

Decision No. R23-0309

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

PROCEEDING NO. 22A-0580G

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IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO GAS, INC. FOR APPROVAL OF A NATURAL GAS DEMAND SIDE MANAGEMENT STRATEGIC ISSUES PLAN FOR CALENDAR YEAR 2023.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MELODY MIRBABA  
DENYING APPLICATION**

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Mailed Date: May 12, 2023

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**I. STATEMENT, SUMMARY, AND BACKGROUND**

**A. Statement and Summary**

1. This Decision denies Black Hills Colorado Gas, Inc.'s, doing business as Black Hills Energy (Black Hills) Verified Application for Approval of a Natural Gas Demand Side Management Strategic Issues Plan for Calendar Year 2023 (Application) and requires Black Hills to file a combined Demand Side Management (DSM) Strategic Issues (SI) plan (DSM SI plan) and DSM plan proceeding on or by July 1, 2023 for 2024-2025.

**B. Procedural History<sup>1</sup>**

2. On December 30, 2022, Black Hills filed the above-captioned Application with attachments.

3. On January 3, 2023, the Commission provided public notice of the Application and established intervention deadlines.<sup>2</sup>

4. On January 9, 2023, Trial Staff of the Public Utilities Commission (Staff) filed a Deficiency Letter asserting that the Application is deficient and should be deemed incomplete.<sup>3</sup>

5. Black Hills responded to the Deficiency Letter on January 19, 2023, disputing Staff's allegations.<sup>4</sup>

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<sup>1</sup> Only the procedural history necessary to understand this Decision is included.

<sup>2</sup> See Notice of Application Filed, filed on January 3, 2023.

<sup>3</sup> Deficiency Letter filed January 9, 2023 at 1-2.

<sup>4</sup> Response to Notification of Deficiencies filed on January 19, 2023.

6. During the weekly meeting held on February 15, 2023, the Commission rejected Staff's assertion that the Application is incomplete; deemed the Application complete; and referred this matter to an administrative law judge (ALJ) for disposition.

7. The following entities were acknowledged as parties to this Proceeding, having timely filed Interventions of Right (collectively, Interventions): the Colorado Energy Office (CEO); the Office of the Utility Consumer Advocate (the UCA); and Staff.<sup>5</sup>

8. On March 6, 2023, the ALJ extended the statutory deadline for a Commission decision to issue by an additional 130 days from June 19, 2023) (among other matters).<sup>6</sup>

9. With the parties' input, on March 16, 2023, the ALJ scheduled a fully remote evidentiary hearing for June 15 and 16, 2023, and established a procedural schedule that includes a March 30, 2023 deadline for Black Hills to file Direct Testimony.<sup>7</sup>

10. Between March 22 and 24, 2023, the UCA, Staff, and CEO each made filings withdrawing their Interventions (collectively, Intervention Withdrawals).<sup>8</sup> While their reasons for withdrawing their Interventions differed slightly, a common thread in all of them is that Black Hills is required to file its next combined Demand Side Management (DSM) strategic issues (SI) and DSM plan proceeding by July 1, 2023 for the 2024-2025.<sup>9</sup> They reasoned that there is little benefit to litigating this Proceeding given the timing of this next proceeding filing; the anticipated timeframe within which a final decision would issue here if fully if fully litigated; and the short

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<sup>5</sup> Decision No. R23-0162-I (mailed March 6, 2023).

<sup>6</sup> *Id.*

<sup>7</sup> Decision No. R23-0182-I at 6-10 (mailed March 16, 2023). *See* Notice of Proposed Procedural Schedule filed March 14, 2023.

<sup>8</sup> The UCA's Withdrawal of Intervention of Right (the UCA's Withdrawal) filed March 22, 2023; Staff's Notice of Withdrawal of Intervention and Request for Hearing (Staff's Withdrawal) filed March 23, 2023; CEO's Notice of Withdrawal of Intervention of Right (CEO's Withdrawal) filed on March 24, 2023.

<sup>9</sup> The UCA's Withdrawal at 1; CEO's Intervention at 2. *See* Staff's Withdrawal at 2.

amount of time that would be left in the 2023 calendar year for Black Hills to implement changes to its DSM Plan.<sup>10</sup>

11. On March 30, 2023, the ALJ issued Decision No. R23-0225-I (the Decision) acknowledging that UCA, Staff, and CEO, withdrew their Interventions, and finding that they are no longer parties to this Proceeding.<sup>11</sup> The Decision confirmed that since all Interventions were withdrawn, the Application and related Plan are uncontested.<sup>12</sup> The Decision explains that because the Application is verified, supported by facts, and no hearing is requested or required, the ALJ would consider the Application and Plan under a modified procedure, without a hearing.<sup>13</sup> For these reasons, the Decision vacated the June 15 and 16, 2023 hearing, and all procedural deadlines except for the Company’s deadline to file Direct Testimony.<sup>14</sup> Rather than vacating the deadline to file Direct Testimony, the Decision extended that deadline to April 20, 2023 to give Black Hills sufficient time to address issues outlined in the Decision that require clarification or further discussion through Direct Testimony.<sup>15</sup> The Decision notes that the ALJ has been unable to verify through the existing record that the Plan complies with the mandatory requirements in § 40-3.2-103, C.R.S., and that Direct Testimony should establish how the Plan does comply with the same.<sup>16</sup>

12. The Decision also took administrative notice of Decision Nos. C22-0760 (mailed December 1, 2022), C23-0039 (mailed January 17, 2023), C23-0117 (mailed February 24, 2023), C23-0117-E (mailed March 15, 2023) and C23-0117-EA (mailed March 15, 2023) in Proceeding

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<sup>10</sup> The UCA’s Withdrawal at 1; CEO’s Intervention at 2. *See* Staff’s Withdrawal at 2.

<sup>11</sup> Decision No. R23-0225-I at 7 (mailed March 30, 2023) (hereinafter Decision No. R23-0225-I).

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 5-6.

<sup>16</sup> *Id.*

No. 21R-00449G, and the status of the newly adopted Rules Regulating Gas Utilities, 4 *Code of Colorado Regulations* (CCR) 723-4, as of March 30, 2023 in Proceeding No. 21R-0449G.<sup>17</sup>

13. On April 20, 2023, Black Hills filed Direct Testimony as Hearing Exhibit 101 and attachments to the same, as Hearing Exhibit 101, Attachments MJC-1 and 2.

## II. FACTUAL FINDINGS

14. Black Hills states that it is a public utility subject to the Commission’s jurisdiction per § 40-1-103, *et seq.*, C.R.S.<sup>18</sup> The Company asks the Commission to approve its natural gas DSM SI Plan (the Plan) for the 2023 calendar year.<sup>19</sup> The Company intends to file a DSM SI application on or before July 1, 2023 for DSM plan years 2024 and 2025.<sup>20</sup>

15. As background, the Company explains that its most recent DSM Plan covers 2021, 2022 and 2023, and its next DSM plan filing is due on May 1, 2023.<sup>21</sup> Although it already has an effective DSM Plan,<sup>22</sup> the Company filed the Application and Plan based upon legislative changes made in 2021 through House Bill (HB) 21-1238 and Senate Bill (SB) 21-264.<sup>23</sup> The Company submits that the purpose of DSM SI proceedings is to develop energy savings targets.<sup>24</sup> The Company’s Plan is intended to establish the already Commission-approved budgets, corresponding energy savings, and peak capacity reduction goals for DSM Plan Year 2023.<sup>25</sup> Essentially, this

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<sup>17</sup> *Id.* at 6, fn. 19.

<sup>18</sup> Hearing Exhibit 100 at 1. This Decision cites to the Application as Hearing Exhibit 100, which is how it is identified in the record.

<sup>19</sup> *Id.*

<sup>20</sup> Hearing Exhibit 100 at 2-3.

<sup>21</sup> *Id.* at 1-2, citing Decision No. R20-0810 (mailed November 16, 2020) in Proceeding No. 20A-0190G (Decision No. R20-0810).

<sup>22</sup> *See* Decision No. R20-0810.

<sup>23</sup> Hearing Exhibit 100 at 2.

<sup>24</sup> Hearing Exhibit 101, 9: 1-2.

<sup>25</sup> Hearing Exhibit 100 at 3.

approach incorporates the Company's DSM Plan for 2023 into its Company's DSM SI Plan for 2023.<sup>26</sup>

16. The Plan, included with the Application, includes programs intended to serve residential, nonresidential, and income-qualified (IQ) customers.<sup>27</sup> Black Hills states that the Plan is similar in form and content to the 2023 DSM Plan Year approved in Proceeding No. 20A-0190G with the following changes or additions:

- Includes a methodology for estimating peak demand savings and the resulting cost savings consistent with pending Rule 4761(b)(III);
- Includes an analysis of the comparative economics of DSM programs distinguished by new construction, existing homes and businesses, and the weatherization of existing homes, reflected as the modified total resource cost (mTRC) for each respective category, consistent with pending Rule 4761(b)(IV) and (V);
- Includes a cost-effectiveness methodology and assumptions in effect for DSM Plan Year 2023, consistent with pending Rule 4761(b)(VIII);
- Incorporates the social cost of carbon dioxide and social cost of methane in calculating DSM program mTRC cost-effectiveness, consistent with pending Rule 4753(o)(I); and,
- Eliminates societal impacts factor, consistent with pending Rule 4753(o)(III), that was previously considered in the 2023 DSM Plan Year.<sup>28</sup>

17. Although the Commission has recently adopted rules to align with 2021 statutory changes that are not yet effective, (in Proceeding No. 21R-0449G), the Company believes that its Plan meets the requirements of the relevant pending rule (Rule 4761).<sup>29</sup>

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<sup>26</sup> See Hearing Exhibit 101, 9: 4-7.

<sup>27</sup> Hearing Exhibit 100, Attachment 1 at 6.

<sup>28</sup> *Id.* at 3-4; Hearing Exhibit 101, 7: 4-16.

<sup>29</sup> Hearing Exhibit 100 at 2.

18. The Plan includes: a Residential Retrofit Program; a Residential New Construction Program; a Nonresidential Retrofit Program; a Nonresidential New Construction Program; an IQ Weatherization Program (IQ Program); and a School-Based Energy Education Program.<sup>30</sup>

19. The Company asks that the Application and Plan be approved, and that the Commission specifically approve its energy and peak savings goals; proposed budget; and cost-effectiveness determination (using the modified total resource cost (mTRC) test), as set forth in more detail below.<sup>31</sup> The below table summarizes this data specific to each Program:<sup>32</sup>

**Table 1**

Program	1-year mTRC (gas savings only)	Budget	Energy Savings Goal (Dth)	Peak Savings Goal (Dth)	Dth per Dollar of Expenditure
Residential Retrofit Program	1.49	\$1,663,537	79,385	658	0.0477
<i>Residential Retrofit Program Excluding Indirect Products</i>	<i>1.82</i>	<i>\$789,901</i>	<i>18,988</i>	<i>127</i>	<i>0.0240</i>
Residential New Construction Program	2.06	\$510,902	10,179	75	0.0199
Nonresidential Retrofit Program	1.98	\$1,206,616	31,287	181	0.0259
Nonresidential New Construction Program	1.92	\$154,826	2,704	31	0.0175
Income-Qualified Program	.68	\$1,328,864	6,927	54	0.0052
School-Based Energy Education Program	4.55	\$484,607	28,884	229	0.0596
Total Portfolio	1.73	\$5,349,352	159,367	1,228	0.0298

<sup>30</sup> Hearing Exhibit 100, Attachment 1 at 7.

<sup>31</sup> Hearing Exhibit 100 at 4.

<sup>32</sup> Hearing Exhibit 100, Attachment 1 at 7-8 (Tables ES-1 and ES-2).

20. The above budget amounts include program specific customer and dealer incentives, marketing, delivery, administration expenditures, cross-program expenses, and evaluation, measurement and verification (EM&M) expenses.<sup>33</sup>

21. The Company estimates the total projected lifetime carbon dioxide emissions reductions for the Plan will be 55,758.0 metric tons, and the total methane savings will be 51.5 metric tons.<sup>34</sup>

22. The Company observes that programs directed at new construction offer the highest savings per dollar spent, but not necessarily as many opportunities for such savings; that those directed at existing facilities provide the highest total savings opportunities, returning \$2.03 for every \$1.00 of cost (somewhat lower per dollar spent than for new construction); and that weatherization “is the most expensive savings” measure.<sup>35</sup>

23. The Company’s 2023 DSM year financial bonus structure is based on a percent of the net economic benefits resulting from the 2023 DSM year.<sup>36</sup> The percentage value is the product of an energy factor determined by a percent of the energy target that the Company achieves, and a savings factor determined by the actual savings achieved, divided by the savings target.<sup>37</sup> To determine the financial bonus, the resulting percentage value is multiplied by the net economic benefits achieved in the 2023 DSM year.<sup>38</sup> The bonus is capped at the lesser of 25 percent of expenditures or 20 percent of the net economic benefits of the DSM Program.<sup>39</sup>

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<sup>33</sup> Hearing Exhibit 100, Attachment 1 at 7-8.

<sup>34</sup> *Id.* at 11. Since the Plan only covers 2023, these figures likewise only cover projections for 2023. *Id.*

<sup>35</sup> *Id.* at 16.

<sup>36</sup> Hearing Exhibit 101, 12: 18-20.

<sup>37</sup> *Id.* at 12: 20-22.

<sup>38</sup> *Id.* at 12: 22—13: 1-2.

<sup>39</sup> *Id.* at 13: 2-5.

24. The Company recovers costs for the Programs through its DSM Cost Adjustment rider (DSMCA), which uses a monthly and volumetric charge calculated as a percent of monthly and volumetric base rates.<sup>40</sup> The currently effective DSMCA rates became effective July 1, 2022 (filed in Proceeding No. 22AL-0239G).<sup>41</sup> The Company anticipates making its next DSMCA filing on or before May 31, 2023.<sup>42</sup> The DSMCA allows the Company to recover prudently incurred DSM costs without filing a new rate case.<sup>43</sup>

25. Because it has fewer than 250,000 customers, the Company does believe that § 40-3.2-103(3), C.R.S. applies to it.<sup>44</sup> The Company states that its filing in this Proceeding is a combined DSM SI and DSM Program Plan filing for 2023.<sup>45</sup>

26. The Company considered including incentives for customers to use behind-the-meter thermal renewable sources, consistent with § 40-3.2-103(3.5), C.R.S., but given that the Commission's new rules are not effective yet and that it was required to submit the Plan before the rules were effective, the Company opted to roll forward its 2023 DSM Plan that the Commission has already approved.<sup>46</sup>

27. The Company explains that the labor standards in § 40-3.2-105.5, C.R.S., apply to situations where the customer applies for a rebate directly from the utility.<sup>47</sup> Only some of the Company's gas DSM programs result in the customer applying for a rebate directly from the

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<sup>40</sup> *Id.* at 10: 7-10.

<sup>41</sup> *Id.* at 10: 11-12. A breakdown of the current DSCMA rate calculation is provided in Hearing Exhibit 101, Attachment MJC-1.

<sup>42</sup> Hearing Exhibit 101, 10: 15-16.

<sup>43</sup> *See Id.* at 10: 4-6.

<sup>44</sup> *Id.* at 13: 13-16.

<sup>45</sup> *Id.* at 13: 16-17. The Company did not title its Application as a combined DSM SI and DSM plan, which makes this assertion perplexing at best.

<sup>46</sup> *Id.* at 13: 18-23—14:1-2.

<sup>47</sup> *Id.* at 10: 19-21.

Company.<sup>48</sup> The Company submits that § 40-3.2-105.5(3), C.R.S., requires utilities to use a certified contractor list, which the Colorado Department of Labor and Employment (CDLE) must compile.<sup>49</sup> The Company has been unable to locate CDLE's certified contractor list, and as a result, submits that CDLE has not developed this list.<sup>50</sup> Given that CDLE has not developed the required certified contractor list, the Company has been unable to use a certified contractor list as contemplated by § 40-3.2-105.5(3)(a) and (b), C.R.S.<sup>51</sup> Nonetheless, the Company does vet contractors used to perform work for gas DSM programs.<sup>52</sup> This vetting includes ensuring that contractors have proof of W-9s for tax purposes, proof of insurance, certificates of liability, proof of worker's compensation insurance, and other Colorado certifications necessary to be in good standing with the state.<sup>53</sup> The Company posts a list of vetted contractors on its website for customers to use when selecting a contractor to install energy efficiency measures.<sup>54</sup> Customers have to use one of the listed contractors to receive an energy efficiency rebate.<sup>55</sup>

28. The Company proposes a 60- and 90-Day Notice process for Plan changes, with the limit that the changes cannot exceed 125% of the Plan budget.<sup>56</sup> The 90-Day Notice process will apply for changes that discontinue a program and the 60-Day Notice process will apply to other changes (such as adding a program, changing eligibility requirements, and changing rebate

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<sup>48</sup> *Id.* at 10: 21—11:1-2.

<sup>49</sup> *Id.* at 11: 3-10, citing § 40-3.2-105.5(3)(a) and (b), C.R.S.

<sup>50</sup> *See Id.* at 11: 11-17.

<sup>51</sup> *See Id.* at 11: 15-17.

<sup>52</sup> *Id.* at 11: 17-19.

<sup>53</sup> *Id.* at 11: 20—12: 1-2. Contractors must complete the "Trade Ally Application" so that the Company may vet them and approve them as verified contractors for DSM programs and measures; this is included as Hearing Exhibit 101, Attachment MJC-2. *Id.* at 12: 6-9.

<sup>54</sup> *Id.* at 12: 10-11, citing <https://www.blackhillsenergy.com/efficiency-and-savings/trade-ally-listing>.

<sup>55</sup> *Id.* at 12: 11-14.

<sup>56</sup> Hearing Exhibit 100, Attachment 1 at 67.

levels).<sup>57</sup> Both types of notices will be filed in this Proceeding and posted on the Company's website.<sup>58</sup>

### **III. RELEVANT LAW, FINDINGS, ANALYSIS, AND CONCLUSIONS**

#### **A. Relevant Law**

##### **1. Commission Jurisdiction and Relevant Statutory Requirements**

29. The Commission has broad authority to regulate public utilities and has jurisdiction to enforce statutes affecting public utilities.<sup>59</sup> The Commission has specific authority to decide DSM SI plans per § 40-3.2-103, C.R.S. The Plan directly falls under the Commission's authority to decide DSM SI plans. For these reasons and based on the record, the ALJ concludes that the Commission has general and specific jurisdiction over the issues presented in this Proceeding.

30. When exercising any power granted to it, the Commission must give the public interest first and paramount consideration.<sup>60</sup>

31. Generally, DSM SI applications and plans are governed by § 40-3.2-103, C.R.S., which includes numerous mandatory requirements.<sup>61</sup> Under 40-3.2-103(1), C.R.S., starting in 2022, and no less frequently than every four years thereafter, investor-owned gas distribution utilities must file an application to open a DSM SI proceeding to "develop energy savings targets" that account for the potential for cost-effective demand-side management and Colorado's greenhouse gas reduction goals. When approving a DSM SI application, the Commission must

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Colo. Const. art. XXV; and §§ 40-1-103(1)(a)(I); 40-3-102; 40-7-101, C.R.S.

<sup>60</sup> § 40-3-101(1), C.R.S.; *Public Serv. Co. of Colo. v. Public Util. Comm'n*, 350 P.2d 543, 549 (Colo. 1960), *cert. denied*, 364 U.S. 820 (1960).

<sup>61</sup> This Decision does not outline each requirement in § 40-3.2-103, C.R.S., but only those necessary to understand this Decision.

also develop an estimated DSM budget commensurate with natural gas savings targets, funding and cost-recovery mechanisms, and a financial bonus structure for DSM programs.<sup>62</sup>

32. Section 40-3.2-103(2), C.R.S., includes numerous requirements for developing targets, mechanisms, and a bonus structure under § 40-3.2-103(1), C.R.S. Among those are that the plan must include the following for the Commission to adopt: an estimated budget for DSM program expenditures commensurate with energy savings targets; procedures to allow gas utilities to recover their prudently incurred costs of DSM programs without filing a rate case through a cost adjustment mechanism; and establish energy savings targets that are consistent with achieving the greenhouse gas reduction goals in § 25-7-102 (2)(g), C.R.S., that consider new clean energy technologies as contemplated by § 40-2-123, C.R.S., and that reflect the maximum cost-effective and achievable natural gas savings potential for the gas utility consistent with the needs of its full-service customers.<sup>63</sup> In addition, § 40-3.2-103(2)(c)(II), C.R.S., requires that cost recovery for programs directed at residential customers only be collected from such customers, and that cost recovery for programs directed at nonresidential customers only be collected from such customers.

## 2. Burden of Proof and Relevant Commission Rules

33. As the proponents of an order, Black Hills bears the burden of proof by a preponderance of the evidence that Application and Plan should be approved.<sup>64</sup> This standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.<sup>65</sup> The preponderance of the evidence standard requires “substantial evidence,” which is defined as such relevant evidence as a reasonable person’s mind might accept

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<sup>62</sup> § 40-3.2-103(1), C.R.S.

<sup>63</sup> § 40-3.2-103(2)(a), (b), (c)(I)(A), C.R.S.

<sup>64</sup> § 24-4-105(7) C.R.S.; Rule 1500, 4 CCR 723-1.

<sup>65</sup> *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985).

as adequate to support a conclusion, and enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.<sup>66</sup>

34. Under Rule 1403, the Commission may consider an uncontested application without a hearing when a hearing is not requested or required by law, and the application is verified and supported by facts.<sup>67</sup> Such is the case here. The ALJ considers the Application and Plan without a hearing.

### **B. Findings, Analysis, and Conclusions**

35. The ALJ assesses the requested relief with the above principles and legal standards in mind.<sup>68</sup> The Plan largely relies on and incorporates the Company's current Commission-approved DSM Plan in Proceeding No. 20A-0190G, which, in turn, was developed and approved pursuant to DSM standards that do not contemplate all the new mandatory statutory requirements for DSM SI plans in § 40-3.2-103, C.R.S.

36. The Company's Application and Plan represent a good faith effort to comply with the statutory requirements in § 40-3.2-103, C.R.S. Indeed, the Application meets the statutory requirement to file a DSM SI application in the 2022 calendar year; includes analyses regarding the Programs' cost-effectiveness; establish energy savings targets; includes a budget; and proposes

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<sup>66</sup> See, e.g., *City of Boulder v. Pub. Utilis. Comm'n.*, 996 P.2d 1270, 1278 (Colo. 2000) quoting *CF&I Steel, L.P. v. Pub. Utilis. Comm'n.*, 949 P.2d 577, 585 (Colo. 1997).

<sup>67</sup> Rule 1403 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

<sup>68</sup> The Company submits that its Application and Plan comply with newly adopted rules in Proceeding No. 21R-0449G governing DSM SI proceedings. Given that those rules were not adopted when the Company filed its Application and are not effective until May 15, 2023, to avoid due process issues, this Decision does not apply those rules here, directly or indirectly. *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Peoples Natural Gas Div. of Northern Natural Gas Co. v. Public Utilities Comm'n.*, 590 P.2d 960, 962 (Colo. 1979). See *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978); Colo. Const. art II, § 11 (General Assembly may not pass retrospective laws); *City of Colo. Springs v. Powell*, 156 P.3d 461, 465 (2007); *Abromeit v. Denver Career Service Bd.*, 140 P.3d 44, 50 (Colo. App. 2005), cert. denied August 14, 2006.

a bonus structure consistent with § 40-3.2-103(2)(d), C.R.S.<sup>69</sup> But the record falls short of establishing that the Application and Plan meet all of the mandatory statutory requirements in § 40-3.2-103, C.R.S. For example, the record does not address requirements that the Plan's energy savings targets are consistent with achieving the greenhouse gas reduction goals in § 25-7-102 (2)(g), C.R.S.; that such targets consider new clean energy technologies as contemplated by § 40-2-123, C.R.S.; and that such targets reflect the maximum cost-effective and achievable natural gas savings potential for the gas utility consistent with the needs of its full-service customers (all of which are required by § 40-3.2-103(2)(b), C.R.S.).<sup>70</sup>

37. Though not clearly stated, the ALJ infers that the Company seeks to use the existing DSMCA to recover costs associated with its Plan given that the Company's current gas DSM Plan recovers costs through the DSMCA.<sup>71</sup> The record does not reflect any attempt to modify the existing DSMCA structure or propose a different cost recovery approach that will ensure that the Company will recover costs associated with programs directed at residential customers only from such customers and costs associated with program directed at nonresidential customers only from such customers, as required by § 40-3.2-103(2)(c)(II), C.R.S.

38. For the reasons and authorities discussed, the ALJ concludes that the preponderance of the evidence fails to establish that the Application and Plan complies with all of the mandatory statutory requirements in § 40-3.2-103, C.R.S. As noted above, the ALJ explicitly advised the Company that unless it files Direct Testimony or otherwise provides information upon which the

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<sup>69</sup> See *supra*, ¶¶ 19 (Table 1) and 23.

<sup>70</sup> To the extent that Black Hills argues that it is not required to meet all of the mandatory statutory provisions in § 40-3.2-103(3), C.R.S., (*supra*, ¶ 25) or any of the above requirements, the ALJ rejects this argument. No language within § 40-3.2-103(2.5), C.R.S., or elsewhere in § 40-3.2-103 support this argument.

<sup>71</sup> See Hearing Exhibit 101, 9:16-17—10: 1-6. See also, Hearing Exhibit 100 at 2 (stating that its 2023 DSM Plan was approved by Decision No. R20-0810).

ALJ may rely to find that the Plan complies with all mandatory statutory requirements in § 40-3.2-103, C.R.S., the ALJ may be unable to grant the Application and approve the Plan, even though it

is no longer contested.<sup>72</sup> Indeed, the ALJ extended the deadline for the Company to file Direct Testimony to give it more time to submit Direct Testimony that explains how its Plan complies with the mandatory requirements in § 40-3.2-103, C.R.S.<sup>73</sup> While Direct Testimony provides helpful information, as discussed above, it does not explain how the Company’s Plan complies with all the mandatory requirements in § 40-3.2-103, C.R.S.

39. As already noted, a more thorough application and plan is likely already in the works given that the Company expects to file a combined DSM SI and DSM plan for 2024-2025 by July 1, 2023. Indeed, in withdrawing their Interventions, the UCA, CEO, and Staff relied (in part) on this, and the fact that they will have an opportunity to address outstanding concerns in that Proceeding.<sup>74</sup>

40. For the foregoing reasons and authorities, the ALJ denies the Application, rejects the Plan, and will require the Company to file its combined DSM SI and DSM plan for 2024-2025<sup>75</sup> by July 1, 2023.<sup>76</sup>

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<sup>72</sup> *Supra*, ¶11. Decision No. R23-0225-I at 5-7. The ALJ identified numerous areas where the record appeared lacking, but specifically advised that those were just a few examples of instances in which the Company’s Application and Plan did not appear to meet mandatory statutory requirements, and that the examples were not intended to be a full compilation of all of the areas where the record may not demonstrate compliance with § 40-3.2-103, C.R.S. *Id.* at 5-6.

<sup>73</sup> Decision No. R23-0225-I at 7.

<sup>74</sup> The UCA’s Withdrawal at 1; CEO’s Withdrawal at 2. *See* Staff’s Withdrawal at 2.

<sup>75</sup> The ALJ does not include the 2023 calendar year in this requirement as there is almost no chance that a DSM SI and DSM plan filed by July 1, 2023 will be fully litigated and approved within a timeline that would allow it to be effective during the 2023 calendar year. *See* § 40-6-109.5(1) and (2), C.R.S.

<sup>76</sup> The Commission has taken a similar approach in two other DSM SI proceedings *See* Decision No. C23-0115 at 3 (mailed February 21, 2023) in Proceeding No. 22A-0577G; and Decision No. C23-0116 at 3 (mailed February 21, 2023) in Proceeding No. 22A-0579G.

41. In accordance with § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this proceeding along with this written recommended decision and recommends that the Commission enter the following order.

**III. ORDER**

**A. The Commission Orders That:**

1. Consistent with the above discussion, the Verified Application for Approval of a Natural Gas Demand Side Management (DSM) Strategic Issues (SI) Plan for Calendar Year 2023 filed on December 30, 2022 by Black Hills Colorado Gas, Inc., doing business as Black Hills Energy (Black Hills) is denied and the Company's 2023 DSM SI Plan is rejected.

2. Black Hills is directed to file a combined DSM SI and DSM plan for 2024-2025 on or by July 1, 2023.

3. Proceeding No. 22A-0580G is closed.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

6. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

7. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,  
Director