the 2024 TCA by limiting the eligibility of the costs recovered through the TCA to capital costs associated with transmission investment that results in a net increase in transmission capacity. We agree with Trial Staff that jurisdictional utilities have a statutory right to recover transmission costs covering construction and expansion through a TCA rider. But we observe that the statute does not exclude other types of projects from being included in the rider. In our view, the statute sets forth what at the very least must be included in the rider. However, the Commission retains the authority to go beyond the "floor" set by the legislature because it can always authorize additional recovery through such a rider. In this Proceeding, we find the statute's plain language in § 40-5-101(4)(a), C.R.S., stating a utility is entitled to recover through a rate adjustment mechanism the costs it prudently incurs "in planning, developing, and completing the construction or expansion of transmission facilities" excludes repair- and replacement-type projects, as Staff has advocated. We further determine that, going forward, these types of projects should be excluded from TCA rider recovery, as they are not required by statute.

23. As an initial matter, the Commission indeed ruled as a matter of first impression in Proceeding No. 07A-339E, where it first approved a TCA rider for Public Service Company of Colorado (Public Service), that Public Service should recover all incremental transmission costs through its TCA rider.¹² At that time, the entirety of the Commission's analysis on this issue was "that the plain language of § 40-5-101(4), C.R.S., does not contemplate differentiating between transmission investment made in the ordinary course or incremental investments. Simply the only restriction placed on the recovery of costs is with regard to facilities that the utility has been granted a [CPCN] or for which the Commission has determined that no CPCN is required."¹³

24. So it is true that the Commission has addressed the meaning of the TCA statute, but that does not settle the issue that Trial Staff has raised. The Commission cannot ignore legal arguments presented to it simply because it has addressed them in the past. As it is before the courts, parties may argue that the Commission erred in its previous interpretation of the law. Because Trial Staff has presented us with a robust legal argument to that effect, we once again examine the statutory language in § 40-5-101(4), C.R.S., to determine whether the legislature intended to entitle utilities to extraordinary recovery for all incremental transmission costs.

25. To begin, after reviewing the Recommended Decision we must set aside the ALJ's statutory analysis. That analysis is flawed because it looks to both the plain language of the statute (and bill) and the legislative declaration but does not determine that the language of the statute is ambiguous. As a general matter, a legislative declaration is only used as an aid in

¹² See Proceeding No. 07A-339E, Decision No. C07-1085 (issued Dec. 24, 2007) (approving Public Service's application to implement a TCA rider pursuant to recently enacted Senate Bill 07-100).

¹³ Decision No. C07-1085 at ¶ 19.

construing a statute that has been found to be ambiguous. See § 2-4-203(1)(g), C.R.S. (identifying the legislative declaration or purpose as an aid in construing ambiguous statutes).¹⁴

26. In the absence of an industry-specific term of art, we look to the plain language of the statute when ascertaining legislative intent and give the words and phrases their plain and ordinary meanings.¹⁵ If the language is unambiguous, we look no further.¹⁶ In so doing we must read the statutory scheme as a whole, “giving consistent, harmonious, and sensible effect to all of its parts.”¹⁷ We read words and phrases in context and construe them literally according to common usage unless they have acquired a technical meaning by legislative definition.¹⁸ If the language is ambiguous, we may resort to other aids in statutory construction, including the legislative declaration and the consequences of various constructions.

27. The parties have briefed this issue and pointed to other parts of the section, other sections, and the legislative history in support of their interpretations of “construction” and “expansion.” In our view, the most instructive language, which comes just before those terms in subsection 4(a), describes the statutorily eligible costs as those costs the utility prudently incurs in: “*planning, developing, and completing* the construction or expansion of transmission facilities” (emphasis added). By limiting recoverable costs to those related to planning, developing, and completing the construction or expansion of transmission facilities, the legislature indicated it was contemplating larger scale projects that necessarily require planning and development. This is in contrast to, as Trial Staff would put it, the ordinary churn of

¹⁴ See also, *People In Int. of T.B.*, 2016 COA 151M, ¶ 42 (noting courts generally do not consider a declaration where a statute is unambiguous); *McDonald v. People*, 2021 CO 64, ¶ 20 (explaining, where a statute is ambiguous, courts turn to other interpretative aids to discern the legislature’s intent, including a statute’s declaration or purpose).

¹⁵ See *Montezuma Valley Irrigation Co. v. Bd. of Cnty. Commissioners of Cnty. of Montezuma*, 2020 COA 161, ¶ 19.

¹⁶ *Id.* (citing *People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004)).

¹⁷ *Colorado Prop. Tax Adm’r v. CO₂ Comm., Inc.*, 2023 CO 8, ¶ 22.

¹⁸ *Yascavage*, 101 P.3d at 1093; §§ 2–4–101, 2–4–212, C.R.S.

replacement of equipment that has failed or reached the end of its useful life.¹⁹ The legislature's inclusion of these descriptive terms indicates it intended for eligible projects to be those that required planning, developing, and completing, which we interpret to plainly exclude repair- and replacement-type projects. Finally, we note that throughout the revised statutes the legislature distinguishes between the terms "repair," "replacement," and "construction."²⁰ We conclude that had the legislature intended to include repair and replacement as eligible costs, it could have used those words in this statute as it has many times in the past. It did not.

28. Moreover, the plain and ordinary meaning of the terms "construction" and "expansion" supports this reading. "Where the statute does not specifically define key terms, we look to the plain and ordinary meanings of the words, aided by the dictionary definition(s)."²¹

29. The common usage of *constructing* and *expanding* refers to creating something new or increasing the size of something, not to simply repair, replace, or otherwise restore something to its original condition. For example, if someone were to say they were constructing or expanding a garage, it would be unreasonable to understand that they were simply replacing the garage door opener. Thus, by excluding repair and replacement type projects are we are giving the statutory terms their commonly accepted meanings instead of a strained or forced interpretation that would equate construction and expanding to the act of maintenance.

¹⁹ See, e.g., Hrg. Exh. 300, Camp Answer, p. 19 (Trial Staff arguing it is implausible the legislature intended the ordinary churn of replacing equipment required cost recovery incentives and rather it is reasonable to expect utilities would make such routine investment without incentives in order to maintain reliability).

²⁰ See, e.g., §§ 23-71-122 ("construct, erect, repair, alter, and remodel buildings and structures"); 24-30-1310 (funding for capital construction); 25-25-107 ("to acquire, construct, reconstruct, renovate, replace, alter, improve, maintain, repair, operate, lease as lessee or lessor..."); 35-46-111(1)(a) (road authority must "adequately construct, maintain, or repair right-of-way" fencing); 40-2-115(1)(d)(II)(A) (usage in Title 40-utilities—"Qualifications and verifiable credentials for personnel engaged in pipeline construction, inspection, and repair activities").

²¹ *People v. Grosko*, 2021 COA 28, ¶ 18 (noting that plain language analyses can be aided by dictionary definitions, where the statute does not specifically define key terms).

30. Dictionary definitions support this reading. Both Black’s Law Dictionary²² and Merriam-Webster²³ offer definitions for “construction” that would exclude repair or maintenance type of work. Both definitional chains at their core refer to building something from various components or parts. This general idea stands apart from replacing individual components within the transmission system. In our view, when transmission projects are undertaken for replacement or repair, nothing new is being built or constructed, and therefore those types of projects—while important—find no home in the language of the TCA statute, § 40-5-101(4), C.R.S. Similarly, while Black’s offers no definition for “expand” or “expansion,” Merriam-Webster defines expansion as “the act or process of expanding; an expanded part; something that results from an act of expanding.”²⁴ That same dictionary defines “expand” as “to increase the extent, number, volume, or scope of.”²⁵ Interpreting *expansion* in this way accords with the purpose of the statute because both the electrical capacity and the physical reach of the transmission system are measured, and it can be easily understood whether a given project increases transmission capacity or the physical reach of the system itself.

31. Finally, even if we were to find the statute is ambiguous and then resort to tools of statutory interpretation, including legislative history and purpose, we would reach the same result. We agree with Trial Staff’s position that the legislative declaration, read as a whole, conveys that the purpose of Senate Bill 07-100 was to encourage or incentivize utilities to promptly and efficiently improve their transmission to meet Colorado’s existing and future

²² Construction. Black’s Law Dictionary. “The act of building by combining or arranging parts or elements; the thing so built.” Black’s does not define “build” or the verb “building”.

²³ Merriam-Webster defines “construction” as “the process, art, or manner of constructing something”, and the verb “construct” to mean “to make or form by combining or arranging parts or elements: build.” See Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/construction> & <https://www.merriam-webster.com/dictionary/construct>.

²⁴ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/expansion>.

²⁵ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/expand>.

needs. The bill's focus on building new transmission into energy resource zones comports with the legislative intent evinced by the plain language, revealing a focus on incentives for new build, not quicker cost recovery for maintenance and repair done in the ordinary course. As Trial Staff reasonably points out, the other generic policy statements in the declaration simply provide the narrative introduction necessitating the legislative action. And none of the words cited by Black Hills are carried over in any way to subsection 4(a). We find no reason to deviate from the ordinary and commonly accepted meanings of these terms simply because of general statements made in the legislative declaration.

32. In sum, the statute entitles utilities to recover costs incurred for projects that build out the physical footprint of the transmission system ("construction") or expand the capacity of the existing system. The statute does not mandate that money spent to replace or repair transmission components must be included in a TCA rider. The Commission has allowed those repair and replacement costs—which are above and beyond those required by statute—to be recovered through Black Hills' TCA rider, and we now turn to address Trial Staff's arguments as to whether those costs should continue to be recovered in a rider or should instead be recovered, like most other costs, through rate cases.

2. Policy Determination

a. Trial Staff's Exceptions

33. As a policy matter, Trial Staff advocates for the Commission to find that relief beyond what utilities are entitled to pursuant to statute is within the Commission's authority to grant, but is not currently in the public interest, particularly considering that nearly all utility customers in Colorado have experienced much higher energy burdens, along with higher costs for many other essential needs (health, food, fuel, etc.). Trial Staff suggests the Commission

carefully examine and determine the type of recovery to which utilities should be entitled under Colorado statutes and distinguish this recovery from any additional relief the Commission may grant in its own discretion on a case-by-case basis. Trial Staff states that if any relief beyond a “minimum entitlement” is in the public interest, then the Commission may provide for such a remedy. However, Trial Staff underscores in this case that Black Hills’ TCA has increasingly been used as a mechanism to recover costs of routine repair and replacement of transmission facilities on an expedited basis outside of the review processes of a rate case.

34. In addition, Trial Staff requests that the Commission establish a new framework to determine recovery eligibility under Black Hills’ TCA. Trial Staff’s suggested framework entails authorization, expansion, and prudence to evaluate such TCA eligibility.

35. Regarding “authorization,” Trial Staff states TCA eligible costs would be associated with projects for which the Company has received a CPCN or for which the Commission has determined do not require a CPCN. But Trial Staff also goes on to state that projects completed in the ordinary course of business should not be eligible for recovery through the TCA.

36. Trial Staff contends that a project should only be considered “expansion” if it allows for the injection of new generation capacity to the utility’s grid. According to Trial Staff, when “replacement” is the primary purpose of a transmission project, the Commission should not consider the project as “expansion.”

37. And for prudence, Trial Staff recommends the Commission engage in ongoing monitoring to determine if projects are on time and within budget via a performance indicator. Trial Staff suggests that this process include a requirement that a utility: (a) complete 95 percent of its scheduled work, and (b) demonstrate the annual ratio of the percentage of work completed

to the percentage of actual spend to budget for each project equals or exceeds 95 percent of the project budgeted amount.

38. If a project does not satisfy these requirements, Black Hills may pursue transmission project cost recovery in its next rate case but will be unable to recover costs for the ineligible project using the TCA. Trial Staff concludes that without such a framework, Trial Staff, and other interested intervenors, may expend valuable resources to evaluate future TCA proceedings.

39. To emphasize the need for the “prudence prong” of its test for TCA eligibility, Trial Staff points to the Company’s West Station-Hogback 115kV Transmission Project. Trial Staff states the project was approved by the Commission in 2017 at an estimated cost of \$24 million, while the actual cost for this project was \$52.6 million. Trial Staff contends that under its TCA, however, Black Hills simply “processes” its projects for cost recovery, even if a project is grossly over-budget. Trial Staff contends, if Black Hills’ TCA is modified as Trial Staff suggests, the amount of requested project recovery that was overbudget and not on time would be ineligible for TCA recovery.

b. Black Hills’ Response

40. Black Hills disputes Trial Staff’s claim that energy burden concerns and the size of its TCA, warrant re-examining past practice. Black Hills states the energy burdens discussed by Trial Staff are the recent high winter bills due to high natural gas fuel commodity costs, yet these costs have recently fallen considerably, and customer bills should soon return to normal levels. Black Hills also contends that its TCA revenue requirement has not increased to the extent Trial Staff suggests. Black Hills states the main reason the TCA has increased in recent years is because it has not filed a rate case since 2016. When new rates are adopted by the

Commission as a result of a rate case, the incremental TCA plant investments would be rolled into base rates and the TCA reset. Black Hills states the \$12,269,513 TCA revenue requirement amount in 2023 is only \$10.7 million higher than the 2009 TCA revenue requirement, which represents an increase of approximately \$764,000 per year. Black Hills adds that filing rate cases involves an enormous investment of resources for utilities, the Commission, and intervenors.²⁶ Black Hills urges that, instead of encouraging utilities to file fewer rate cases, Trial Staff's objection to an increased TCA revenue requirement encourages the filing of more rate cases, which is not in the public interest.

41. Black Hills likewise opposes adoption of Trial Staff's three-prong test, which it objects is ill-conceived, unlawful, and unfounded. Citing the discussion in its testimony, and presented in Table MJH-1, Black Hill states that application of Trial Staff's three-prong test would "categorically deny recovery" of 14 of the 17 projects included in Black Hills' 2023 TCA, or, in other words, deny recovery of \$63.5 million of \$70 million total investment.

42. Black Hills opposes the prudence standards in Trial Staff's proposed framework. Black Hills contends that: (1) a rulemaking is required to adopt and apply the new standard; (2) the new standard cannot be applied retroactively; (3) the new standard categorically rejects projects without actually addressing prudence; and (4) the ratios in the standard (*i.e.*, the 95 percent thresholds) are improperly based on a settlement in a different proceeding for a different utility addressing different issues.

43. Black Hills likewise asserts the authorization prong is flawed. However, Black Hills' analysis focuses primarily on the Company's request in this Proceeding for a finding that certain projects included in the 2023 TCA were completed in the ordinary course of business.

²⁶ Trial Staff SOP, p. 26 (citing Hrg. Exh. 102, Harrington Rebuttal, p. 14:17–19).

Black Hills points to a Commission order in a previous proceeding where the Commission held that Black Hills was not prohibited from seeking a determination in the 2023 TCA proceeding that certain projects are in the ordinary course of business and thus do not require a CPCN.²⁷ Black Hills argues that because this matter was set for hearing, its witnesses requested a finding in this Proceeding that the projects were completed in the ordinary course of business, and that the ALJ correctly granted the requested finding.

44. With respect to the expansion prong, Black Hills maintains the Commission should uphold the ALJ's determination that Trial Staff presented no compelling evidence as to its interpretation of the legislative intent behind Senate Bill 07-100. As a policy matter, again, Black Hills disputes Trial Staff's contention that Black Hills' TCA as "drastically increased." Black Hills states the \$12.3 million revenue requirement for the 2023 TCA is only \$10.7 million higher than the 2009 TCA revenue requirement, an increase of approximately \$764,000 per year.

c. Commission Findings and Conclusions

45. We find the public interest would be better served by shifting away from extraordinary rider recovery for the subset of routine maintenance projects, which we have found in our discussion above is not required by statute. We find it appropriate, both as a legal and policy matter, for Black Hills to seek to recover these repair and replacement costs through the ordinary means of rate cases.²⁸ This will ensure the TCA primarily promotes new construction

²⁷ Proceeding No. 22M-0005E, Decision No. C22-0438 (Aug. 2, 2022).

²⁸ When it comes to ratemaking and rate design, the Commission is not bound by prior decisions. *See Pub. Serv. Co. of Colo. v. Pub. Utils. Comm'n*, 26 P.3d 1198 (Colo. 2001) (the making of rates to govern public utilities is legislative in nature and not a judicial function); *Colorado-Ute*, 198 Colo. at 540–41, 602 P.2d at 865 (due to the legislative character of ratemaking, the Commission is not bound by its prior decisions or by any doctrine similar to *stare decisis*). Recognizing that Commission decisions are based on the record of each case, the Colorado Supreme Court has instructed "while consistency in administrative rulings is considered essential, and while agency rulings are entitled to great weight in subsequent proceedings ... the appearance of arbitrariness is dispelled when new findings are made, as they were here, on the basis of new evidence and a new record." *Colorado-Ute Elec. Ass'n, Inc. v. Pub. Utils. Comm'n*, 198 Colo. 534, 541, 602 P.2d 861, 865 (1979).

and expansion of transmission facilities and may provide some relief for customers in the short term. In sum, based on the record in this Proceeding, we find good cause to remove some of the additional projects that we previously allowed to be recovered through this rider by defining the transmission projects eligible for recovery through the TCA in the Company's TCA tariff as those that result in a net increase in transmission capacity.

46. Accordingly, we modify Black Hills' TCA tariff, to take effect prospectively, starting with the TCA advice letter filing to be submitted in November 2023 for the TCA for effect January 1, 2024. These changes are set forth in Appendix A to this Decision. In November 2023 when Black Hills files an advice letter to change the charges set forth on Sheet No. 101 for effect January 1, 2024, Black Hills shall also file a revised Sheet No. 99 for effect January 1, 2024, as required by this Decision.

47. Although we see merit to re-examining other policies governing cost recovery of transmission investments, we are not inclined to make additional adjustments to Black Hills' TCA based on the record in this Proceeding. We reserve such examination for future utility adjudications or a more comprehensive rulemaking.

48. As to Trial Staff's proposed three-prong framework, although we appreciate the effort Trial Staff has made to put forth this robust proposal, we are not persuaded at this time to adopt this new framework except as discussed above regarding the required modifications to Black Hills' TCA tariff beginning with the 2024 TCA. We are mindful of the objections raised by Black Hills and find more analysis would be needed to develop a new approach that meets the legal requirements, achieves the desired policy outcomes, and remains workable for Black Hills in execution.

D. Conclusion

49. Pursuant to § 40-6-109(2), C.R.S., the Commission may adopt, reject, or modify the findings of fact and conclusions of the ALJ or, after examination of the record, enter its own decision and order therein without regard to the findings of fact of the ALJ.

50. Based on our review of the record, including Black Hills' Advice Letter, the parties' testimony, the Recommended Decision, and the exceptions and response, we find grounds to grant, in part, and deny, in part, Trial Staff's exceptions, consistent with the discussion above. We modify the Recommended Decision to the extent inconsistent with the findings and conclusions in this Decision and we expressly set aside the statutory analysis of § 40-5-101(4), C.R.S., in the Recommended Decision and enter our own decision interpreting that statute, as set forth above.

51. We affirm that Black Hills' current TCA tariff and collections are lawful, even under Trial Staff's interpretation, because the statute sets only the minimum amount of costs to be recovered through a transmission-focused rate adjustment mechanism. However, on policy grounds, we order Black Hills to adjust its TCA tariff to reflect a narrower scope of eligible projects. Accordingly, we modify Black Hills' TCA tariff sheets for effect January 1, 2024, so that transmission projects eligible for cost recovery through the TCA are those that result in a net increase in transmission capacity.

52. Based on Trial Staff's advocacy in this case, the Commission sees merit in reexamining other policies governing cost recovery of transmission investments. However, we are not inclined to make additional adjustments to Black Hills' TCA tariff based on the record in this Proceeding. We instead conclude that reexamination of certain cost recovery issues, such as material changes in cost estimates over time and determinations of the prudence of incurred

transmission costs, is best done in a future rulemaking or in a separate set of utility-specific proceedings in the interim, which would allow for a more fully developed record on potential outcomes of any changes.²⁹

53. Finally, we permit Black Hills to recover its 2023 TCA revenue requirement over the final months of 2023. This approach aligns with the thrust of the policy determinations in the Recommended Decision and largely comports with Trial Staff's statement in its exceptions that, by not objecting to the ALJ's rejection of Trial Staff's recommended disallowances from the 2023 TCA, the matter for the Commission to decide in this case is the same as it was in Public Service's concurrent rate case—whether to change Black Hills' TCA prospectively beginning with the 2024 TCA to be filed in November 2023.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R23-0464, filed August 7, 2023, by Trial Staff of the Commission, are granted, in part, and denied, in part, consistent with the discussion above.

2. Black Hills Colorado Electric LLC, doing business as Black Hills Energy (Black Hills) shall file an advice letter compliance filing to modify the tariff sheets in in Colo P.U.C. No. 11 consistent with the findings, conclusions, and directives in the Decision.

3. Black Hills shall file a compliance tariff filing in a separate proceeding and on not less than one business days' notice to put into place the 2023 TCA for the remaining months of

²⁹ At its weekly business meeting on April 19, 2023, the Commission orally adopted a decision opening a pre-rulemaking proceeding to examine potential modifications to the Commission's Rules Regulating Electric Utilities, 4 CCR 723-3, related to the development, construction, and cost recovery of transmission infrastructure. The Commission directed the staff of the Commission to work with stakeholders and other interested participants to elicit and compile responses to questions and to compile proposed rule changes for the development of a future Notice of Proposed Rulemaking (NOPR).

2023, consistent with the discussion above. The advice letter and tariff sheets shall be filed as a new advice letter proceeding and shall comply with all applicable rules. In calculating the proposed effective date, the date the filing is received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. The advice letter and tariff must comply in all substantive respects to this Decision in order to be filed as a compliance filing on shortened notice.

4. Black Hills shall modify Sheet No. 99 for its TCA for effect January 1, 2024, in accordance with this Decision, consistent with the discussion above.

5. The 20-day time period provided pursuant to § 40-6-116, 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.

6. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 30, 2023.**

(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