

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
PERMANENTLY SUSPENDING TARIFF SHEET,
REQUIRING SUBMISSION OF ADVICE LETTER
AND TARIFF SHEET, AND SHORTENING
RESPONSE TIME TO EXCEPTIONS**

Mailed Date: July 18, 2023

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I. PROCEDURAL HISTORY

1. On November 1, 2022, Black Hills Colorado Electric LLC, doing business as Black Hills Energy (Black Hills), filed Advice Letter No. 834 Electric (Advice Letter) with proposed Transmission Cost Adjustment (TCA) Continued Electric tariff sheet, P.U.C. No. 11, Fourth Revised Sheet No. 101 (Tariff Sheet) that included a January 1, 2023 effective date.

2. On November 29, 2022, the Staff of the Colorado Public Utilities Commission (Staff), filed its Protest (Protest Letter).

3. On December 8, 2022, Black Hills' Response to Trial Staff's Protest Letter Filed on November 28, 2022¹ (Black Hills' Response to Protest Letter) was filed by Black Hills.

4. By Decision No. C22-0831, issued December 23, 2022, the Commission suspended the Tariff Sheets' effective date through May 1, 2023, and referred this matter to an Administrative Law Judge (ALJ) for disposition.

5. On January 20, 2023, a Notice of Intervention as of Right by Trial Staff of The Commission, Entry of Appearance, Notice Pursuant to Rule 1007(A) and Rule 1401, and Request for Hearing (Notice of Intervention) was timely filed by Staff's counsel.

6. 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, adopted a procedural schedule, and scheduled an evidentiary hearing for May 18-19, 2023.²

7. On March 27, 2023, Black Hills pre-filed its direct testimony, including attachments, of Mr. Michael J. Harrington and Mr. Patrick Grant Gervais.³

8. On April 24, 2023, Staff pre-filed its answer testimony, including attachments, of Mr. Gene L. Camp and Mr. Adam Gribb.⁴

¹ The Protest Letter was filed on November 29, 2022, but dated November 28, 2022. The title of Black Hills' filing on December 12, 2022, refers to the date of the Protest Letter and not to the date of its filing.

² Initially, Decision No. R23-0179-I erroneously stated an incorrect hearing date. The same was corrected via an Errata Notice, filed March 17, 2023.

³ Hearing Exhibits 100 and 101, respectively.

⁴ Hearing Exhibits 300 and 301, respectively.

9. On May 08, 2023, Black Hills pre-filed its rebuttal testimony of Mr. Michael J. Harrington and Mr. Patrick Grant Gervais,⁵ including attachments.

10. On May 18, 2023, an evidentiary hearing was held as scheduled. Black Hills and Staff, each, appeared represented by legal counsel.

11. By Decision No. R23-0351-I, issued May 24, 2023, the ALJ ordered any party that seeks to submit a closing statement of position to do so on or before June 9, 2023.

12. On June 9, 2023, the Post-Hearing Statement of Position of Black Hills Colorado Electric, LLC (Black Hills' Statement of Position) and Staff's Post-Hearing Statement of Position (Staff's Statement of Position) were filed by Black Hills and Staff, respectively.

II. THE PARTIES' POSITIONS, FACTUAL FINDINGS, RELEVANT LAW, ANALYSIS, AND CONCLUSIONS

A. Black Hills' Position

1. Mr. Harrington's Testimony⁶

a. Direct Testimony

13. Mr. Harrington testified that he is employed by Black Hills as a Director of Regulatory and Finance. According to Mr. Harrington, the Advice Letter seeks to amend Black Hills' TCA calculation inputs for the period of January 1, 2016, through December 31, 2022. According to Mr. Harrington, based on these new inputs, Black Hills' TCA rate would increase from \$0.005072 per kWh to \$0.006361 per kWh. Mr. Harrington testified that the TCA rider is

⁵ Hearing Exhibits 102 and 103, respectively.

⁶ Mr. Harrington's testimony referenced herein refers to Mr. Harrington's written direct testimony, Hearing Exhibit 100, and written rebuttal testimony, Hearing Exhibit 102, filed March 27, 2023 and May 8, 2023, respectively.

meant to facilitate the recovery of Black Hills' transmission-related costs that are incremental to the transmission-related investments already being recovered in base rates.⁷

14. According to Mr. Harrington, Black Hills' revenue to be recovered through the TCA is comprised of projected transmission net plant investments amounting to \$23.7 million, and Black Hills' construction work in progress (CWIP) balances as of December 31, 2022, amounting to \$4.8 million.⁸ To calculate the annual net plant component of the TCA rider, Black Hills used a 13-month average balance of transmission plant in-service.

15. Mr. Harrington testified that Black Hills' TCA recovery is limited to ongoing capital costs.⁹

16. According to Mr. Harrington, Black Hills' Overhead Transmission Reliability Blanket project, Transmission Substation Blanket project, and Colorado Electric Light Detection and Ranging (COE LiDAR) Remediation project are based on costs actually incurred by Black Hills in 2022 and comprise less than seven percent of the projected TCA revenue sought by Black Hills.¹⁰ Mr. Harrington stated that the Notice of Intervention appears to suggest that Black Hills did not provide sufficient detail on every project listed in the Advice Letter.¹¹ According to Mr. Harrington, given that Staff has identified only three of Black Hills' projects in the Protest Letter, "a rather large burden" is placed on Black Hills to litigate every project referenced in the Advice Letter.¹²

⁷ Hearing Exhibit 100 at 7.

⁸ *Id.*

⁹ *Id.* at 7-8.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 10.

¹² *Id.*

17. Mr. Harrington testified that the Commission’s finding in Decision No. C22-0438, issued August 2, 2022, in Proceeding No. 22M-0005E, that Black Hills’ projects were “unrelated to extension or new construction of transmission for 15 facilities”¹³ is not instructive in this Proceeding.¹⁴ Mr. Harrington explains that the applicable legal standard in this Proceeding (which involves a TCA advice letter) is different from the standard for Rule 3206 filings (which was the subject of Proceeding No. 22M-0005E).¹⁵ Mr. Harrington further explains that neither the legislative intent behind, nor the plain reading of Senate Bill (SB) 07-100, suggest that TCA recovery should be limited to new or enhanced transmission facilities.¹⁶

18. Mr. Harrington testified that the costs for each of the projects listed in the Advice Letter are historical and were incurred in 2022.¹⁷

19. Mr. Harrington notes that the TCA recovery sought by Black Hills in connection with the COE LiDAR Remediation project is justified because this project would allow for a more robust and reliable transmission system, as provided for in the legislative declaration of Senate Bill (SB) 07-100.¹⁸

20. Mr. Harrington testified that none of the projects for which TCA recovery is sought through the Advice Letter require a Certificate of Public Convenience and Necessity (CPCN).¹⁹

¹³ *Id.* at 11 and Decision No. C22-0483 in Proceeding No. 22M-0005E, issued August 2 at 9.

¹⁴ Hearing Exhibit 100 at 11.

¹⁵ *Id.*

¹⁶ *Id.* at 15-17.

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 14 and 15-16.

¹⁹ *Id.* at 17.

b. Rebuttal Testimony

21. Mr. Harrington testified that Staff fails to identify any statement by a legislator regarding the purposes of SB 07-100 and points out that Staff focuses only on legislative declaration (1)(c) of SB 07-100, while ignoring declarations (1)(a) and (1)(b).²⁰ Mr. Harrington explains that declarations (1)(a) and (1)(b) suggest that TCA recovery should include investments made in connection with repair and replacement of transmission facilities.²¹

22. Mr. Harrington testified that the reason for the increase in Black Hills' TCA revenue requirements since 2009 is that Black Hills has not filed a Phase I rate case since 2016.²² Mr. Harrington explains that when new, non-TCA, rates are adopted by the Commission, "the incremental TCA plant investments are rolled into base rates and the TCA is reset to zero."²³

23. Mr. Harrington testified that Staff's reading term "*new* construction" into the TCA portion of SB 07-100, is not supported by the statute because the word "new" appears in some sections of SB 07-100, but not in the TCA portion of SB 07-100.²⁴

24. With respect to the first prong, Authorization, of Staff's three-part framework for determining whether a utility's transmission project is eligible for TCA recovery (Staff's three-part framework), Mr. Harrington testified that this prong appears to be nothing more than a recitation of the statutory requirement found in § 40-5-101(4)(a), C.R.S.²⁵ Mr. Harrington reiterates that all

²⁰ Heating Exhibit 102, Rev. 1 at 11

²¹ *Id.* at 11-12.

²² *Id.* at 14.

²³ *Id.*

²⁴ *Id.* at 15-16.

²⁵ *Id.* at 18-19.

projects for which TCA recovery is sought through the Advice Letter do not require a CPCN and that the TCA statute does not limit TCA recovery to new construction.²⁶

25. With respect to the second prong, Expansion, of Staff’s three-part framework, Mr. Harrington testified that it is inconsistent with SB 07-100 in as much as it requires that TCA recovery be granted only for new construction projects.²⁷ Mr. Harrington further testified that “Staff relies on ambiguous definitions that make it difficult or impossible for a utility or the Commission to discern what projects may qualify.”

26. With respect to the third prong, Prudency, of Staff’s three-part framework, Mr. Harrington testified that proposing a new “ongoing process” and a prudency test for “utilities like Black Hills” would require rulemaking proceedings, and cannot be done through an adjudicatory proceeding like the one at hand.²⁸ Mr. Harrington argues that applying the prudency prong to Black Hills for the first time in this Proceeding would be “fundamentally unfair” to Black Hills as it would apply retroactively to the Advice Letter.²⁹

27. Lastly, Mr. Harrington testified that the primary purpose of Black Hills’ annual Rule 3206 report filings is to supply information for the Commission to make a determination as to whether or not a CPCN is needed for Black Hills’ transmission projects.³⁰ Mr. Harrington argues that it would be “unfair” to apply Black Hills’ Rule 3206 report filing made in April 2022, so as to disallow TCA recovery for delayed or over-budget projects, by any time or amount.³¹

²⁶ *Id.* at 19.

²⁷ *Id.* at 20.

²⁸ *Id.* at 23-24.

²⁹ *Id.* at 29.

³⁰ *Id.* at 31.

³¹ *Id.* at 31-32.

2. Mr. Gervais' Testimony³²

a. Direct Testimony

28. Mr. Gervais' testified that he is employed by Black Hills as a regulatory Analyst II.³³

29. Mr. Gervais' testified that after a review of the work orders in Appendix C to Black Hills' Advice Letter, Black Hills discovered it inadvertently excluded a project description from Appendix D. Black Hills subsequently provided information related to the inadvertently-omitted project through a supplemental discovery response.³⁴

30. According to Mr. Gervais, the Overhead Transmission Reliability Blanket project was established for unplanned transmission line repairs and replacements needed throughout Black Hills' service territory. This project does not have an in-service date, due to continued need for repairs and replacements. However, the various components of this project have in-service dates. This project incurred capital expenditures of \$113,000 in 2022.³⁵

31. According to Mr. Gervais, the Transmission Substation Blanket project is similar to the Overhead Transmission Reliability Blanket project, except the project covers Black Hills' 2022 costs incurred for unplanned repairs and replacement of Black Hills' transmission substations. This project incurred capital expenditures of \$178,000 in 2022.³⁶

³² Mr. Gervais' testimony referenced herein refers to Mr. Gervais' written direct testimony, Hearing Exhibit 101, and written rebuttal testimony, Hearing Exhibit 103 filed March 27, 2023 and May 8, 2023, respectively.

³³ Hearing Exhibit 101 at 4.

³⁴ *Id.* at 7.

³⁵ *Id.* at 8.

³⁶ *Id.* at 9.

32. According to Mr. Gervais, the COE Substation Rekey project involves the replacement of all locks on Black Hills' transmission substations with impact and cut resistant locks. Because these locks are a significant upgrade to the previous locks, this project is classified as both a replacement and an upgrade project. This project incurred capital expenditures of \$1,791 in 2022.³⁷

33. According to Mr. Gervais, the COE Transmission Pole Treatment project involves the inspection and treatment of Black Hills' transmission poles in its service territory. These pole treatments are on a continual ten-year inspection and treatment cycle, which is the reason this project does not include an end date. This project incurred capital expenditures of \$248,000 in 2022.³⁸

34. According to Mr. Gervais, the COE LiDAR Remediation project involves Black Hills' conducting LiDAR surveys of its transmission lines to identify malfunctions in the transmission lines. Any repairs or replacements identified through the LiDAR surveys are not subject TCA recovery and were not included in the Advice Letter. This project incurred capital expenditures of \$203,000 in 2022.³⁹

35. According to Mr. Gervais, the NERC DMR project is similar to the COE Substation Rekeying project, except the NERC DMR project involves work only on the Baculite, West Station, Hyde Park, and Reader substations. This project incurred capital expenditures of \$379,000 in 2022.⁴⁰

³⁷ *Id.*

³⁸ *Id.* at 10.

³⁹ *Id.* at 10-11.

⁴⁰ *Id.* at 11.

36. According to Mr. Gervais, Black Hills is also seeking TCA cost recovery for the project involving a line rebuild that would increase the capacity of the 41-mile long West Station to Canon West transmission line. Mr. Gervais testified that this project, unlike the remaining nine projects referenced in Appendix D to the Advice Letter, was inadvertently omitted from the same. This project incurred capital expenditures of \$925,000 in 2022.⁴¹

37. According to Mr. Gervais, Black Hills did not incur any costs in 2022 in connection with three projects⁴² that were included in Appendix D to the Advice Letter, and therefore no costs are sought to be recovered in connection with the same in the Advice Letter.

38. According to Mr. Gervais, calculating Black Hills' TCA revenue requirement involves compiling Black Hills' funding projects and work orders that incurred capital expenditures during the calendar year. The capital expenditures include plant in service expenditures, as well as CWIP expenditures. Accumulated depreciation and accumulated deferred income are then subtracted from the plant in service expenditures determine the net plant in service expenditures. The net plant in service and CWIP expenditures are then multiplied by Black Hills Weighted Average Cost of Capital to determine a return on rate base. The return on rate base is then adjusted to account for income taxes, depreciation expense, trued-up capital expenditures, and trued-up-over/under-recovery.⁴³

39. According to Mr. Gervais, Black Hills needs to true-up its capital expenditures because Black Hills filed the Advice Letter before the end of calendar year 2022, and as such Black Hills is not in possession of its actual capital expenditures for calendar year 2022 at the time of

⁴¹ *Id.* at 12.

⁴² *See* projects no. 6, 7, and 8 in Appendix D to the Advice Letter.

⁴³ *Id.* at 13-14.

filing.⁴⁴ Based on the changes between Black Hills’ estimated capital expenditures at the time of filing and Black Hills’ actual expenditures at the end of 2022, Black Hills’ total TCA revenue requirements of \$12,269,825, as referenced in the Advice Letter, have been trued-up from the value of \$12,084,106.⁴⁵

b. Rebuttal Testimony

40. Mr. Gervais testified that there are many factors that can impact a project’s in-service date that fall outside Black Hills’ control.⁴⁶ Supply-chain issues, which have resulted in shortage in, and increased cost of, components, the tightening of the labor market, resulting in difficulty finding and hiring contractors, and the unpredictability of the weather in the winter months make estimating in-service dates especially difficult.⁴⁷

B. Staff’s Position

1. Mr. Camp’s Testimony⁴⁸

41. Mr. Camp testified that he is employed by the Commission as a Deputy Director of Fixed Utilities.⁴⁹

42. According to Mr. Camp, the term “construction and expansion of transmission facilities,” as used in SB 07-100, is limited to new construction or expansion of transmission, and does not include routine repair or replacement of transmission facilities.⁵⁰

⁴⁴ *Id.* at 13.

⁴⁵ *Id.* at 18.

⁴⁶ Hearing Exhibit 103 at 9.

⁴⁷ *Id.* at 9-10.

⁴⁸ Mr. Camp’s testimony referenced herein refers to Mr. Camp’s written answer testimony, filed April 24, 2023.

⁴⁹ Hearing Exhibit 300 at 4.

⁵⁰ *Id.* at 7.

43. Mr. Camp testified that rate-regulated electric utilities may recover the authorized rate of return on the total balance of construction work in progress related to new construction and expansion of transmission facilities as of the end of the immediately preceding year through the TCA. Mr. Camp testified that rate-regulated electric utilities may not recover the rate of return on repairs or routine replacements of existing transmission facilities.⁵¹

44. According to Mr. Camp, relief beyond what is statutorily permitted in § 40-5-101, C.R.S. is not currently in the public interest, particularly in light of the recently-increased energy burdens placed on almost all electrical utility customers in Colorado as well as the increased costs of essential needs borne by such customers.⁵²

45. According to Mr. Camp, the Commission’s finding good cause to suspend the Tariff Sheet and, in a recently-filed TCA case, giving Public Service Company of Colorado (Public Service) certain directions⁵³ show that the Commission has interest in “considering both the types of transmission capital investments that should be recovered through the TCA, as well as the operation of the TCA...”⁵⁴

46. Mr. Camp testified that SB 07-100 was intended to only incentivize new construction or expansion of electrical utilities’ transmission systems in or near energy resource zones.⁵⁵

⁵¹ *Id.*

⁵² *Id.*

⁵³ *I.e.*, directions to address Staff’s allegations that the Public Service is improperly using the TCA statute to recover certain types of transmission investment costs and the merits of the design and operation of the TCA statute as a forward-looking cost recovery mechanism. Hearing Exhibit 300 at 8.

⁵⁴ *Id.* at 8-9.

⁵⁵ *Id.* at 10-11.

47. Lastly, Mr. Camp notes that Black Hills' TCA revenue requirement has increased from \$1,521,179 in 2009 to \$12,269,513 in 2023, which provides the Commission with "good cause" to revisit Decision No. C07-1085 in Proceeding No. 07A-339E, as to the types of costs that can be recovered and how they may be recovered.⁵⁶

2. Mr. Gribb's Testimony⁵⁷

48. Mr. Gribb testified that he is employed by the Commission as a Professional Engineer.⁵⁸

49. Mr. Gribb opines that the Commission should establish a three-prong framework to determine whether Black Hills may recover the cost of a transmission project via the TCA recovery mechanism. This framework includes the following prongs: authorization, expansion, and prudence.⁵⁹

50. Under the authorization prong, the Commission must determine whether the project for which TCA recovery is sought requires a CPCN, based on the criteria identified in Commission Rule 3206(b),(c), and (d).⁶⁰ Mr. Gribb explains that the authorization prong would allow the Commission to comment on, assign an expected level of cost prudence to the project, and ensure that alternatives for the project were considered.⁶¹

51. Under the expansion prong, for projects to be eligible for TCA recovery, the Commission must determine whether the project for which TCA recovery is sought comprises

⁵⁶ *Id.* at 16-17.

⁵⁷ Mr. Gribb's testimony referenced herein refers to Mr. Gribb's written answer testimony as revised and filed May 22, 2023.

⁵⁸ Hearing Exhibit 301 at 4.

⁵⁹ *Id.* at 7-8.

⁶⁰ *Id.* at 9.

⁶¹ *Id.* at 10.

either new construction or expansion of transmission facilities.⁶² “The Commission should define ‘expansion’ as the planning, developing, and completion of projects that allow for the injection of new generation capacity in Black Hills’ interconnection queue.”⁶³ Mr. Gribb explains that actions such as the changing of conductor material, line resistance, or temperature, or the replacement of transformer with similarly rated equipment, do not substantially increase network capacity and therefore do not constitute “expansion.”⁶⁴

52. Under the prudence prong, Mr. Gribb argued that the Commission should establish an ongoing monitoring process to ensure that Black Hills recovers only timely-incurred costs that are within its budget. Mr. Gribb explains that the monitoring process should include the requirements that Black Hills: “(a) complete 95 percent of its scheduled work, and (b) demonstrate that the annual ratio of the percentage of work completed to the percentage of actual spend to budget for each project equals or exceeds 0.950. In addition, according to Mr. Gribb, the Commission should require Black Hills to meet with Staff on a quarterly basis to review the projects for which recovery is sought pursuant to the TCA recovery mechanism.⁶⁵ Mr. Gribb argues that the second requirement of the prudence prong requiring a showing that the annual ratio of the percentage of work completed to the percentage of actual spend to budget for each project equals or exceeds 0.950 is not without precedent.⁶⁶ Mr. Gribb explains that in Decision No. R21-0109, issued February 26, 2021, in Proceeding No. 20A-0300E, the Commission accepted a stipulation that required Public Service to complete 90 percent of its scheduled work annually as proposed in

⁶² *Id.* at 11.

⁶³ *Id.* at 12.

⁶⁴ *Id.*

⁶⁵ *Id.* at 18.

⁶⁶ Hearing Exhibit 301 at 14.

PSC's Wildfire Mitigation Plan and complete system hardening/repair/replacement and system protection programs with a ratio equal to or exceeding 0.900.⁶⁷

53. According to Mr. Gribb, projects that are behind schedule, over budget, or completed after the approved in-service date would be ineligible for TCA recovery pursuant to the prudence prong.⁶⁸

54. According to Mr. Gribb, only seven projects which Black Hills claims are eligible for TCA recovery, passed the first two prongs (Authorization and Expansion) of Staff's three-part framework.⁶⁹ Of these seven projects, three met Staff's prudence prong.⁷⁰ The remaining four projects were either behind schedule, completed after the approved in-service date, or overbudget.⁷¹

55. According to Mr. Gribb, based on the application of Staff's three-part framework to the projects which Black Hills claims are eligible for TCA recovery, Staff estimates that Black Hills' claimed plant-in-service costs of \$70 million will be reduced to \$7.3 million.⁷²

C. Factual Findings

56. During 2022, Black Hills engaged in, and expended money in connection with, projects involving constructing, expanding, repairing, or replacing transmission facilities.

57. Black Hills initiated this matter to amend its TCA tariff sheet to reflect increases to its incremental transmission-related costs. Black Hills seeks recovery of incremental costs since its last TCA filing (Proceeding No. 21AL-0516E⁷³) for transmission-related costs for the period

⁶⁷ *Id.*

⁶⁸ *Id.* at 19-20 and 21.

⁶⁹ *Id.* at 21; *see also* Attachment AMG-1 to Hearing Exhibit 301 at 3.

⁷⁰ *Id.* at 21-22; *see also* Attachment AMG-1 to Hearing Exhibit 301 at 4 and 5.

⁷¹ *Id.*

⁷² *Id.* at 22.

⁷³ *See* Hearing Exhibit 100 at 25.

January 1, 2021 through December 31, 2022, by increasing its TCA rate from \$0.005072 per kWh to \$0.006361 per kWh.⁷⁴ Black Hills attributes the need to increase its TCA rate to increased plant in service (PIS) costs, as well as an increase in Black Hills' CWIP balance for 2022 as compared with 2021.⁷⁵

58. Staff intervened in this matter to address whether the Advice Letter seeks recovery of capital investments costs other than those statutorily contemplated under § 40-5-101(4), C.R.S., whether such costs are eligible to be recovered through Black Hills' TCA tariff sheet, and to establish a new three-prong framework for TCA recovery to be adopted by the Commission in this Proceeding, and future TCA proceedings.⁷⁶

D. Relevant Law

59. Article XXV of the Colorado Constitution gives the Commission authority to regulate Public Service's electric utility rates, services, and facilities. The Commission is charged with ensuring the provision of safe and reliable utility service at just and reasonable rates for customers pursuant to §§ 40-3-101, 40-3-102, 40-3-111, and 40-6-111, C.R.S.

60. Pursuant to § 40-3-101(1), C.R.S., “[a]ll charges made, demanded, or received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable.”

61. Section 40-3-102, C.R.S., states, in part:

The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust

⁷⁴ See Advice Letter at 1.

⁷⁵ *Id.* at 1-2.

⁷⁶ See Notice of Intervention at 1. See also Protest Letter at 1-3.

discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state...

62. Section 1 of SB 07-100 includes the following legislative declaration:
 - (a) A robust electric transmission system is critical to ensuring the reliability of electric power for Colorado's citizens;
 - (b) Colorado's vibrant economy and high quality of life depend on the continued availability of clean, affordable, reliable electricity; and,
 - (c) Therefore, Colorado utilities should continually evaluate the adequacy of electric transmission facilities throughout the state and should be encouraged to promptly and efficiently improve such infrastructure as required to meet the state's existing and future energy needs.

63. Section 3 of SB 07-100 was codified in § 40-5-101(4), C.R.S. and provides:
 - (a) A public utility is entitled to recover, through a separate rate adjustment clause, the costs that it prudently incurs in planning, developing, and completing the construction or expansion of transmission facilities for which the utility has been granted a certificate of public convenience and necessity, or for which the commission has determined that no certificate of public convenience and necessity is required. The transmission rate adjustment clause is subject to annual changes, which are effective on January 1 of each year.
 - (b) To provide additional encouragement to utilities to pursue the construction and expansion of transmission facilities, the commission shall approve current recovery by the utility through the annual rate adjustment clause of the utility's weighted average cost of capital, including its most recently authorized rate of return on equity, on the total balance of construction work in progress related to such transmission facilities as of the end of the immediately preceding year. The rate adjustment clause shall be reduced to the extent that the prudently incurred costs being recovered through the adjustment clause have been included in the public utility's base rates as a result of the commission's final order in a rate case.

E. Analysis and Conclusions

1. Jurisdiction

64. The issues in this Proceeding directly fall under the authority granted to the Commission by Article XXV of the Colorado Constitution and §§ 40-3-101, 40-3-102, 40-3-111,

and 40-6-111, C.R.S. Therefore, and based on the record, the ALJ finds that the Commission has jurisdiction over the subject matter at issue in this Proceeding.

2. The Burden of Proof, The Burden to Move Forward, and Adjudicatory Proceedings

65. In Decision No. C22-0642, issued October 25, 2022 in Case No. 22AL-0046G, the Commission stated:

... the party that seeks Commission approval or authorization... bears the burden of proof with respect to the relief sought; and the burden of proof is by a preponderance of the evidence... The evidence must be ‘substantial evidence,’ which the Colorado Supreme Court has defined as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion ... it must be 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’... The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence... A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

... This standard for the burden of proof must be integrated with the understanding that in the context of a rate case, the Commission acts in its legislative capacity, and the key issues require policy-based decisions in order to adopt a particular regulatory principle or to change an existing regulatory principle. As such, the Commission ‘may set rates based on the evidence as a whole’ and ‘need not base its decision on specific empirical support in the form of a study or data’...⁷⁷

66. As the party seeking approval of the rates and tariff sheet, Black Hills bears the burden of going forward and the burden of proof with respect to the same.⁷⁸ As the party seeking

⁷⁷ Decision No. C22-0642, issued October 25, 2022, in Case No. 22AL-0046G at 14, *citing* § 24-4-107(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Commission’s Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1; *quoting City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (*quoting CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)); *quoting Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985); and *quoting Colorado Office of Consumer Counsel v. Pub. Utils. Comm’n.*, 275 P.3d 656, 660 (Colo. 2012).

⁷⁸ See Decision No. R21-0400, issued July 12, 2021, in Case No. 20AL-0432E at 19-20.

that the Commission adopt and apply to Black Hills Staff's three-part framework, Staff bears the burden of going forward and the burden of proof with respect to the same.⁷⁹

67. It is clear that the Commission cannot make a "statement of general applicability and future effect implementing [and] declaring policy" in this proceeding. *Home Builders Assoc. v. Pub. Utils. Com.*, 720 P.2d 552, 561 (Colo. 1986). Here, the ALJ makes no findings of general applicability, including whether Staff's three-prong framework must be applied in other cases filed by Black Hills or other utilities. Rather, in this Decision, the ALJ analyzes whether, evidence presented by Staff applying its three-part framework, demonstrates that expenditures were not prudently incurred and should not be recoverable in the TCA rate increase sought by Black Hills herein.

3. Opportunity to be Heard and Due Process

68. Black Hills argues that because Staff has identified only three of Black Hills' projects in the Protest Letter, yet the Notice of Intervention contests every project referenced in the Advice letter, "a rather large burden"⁸⁰ is borne by Black Hills. To the extent as Black Hills is arguing that it was not afforded an adequate opportunity to be heard or meaningfully respond to the Staff's allegations, the ALJ disagrees. Black Hills received notice of Staff's intent to contest the allegations made in the Advice Letter on November 29, 2022, upon Staff's filing of the Protest Letter. Black Hills was then afforded the opportunity to fully litigate this case, including the opportunity to present evidence at an evidentiary hearing, cross-examine witnesses, and submit a statement of position.

⁷⁹ *Id.*

⁸⁰ Hearing Exhibit 100 at 10.

4. Legislative Intent Behind SB 07-100

69. Staff argues that the meaning of the phrase “construction and expansion of transmission facilities,” as used in SB 07-100 and codified in §§ 40-2-125 and 40-5-101(4), C.R.S. (SB 07-100), applies to new construction or expansion of transmission facilities, and not to routine replacement or repair of transmission facilities.⁸¹ Staff explains that: 1) the instructional language in subsection c) of § 1 SB 07-100, 2) the claimed implausibility that the Legislature intended to incentivize replacement of equipment that has failed or reached the end of its useful life, 3) the language in § 2 of SB 07-100 regarding electric resource zones, renewable energy, and the accelerated process for obtaining a CPCN, 4) the title of § 3 of SB 07-100, which contains the term “[n]ew construction,” and 5) the language in § 40-5-101(4), C.R.S. concerning the “additional encouragement” for electrical utilities to pursue “construction and expansion of transmission facilities,” together, show that the Legislature intended that § 40-5-101(4) be applied to new construction or expansion of transmission facilities.⁸² On this basis, Staff requests that the Commission find that rate-regulated electric utilities, such as Black Hills, are not entitled to recover the cost of routine replacement and repair of existing transmission facilities through the TCA recovery mechanism enunciated in § 40-5-101(4), C.R.S.⁸³ In Decision No. C07-1085, issued December 24, 2007, in Proceeding No. 07A-339E this very issue was addressed by the Commission. The Commission found that:

The plain language of § 40-5-101(4), C.R.S., does not contemplate differentiating between transmission investment made within the ordinary course of business 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 certificate of public convenience and necessity (CPCN) or for which the Commission has determined that no CPCN is required.

⁸¹ Staff’s Statement of Position at 7-9.

⁸² *Id.* at 7-12.

⁸³ *Id.* at 13.

Therefore Public Service should receive recovery of all incremental transmission costs.

Staff is requesting that the Commission revisit this Decision No. C07-1085.⁸⁴ In contrast, Black Hills argues that Decision No. C07-1085, as well as the “progeny of sixteen years of decisions since then continue to be good law, which should be adhered to in this proceeding.”⁸⁵ Black Hills further notes that while subsections 40-5-101(1) and (3), C.R.S., include the term “new construction,” in subsection (4) of very same statute – the TCA recovery statute, the word “new” does not precede the word “construction.”⁸⁶ The Colorado Supreme Court has consistently held that the doctrine of *stare decisis* does not apply to Commission decisions, and that the Commission’s prior decisions cannot be applied as binding precedent in future proceedings involving the same utility or to any other utility. The Commission’s decision in each proceeding must be based upon substantial evidence in the record of that case.⁸⁷ Nonetheless, Staff presented no compelling evidence as to its interpretation of the legislative intent behind SB 07-100. The ALJ agrees with Black Hills that had the Legislature intended for TCA recover to apply only to *new* construction, the statute would have stated as much. Further, the ALJ notes that the use of the terms “robust electric transmission system,” “reliability of electric power,” “continued availability,” “reliable electricity,” and “continually evaluate the adequacy of electric transmission facilities” in SB 07-100(1)(a),(b), and (c) tend to show more likely than not that the Legislature contemplated that routine repair and replacement of transmission facilities would be recoverable under SB 07-100. Therefore, the ALJ finds no reason to reverse course with respect to the type of

⁸⁴ *Id.* at 15 and 20.

⁸⁵ Black Hills’ Statement of Position at 20 and 25.

⁸⁶ *Id.* at 21.

⁸⁷ See *Colorado Office of Consumer Counsel v. Public Service Company*, 877 P.2d 867, 876 (Colo. 1994); *Colorado Ute Electric Association, Inc., v. PUC*, 198 Colo. 534, 602 P.2d 861, 865 (Colo. 1979); *B&M Services, Inc. v. PUC*, 429 P.2d 293, 295 (Colo. 1967).

investments for which TCA recovery is permitted pursuant to § 40-5-101(4). Based on the foregoing, Staff's request that the Commission find that rate-regulated electric utilities, such as Black Hills, are not entitled to recover the cost of routine replacement and repair of existing transmission facilities through the TCA recovery mechanism enunciated in § 40-5-101(4), C.R.S. is rejected.⁸⁸

5. Staff's Request to Revisit the Commission's Application of § 40-5-101(4), C.R.S. and the Public Interest

70. Staff asserts that Black Hills' revenue requirements have drastically increased since Black Hills' first TCA application for recovery its investments in 2009, and the majority of the early TCA recovery requests by electrical utilities, including Black Hills' initial TCA filing in 2009, concerned primarily new construction.⁸⁹ Staff argues that interpretation of the SB 07-100 and the "fundamentally different financial circumstances" since the Commission made its findings in the early TCA cases requires that the Commission reexamine the issuance of Decision No. C07-1085 in Proceeding No. 07A-339E and provide clarity regarding recoverable investments under § 40-5-101(4), C.R.S.⁹⁰ It is noteworthy that nothing in SB 07-100 suggests that TCA recovery by electrical utilities is restricted to, or otherwise dependent on, certain market conditions. Therefore, Staff's argument regarding Black Hills' changed financial circumstance between 2009 and the filing at issue herein, is unpersuasive. For the same reasons, the ALJ finds unpersuasive Staff's argument that TCA recovery beyond what Staff believes to be permitted under § 40-5-101(4), C.R.S. is not currently in the public interest because almost all Colorado utility consumers have recently experienced increased energy burdens and costs of essential needs. Moreover, Staff presented no

⁸⁸ Notably, this also is not a case of general applicability.

⁸⁹ Hearing Exhibit 300 at 13.

⁹⁰ *Id.* at 15.

compelling evidence regarding its allegations pertaining to the increased energy burdens and costs of essential needs for most electrical utilities' customers in Colorado. The ALJ makes no findings regarding these allegations by Staff. Nonetheless, even accepting these allegations as true, given the lack of support for Staff's position anywhere in SB 07-100, the ALJ, still, does not find Staff's position as to the public interest persuasive.

71. Staff also argues that the term 'entitled' as used in § C.R.S. 40-5-101(4)(b) should be interpreted to mean the minimum relief that the Commission is statutorily obligated to grant[,]" and therefore exclude recovery of all costs, other than prudently incurred costs associated with the development of new construction or expansion of transmission.⁹¹ The ALJ agrees with Staff that the term "entitled" should be interpreted to mean the minimum relief that the Commission is statutorily obligated to grant. However, given the ALJ's finding that routine repair and replacement of transmission facilities are recoverable by electrical utilities pursuant to § 40-5-101(4)(b), C.R.S., that minimum entitlement includes prudently incurred costs associated with routine repair and replacement of transmission facilities.

6. The TCA Recovery Framework

72. Staff contends that the Commission should adopt a new three-prong framework to determine Black Hills' and other electrical utilities' recovery eligibility under § 40-5-101(4), C.R.S.⁹² The three prongs of Staff's TCA recovery framework are: authorization, expansion, and prudence.

⁹¹ Staff's Statement of Position at 13.

⁹² *Id.* at 15.

a. Authorization Prong

73. According to Staff, the authorization prong is necessary for the Commission to ensure that a project for which TCA recovery is requested either has a CPCN, or is one that the Commission determined does not require a CPCN as required under § 40-5-101(4)(a), C.R.S.⁹³ Staff further argues that projects completed in the ordinary course of business, should not be eligible for recovery under § 40-5-101(4).⁹⁴ Black Hills agrees that a determination as to whether a CPCN is required for projects subject to TCA recovery is necessary, such a determination should be made in “*this proceeding*” (emphasis in original). Black Hills notes that, in Decision No. C22-0438, issued August 2, 2022, in Proceeding No. 22M-0005E, the Commission expressly permitted Black Hills to seek TCA recovery for all projects, which Staff now claims should be excluded from recovery because they were undertaken by Black Hills in the ordinary course of business. Given the ALJ’s finding herein that ordinary repair or replacement of transmission facilities is recoverable pursuant to § 40-5-101(4), C.R.S., the authorization prong does not add value to the TCA eligibility requirements already found in § 40-5-101(4)(a), C.R.S. As such, the ALJ finds that there is no need for the Commission to adopt the authorization prong advanced by Staff.

b. Expansion Prong

74. According to Staff, the expansion prong involves verification that the projects that are the subject of a TCA filing involve either new construction or expansion of an existing transmission facility.⁹⁵ A project for which TCA recovery is sought must be verified by the

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 16.

Commission to comprise either new construction or expansion of an existing transmission facility.⁹⁶ According to Staff, a project should only be considered to comprise expansion of a transmission facility if it adds new generation injection capacity.⁹⁷ According to Black Hills, Staff's position that TCA recovery is strictly limited to *new* construction of transmission facilities is not supported by SB 07-100 and "inconsistent with sixteen years of Commission decision-making."⁹⁸ The ALJ agrees with Black Hills in this regard. As indicated in section IV.B.3. of this Decision, Staff failed to present sufficient evidence that would justify a course-reversal with respect to the type of investments for which TCA recovery is permitted pursuant to § 40-5-101(4).

c. Prudency Prong

75. Staff contends that the Commission should establish an ongoing process to ensure that only prudently incurred costs are recovered via C.R.S. § 40-5-101(4)(a) by requiring utilities to: (a) complete 95 percent of its scheduled work and (b) demonstrate that 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.⁹⁹ According to Staff, without complying with these requirements, Black Hills would not be eligible for TCA recovery but could seek recovery for the underlying expenditures in a future rate case.¹⁰⁰ Staff explains these requirements would promote good project management, which are particularly important in "cost recovery requested outside of the strict procedural confines of a rate case."¹⁰¹ Black Hills argues that Staff's prudency prong: would require rulemaking to implement, violates Black Hills' due process, and

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Black Hills' Statement of Position at 18-27.

⁹⁹ Staff's Statement of Position at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 17.

the work completion ratio portion of the prudence prong is actually inapposite to § 40-5-101(4). Black Hills further argues that Staff did not actually show that Black Hills has been imprudent as it relates to the costs identified in the Advice Letter. As it relates to the rulemaking argument, Black Hills explains that the prudence prong has not been approved by the Commission, and thus it cannot meet the adjudicatory standard of “determined rules or policies to the circumstances.”¹⁰² As it relates to the due process argument, Black Hills explains that Staff introduced the prudence prong for the first time in April 2023, a full year after Black Hills filed its Rule 3206 report in Proceeding No. 22M-0005E; yet Staff now seeks to use Black Hills’ Rule 3206 report in Proceeding No. 22M-0005E to disallow Black Hills’ TCA recovery in this Proceeding for any over-budgeted or delayed projects.¹⁰³ As it relates to work completion ratio argument, Black Hills argues that Staff’s attempt to correlate the two-part work completion ratio requirements under Staff’s prudence prong to the 90 percent requirements in Decision No. C22-0438 is misplaced because the latter were intended to be used as future performance indicators, rather than metrics that categorically exclude recovery, and because the 90 percent requirements in Decision No. C22-0438 was the product of settlement, not litigation.¹⁰⁴

76. In as much as Staff argues that Black Hills was imprudent in incurring the costs sought to be recovered through the Advice Letter, in violation of § 40-5-101(4), C.R.S., the ALJ finds that Staff failed to meet its burden of proof. Staff’s allegations concerning Black Hills’ prudence are contained in Staff’s annunciation and application of the prudence prong of Staff’s three-part framework. Namely, Staff argues that four of Black Hills’ transmission projects that

¹⁰² Black Hills’ Statement of Position at 6, quoting *Colorado Off. of Consumer Couns. v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 285 (Colo. 1991).

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 15-16.

were behind schedule, or completed after the Commission-approved in-service date, or over-budget were not eligible for TCA recovery.¹⁰⁵ However, considering the record as a whole, Staff failed to adequately demonstrate that Black Hills' failure to meet the completion criteria of the prudence prong of Staff's three-part framework¹⁰⁶ shows that the costs Black Hills is seeking to recoup through the Advice Letter were not prudently incurred. The ALJ notes that the very notion of requiring Black Hills to complete 95 percent of its scheduled work to be eligible for TCA recovery seems contradictory to § 40-5-101(4), C.R.S., as § 40-5-101(4), C.R.S. appears to allow for TCA recovery for CWIP without qualifications.¹⁰⁷

7. Black Hills' TCA Recovery

77. Staff is neither directly contesting the methodology used by Black Hills to calculate the amount it is eligible to recover pursuant to § 40-5-101(4), C.R.S. nor Black Hills' claim that the projects that are the subject of the Advice Letter involved either expansion of transmission facilities or repairs or replacement of transmission facilities, made in the ordinary course of business.

78. The ALJ finds that Black Hills' use of the 13-month average methodology to calculate the net plant component of the TCA rider at issue herein is reasonable and consistent with the methodology used in Commission rate cases.¹⁰⁸

¹⁰⁵ Hearing Exhibit 301 at 19-20.

¹⁰⁶ *I.e.*, the criteria requiring that Black Hills: (a) complete 95 percent of its scheduled work and (b) demonstrate that 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.

¹⁰⁷ The ALJ further notes that nothing in the record reflects that § 40-5-101(4), C.R.S. should be interpreted to exclude TCA recovery for CWIP.

¹⁰⁸ *See* Decision No. C07-1085 in Proceeding No. 07A-339E, issued December 24, 2007 at 8 and Decision No. C16-1140 in Proceeding No. 16AL-0326E, issued December 19, 2016 at 63-64.

79. The ALJ finds that Black Hills' use of its CWIP 2022 end of year balance to determine the CWIP component of the TCA rider at issue herein is reasonable and consistent with § 40-5-101(4)(b), C.R.S.

80. The ALJ finds that Company's TCA recovery amount of \$12,084,106 was appropriately 'trued-up' by Black Hills, and it is otherwise consistent with the Advice Letter (subject to Black Hills' inadvertent omission discussed above), and Black Hills' relevant discovery response to Staff's discovery requests.¹⁰⁹

81. The ALJ finds that all projects referenced Appendices C and D to the Advice Letter were made in the ordinary course of business and therefore a CPCN is not required for the same.¹¹⁰

82. The ALJ finds that the amounts sought to be recovered through the Advice Letter are just and reasonable.

83. Based on the forgoing, the terms of the Advice letter will be approved, subject to the 'trued-up' figures and substantive correction of Black Hills' inadvertent omission, as addressed Attachments PGG-2 and PGG-3 to Hearing Exhibit 101.

8. Exceptions Deadline

84. In order to maximize the opportunity for the Commission to consider any exceptions that may be filed within the remainder of the suspension period, response time for any exceptions to this Recommended Decision will be shortened, as ordered below.

¹⁰⁹ See Appendices C and D to the Advice letter and Attachments PGG-2 and PGG-3 Hearing Exhibit 101.

¹¹⁰ See § 40-5-101(1)(a)(III).

9. Transmission of Recommended Decision

85. 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. The tariff sheet filed by Black Hills Colorado Electric LLC, doing business as Black Hills Energy's (Black Hills) pursuant to Advice Letter No. 834-Electric is permanently suspended.

2. Black Hills shall file on not less than five days' notice to the Commission, an advice letter compliance filing to modify the tariff sheet consistent with this Recommended Decision.

3. Black Hills shall file the compliance tariff sheet in a separate proceeding. 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 Recommended Decision in order to be filed as a compliance filing on shortened notice.

4. Response time to any exceptions be shortened to seven days.

5. Proceeding No. 22AL-0483E is closed.

6. 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.

7. 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.

- a. 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 within 20 days after service, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
- b. 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

AVIV SEGEV

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director