Decision No. C24-0837

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0230E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR (1) APPROVAL OF ITS 2022 ELECTRIC RESOURCE PLAN AND CLEAN ENERGY PLAN, AND (2) APPROVAL OF ITS 2023-2026 RENEWABLE ENERGY STANDARD COMPLIANCE PLAN.

COMMISSION DECISION ADDRESSING THE APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF COMMISSION DECISION NO. C24-0634

Issued Date: November 15, 2024
Adopted Date: November 6, 2024

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I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission grants, in part, and denies in part, the Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0634 that Black Hills Colorado Electric, LLC doing business as Black Hills Energy ("Black Hills" or the "Company") filed on September 24, 2024.

B. Background

2. On September 4, 2024, the Commission issued Decision No. C24-0634 ("Phase II Decision"), which approved a modified Clean Energy Plan ("CEP"). One of the most substantial changes in the modified CEP was the selection of Bid 114-08 (a 200 MW solar power purchase agreement ("PPA")) in place of Bid 114-05a (a 200 MW solar build transfer agreement ("BTA")). We reasoned that although Bid 114-08 has a higher price, Bid 114-08 shields customers from substantial construction cost overrun and underproduction risks. In the absence of a utility-ownership performance incentive mechanism ("PIM"), the Commission refused "to ignore the risk that approval of Bid 114-05a will ultimately result in customers paying unreasonable costs because the BTA project's construction costs are substantially more than expected or its energy projection is less than anticipated."[1] The Commission reasoned that by selecting Bid 114-08, such risks are placed on the independent power producer ("IPP"), not customers.

3. The modified CEP also contemplates the acquisition of a 50 MW storage BTA (Bid 245-01), subject to a cost-to-construct ("CtC") PIM. The Phase II Decision specifies that the baseline for the CtC PIM is the construction costs set forth in Appendix A to the 120-Day Report,

[1] Phase II Decision, ¶ 85.

there is a five percent deadband around that baseline, and Black Hills will bear 25 percent of any overage or savings outside of the deadband.[2]

4. In addition to modifying the resource portfolio of the CEP, the Phase II Decision approves a backup bid check-in process. We specified that if an approved solar project fails, the Company must submit a filing in this Proceeding explaining the failure and the Company's selected backup project. Parties in this Proceeding will then have 30 days after Black Hills' submission to file a protest regarding the Company's backup selection.[3]

5. The Phase II Decision authorizes Black Hills to pursue the approved CEP and the acquisition of the resources and backup bids with further due diligence and contract negotiations, and states that Black Hills' actions consistent with the Phase II Decision will have a presumption of prudence per Rule 3617(d).[4]

6. In its RRR, Black Hills urges the Commission to reconsider the replacement Bid 114-05a (the 200 MW solar BTA) with Bid 114-08 (the same underlying 200 MW solar PPA), arguing among other reasons that the BTA project (Bid 114-05a) is less expensive than the PPA version and that the ability to control cost increases with BTAs and PPAs is essentially equal.[5]

7. Regarding the CtC PIM, Black Hills states that it "takes no issue with the cost-to-construct PIM ordered for [Bid 245-01]."[6] The Company expects to be able to control the construction costs of Bid 245-01 through the BTA.

8. In addition, the Company states that it asked all the primary and backup solar bidders whether the original price of their bids could be held, and, if not, to refresh their bid price.

[2] Phase II Decision, ¶ 101.
[3] Phase II Decision, ¶ 97.
[4] Phase II Decision, pp. 61-62.
[5] Black Hills' RRR, p. 1.
[6] Black Hills' RRR, p. 13.

In its RRR, Black Hills provides the updated pricing information that it received as of September 20, 2024.[7] The Company acknowledges that "ordinarily new information may not be introduced through [a RRR]," but asserts the best course of action is to present the most recent pricing information.[8] Black Hills is open to "the appropriate procedural approach given the new information" but urges the Commission to expedite its decision making.[9]

9. Based on the updated price information, Black Hills seeks clarification as to the flexibility the Company has to enter into PPA and BTA contracts with revised pricing.[10] Black Hills reasons that if it enters into a PPA contract but the bidder cannot maintain its as-bid price, the Company would be taking a prudency risk in entering into such a PPA contract. Black Hills states it "cannot take such a risk" given that such contracts can cost tens or hundreds of millions of dollars.[11] As an additional flexibility measure, the Company asks that bidders be allowed "to consolidate two separate project bids into one aggregate project bid if this results in a material price decrease and does not increase the total portfolio above 400 MW."[12] Black Hills similarly asks that the Commission allow "a single project to have divided ownership between the IPP and the Company if this decreases or does not increase project cost, consistent with the Colorado Legislature's target of 50 percent utility ownership as an incentive toward emissions reductions."[13]

10. In addition, Black Hills suggests that any changes to the resources that the Commission approved in its Phase II Decision be subject to the approved 30-day notice and protest

[7] Black Hills' RRR, pp. 20-21.
[8] Black Hills' RRR, p. 2.
[9] Black Hills' RRR, p. 2.
[10] Black Hills' RRR, pp. 1-2.
[11] Black Hills' RRR, p. 23.
[12] Black Hills' RRR, p. 23.
[13] Black Hills' RRR, p. 23.

process. Pursuant to this process, the Company would submit a filing in this Proceeding explaining the Company's selected backup project, and parties in this Proceeding would have 30 days to file a protest regarding the Company's backup selection.[14]

11. On October 4, 2024, the Commission issued interim Decision No. C24-0715, which acknowledges the new pricing information Black Hills provided in its RRR. In Decision No. C24-0715, the Commission required the Company to file supplemental information by October 11, 2024, regarding the updated pricing information. We also invited the Company to propose a CtC PIM and an operational PIM addressing Bid 114-05a. To proactively permit responses to the new information in the RRR and the supplemental filing, the Commission waived Rule 1506(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, and set a deadline of October 18, 2024, by which intervenors could respond to the Company's RRR and its supplemental information.

12. Finally, to accommodate the new information included in the RRR and the additional filings, the Commission granted—as a procedural matter—the Company's RRR for the sole purpose of tolling the 30-day statutory time limit in § 40-6-114(1), C.R.S., for the Commission to act upon the RRR so that it would not be denied by operation of law.

13. In accordance with Decision No. C24-0715, Black Hills filed its Supplemental RRR Filing on October 11, 2024. In the Supplemental RRR Filing, Black Hills provides additional information regarding the updated pricing information and also proposes a CtC PIM and an operational PIM for Bid 114-05a, as well as an emissions PIM.

14. Staff of the Public Utilities Commission ("Staff"), the Office of Utility Consumer Advocate ("UCA"), and the Colorado Energy Office ("CEO"), each filed a Response to

[14] Black Hills' RRR, p. 24.

Black Hills' RRR and Supplemental RRR Filing on October 18, 2024. UCA's Response is relatively brief and primarily argues for the selection of Bid 114-08 (the 200 MW solar PPA) instead of Bid 114-05a (the 200 MW solar BTA).[15] UCA also asks the Commission to remind Black Hills that seeking refreshed bids without explicit approval from the Commission is inappropriate and could negatively affect the competitive bidding process in future ERP solicitations. Additionally, UCA agrees with the Company that refreshed bids that exceed a certain percent increase should be excluded from further consideration.[16] CEO's Response focuses on its concern that any additional delays will cause further price increases and negatively impact Black Hills' customers. CEO urges the Commission to reach the fastest resolution possible to preserve bid pricing and approve a portfolio of resources that minimizes new costs to customers as much as possible, while meeting or exceeding the 2030 greenhouse gas emissions reduction requirement.[17]

15. Staff covers several topics in its Response but, like UCA, supports selection of Bid No. 114-08 (the 200 MW solar PPA).[18] Regarding the PIMs Black Hills proposes in its Supplemental RRR Filing, Staff argues that the Commission "should finalize its bid selection here but save finalization of all new PIMs to CPCN proceedings for the selected bids."[19] Staff asserts that a future CPCN proceeding represents the best way for the Commission to develop an effective package of PIMs.[20] Staff goes on to address Black Hills' requests for flexibility regarding contract negotiations in the context of the revised pricing and Black Hills' request to allow bidders to consolidate separate projects or modify the ownership structure of projects.

[15] UCA's Response Comments, p. 3.
[16] UCA's Response Comments, pp. 3-4.
[17] CEO's Response Comments, pp. 4-5.
[18] Staff's Response Comments, p. 3.
[19] Staff's Response Comments, p. 2.
[20] Staff's Response Comments, p. 16.

C. Bid 114-05a versus Bid 114-08

1. Black Hills' RRR and Supplemental RRR Filing

16. The bulk of Black Hills' RRR urges the Commission to reconsider replacing Bid 114-05a (a 200 MW solar BTA) with Bid 114-08 (the same underlying 200 MW solar PPA). The Company asserts that "there is a lack of evidence in the record supporting the selection of Bid 114-08, because it results in a higher cost to customers."[21]

17. As for the Commission's reasoning in the Phase II Decision that the PPA version of the solar project will greatly reduce the risk that customers will bear significant cost increases, Black Hills argues the Commission's premise is incorrect. The Company asserts that it *does* have control over the construction cost through the BTA contract. The Company argues that the point it was attempting to make in its Second Motion for Extension is that a BTA contract does not create incentives for a developer to deliver at a cost that is less than the contract price.[22] Black Hills emphasizes that the Company "remains willing to file a PIM and absolutely agrees with the Commission that 'utility and customer financial incentives must be aligned now based on the economics as presented.'"[23] In the alternative, if the Commission retains Bid 114-08 (the 200 MW solar PPA), then Black Hills asks that the Commission allow the Company to move forward with an alternative solar project that increases the Company's utility-ownership percentage. Black Hills notes that the resource portfolio approved in the Phase II Decision lowers Black Hills' ownership percentage to just 12.5 percent—well below the 50 percent ownership target in § 40-2-125.5(5)(b), C.R.S.

[21] Black Hills' RRR, p. 8.
[22] Black Hills' RRR, pp. 8-9.
[23] Black Hills' RRR, p. 12.

18. In its Supplemental RRR Filing, Black Hills proposes a CtC PIM and an operations PIM for Bid 114-05a.[24] Regarding the CtC PIM, Black Hills proposes to use essentially the same PIM the Commission established for Bid 245-01 (the 50 MW storage BTA project). Under this CtC PIM, the baseline is the construction costs set forth in Appendix A, there is a five percent deadband around that baseline, and Black Hills will bear 25 percent of any overage or savings outside of the deadband.[25] Black Hills states that this same PIM structure can be used for Bid 114-05a (the 200 MW solar BTA) if certain force majeure standards are applied to the PIM.[26]

19. Regarding the force majeure definition, Black Hills recites the definition of force majeure in the Article 14 of the Model PPA and notes that the definition delineates several circumstances that are excluded from the definition of force majeure, which Black Hills states it "generally agrees with."[27] The Company states that another issue that could justify relief from a CtC PIM is a change in federal law such as additional federal tariffs that directly increase the cost of project components for a selected project. The Company proposes that it be required demonstrate that the cause of the increase is legitimate and the increased amount is reasonable through a filing with the Commission. Under the Company's approach, the PIM baseline would be adjusted upon a Commission finding that the cause of the increase is legitimate and the costs are reasonable.[28]

20. As for the operations PIM, the Company recommends a more granular approach focused on the Production Tax Credit ("PTC") transfer price and annual production from the

[24] In its Supplemental RRR Filing, the Company also revises upward the price of Bid 114-05a. (Black Hills' Supplemental RRR Filing, p. 4, fn.7).

[25] Black Hills' Supplemental RRR Filing, p. 4.

[26] Black Hills asserts that the force majeure protections should apply both to the 50 MW storage project and the 200 MW solar project.

[27] Black Hills' Supplemental RRR Filing, p. 5.

[28] Black Hills' Supplemental RRR Filing, p. 6.

facility. The Company proposes the operations PIM to be in effect for the first 10 years of operations, which Black Hills argues aligns with the approved cost recovery proposal and the project's PTC eligibility. The Company also proposes to remove the capital-based costs from the operations PIM as the capital costs are already subject to the CtC PIM.[29]

21. As to the component of the proposed operations PIM focused on the annual production from the facility, Black Hills argues the PIM should exclude any factors that are beyond the Company's control, such as cloud cover, weather, and other environmental conditions that may adversely impact solar production. Thus, the Company proposes to compare the actual solar generation (adjusted for curtailments) to the solar "Park Potential" production of the facility. To determine the "Park Potential," or baseline, the solar facility will be equipped with remote meteorological equipment that provides a real time calculation of the potential energy capable of being provided by the facility as measured at the point of delivery. Actual production would be compared to this baseline park potential, with a five percent deadband. If actual generation is above or below the deadband, a reward or penalty will be assessed.[30]

2. Intervenor Positions

22. Staff agrees with the Commission's Phase II Decision regarding Bid 114-08 and argues the Commission should not replace this PPA project with the BTA Bid 114-05a. Staff notes that the updated information in Black Hills' RRR and Supplemental RRR Filing shows that the BTA and PPA projects are expected to be in service on similar timelines, resulting in similar resource adequacy and emission reduction benefits. As for the projected pricing difference between Bid 114-08 and Bid 114-05a, Staff states that, like the Commission, "Staff has serious,

[29] Black Hills' Supplemental RRR Filing, pp. 6-7.
[30] Black Hills' Supplemental RRR Filing, p. 8.

ongoing concerns regarding the increased risk to ratepayers posed by utility ownership of generation resources and the appropriate ratepayers protection mechanisms needed to address the differing risk profile."[31] Staff acknowledges that Bid 114-08a has higher projected costs but asserts that the risk of cost overruns and underproduction will be placed on IPPs. Staff further argues that Bid 114-08a promotes ownership diversification and could result in a portfolio that is closer to the 50 percent ownership target.[32]

23. At a high level, while Staff supports requiring Black Hills to implement a CtC PIM and an operations PIM, Staff asserts that there are "significant issues" with the PIM proposals Black Hills puts forth. If the Commission selects Bid 114-05a, Staff recommends deferring consideration of all PIMs to a future CPCN proceeding to allow for proper vetting of the Company's proposals.[33] Regarding the operations PIM in particular, Staff argues that Black Hills' proposal is insufficient to protect ratepayers and lacks important details.

24. UCA likewise opposes BTA Bid 114-05a. UCA states that Black Hills' Supplemental RRR Filing reveals Bid 114-05a's heavy reliance on PTCs to obtain a lower LEC compared to Bid 114-08. UCA asserts that with this heavy reliance on PTCs, if the PTC assumptions are off by even a small percentage, the PPA option may by the lower cost option in the long run. UCA notes that the IPP for Bid 114-08 would absorb the risk as to the level of PTCs, and not the ratepayers. UCA thus recommends the Commission give preference to PPA Bid 114-08 over BTA Bid 114-05a. UCA notes that such a decision would still reflect a choice amongst the projects with the lowest updated prices. [34]

[31] Staff's Response Comments, p. 4.
[32] Staff's Response Comments, p. 4.
[33] Staff's Response Comments, p. 11.
[34] UCA's Response Comments, pp. 2-3.

3. Findings and Conclusions

25. We deny Black Hills' RRR regarding Bid 114-05a and maintain our initial decision to instead authorize the Company to move forward with the PPA version of the project, Bid 114-08. As Staff and UCA note in their Responses, there are ongoing concerns that cost overruns associated with the BTA Bid 114-05a would be borne by ratepayers, and the PIMs Black Hills proposed for Bid 114-05a do not sufficiently ensure that BTA Bid 114-05a will be the best option for ratepayers. For example, under the flexibility built into the proposed CtC PIM with the five percent deadband, Bid 114-05a could end up being more expensive for ratepayers than Bid 114-08 with no financial disincentive for the Company. Black Hills does not address this issue in its Supplemental RRR Filing or suggest improvements to the CtC PIM that would help ensure that Bid 114-05a is the better option for ratepayers. As discussed more below, the operations PIM Black Hills proposes for Bid 114-05a likewise has serious flaws. Although the Company purportedly agrees that utility and customer financial incentives must be aligned now based on the economics as presented, the PIMs it proposes for Bid 114-05a fail to accomplish this.

26. As Staff and UCA set forth in their Responses, it is far from clear that Bid 114-05a will turn out to be better for ratepayers than Bid 114-08. Small deviations in the cost projections and expected operational performance of Bid 114-05a could result in ratepayers paying more than if the Company had instead acquired PPA Bid 114-08. Given that Bid 114-05a/Bid 114-08 is the single largest project in the resource portfolio, the Commission is especially concerned about the risk of cost overruns. Moving forward with Bid 114-08 helps ensure that ratepayers will be protected from any such cost overruns. And, as Staff includes in its Response, Bid 114-08 will provide similar emission reduction and resource adequacy benefits and promotes ownership

diversification. In short, the benefits of the PPA project still justify pursuing PPA Bid 114-08 instead of BTA Bid 114-05a.

D. Replacement of Bid 334-03

27. In addition to Bid 114-08, the Phase II Decision also authorizes Black Hills to move forward with a second solar resource, Bid 334-03. Bid 334-03 is a 150 MW solar PPA.

28. In its RRR, Black Hills requests that if the Commission decides to retain the PPA Bid 114-08, the Commission should allow the Company to switch from Bid 334-03 (a PPA solar project) to Bid 223-03b (a 100 MW BTA solar project). Black Hills argues this modification is justified based on updated pricing information and the fact that the resulting portfolio would have a more balanced level of Company ownership.[35]

29. Staff agrees with the Company that the Commission should reconsider Bid 334-03.[36] Staff recommends the Commission provide Black Hills with the flexibility to select either Bid 223-03b or Bid 223-01b (both of which are 100 MW BTA solar projects). Staff reasons that these similar projects would both ensure that the Company meets the 80 percent carbon emission reduction target at a much lower cost than Bid 334-03. Staff further notes that authorizing Black Hills to move forward with either Bid 223-03b or Bid 223-01b gives the Company the opportunity to own up to 43 percent of new resources, which is more consistent with the statutory 50 percent ownership target. Given the risks of utility-owned projects, however, Staff recommends the Commission still require that the selected BTA project be subject to a CtC PIM and an operations PIM. [37]

[35] Black Hills' RRR, p. 27.
[36] Staff's Response Comments, p. 5.
[37] Staff's Response Comments, pp. 5-6.

30. UCA similarly argues that after selecting PPA Bid 114-08, the remaining solar resource should be selected based on economics, and any BTAs ultimately approved should be held to a CtC PIM.[38]

31. Consistent with the recommendations from Staff and UCA, after Bid 114-08 Black Hills shall move forward with the next lowest-cost solar bid, which appears to be Bid 223--03b or Bid 223-01b. Both of these projects appear to be more economical than Bid 334-03 and would result in a more balanced percentage of utility ownership. While Bid 223-03b and Bid 223-01b are much smaller than Bid 114-05a (100 MW instead of 200 MW), the risk that ratepayers will bear cost overruns is still present. Thus, if Black Hills ultimately moves forward with either Bid 223-03b or Bid 223-01b—both of which are BTA bids—the resulting project will be subject to a CtC PIM and an operations PIM. The Commission outlines the basic requirements of these PIMs below, but we defer resolution of certain details to the follow-on CPCN proceeding where the parties can develop a more robust record. If Black Hills finds the basic requirements of the PIMs unacceptable or decides that waiting until a future CPCN to establish the details creates too much uncertainty, the Company should proceed via the 30-day notice and protest process with Bid 248-01, which is the next lowest-cost PPA bid.

32. Finally, we emphasize that our authorization to move forward with Bid 223-03b or Bid 223-01b is contingent on the relevant BTA contracts staying at or below the revised pricing set forth in Black Hills' RRR. If Black Hills is unable to execute a BTA contract at or below these prices, Black Hills would need to move to the backup PPA project (Bid 248-01) pursuant to the 30-day notice and protest process. In this 30-day notice process, the Commission might proactively

[38] UCA's Response Comments, p. 3.

require additional analysis or process if we have concerns that the resulting costs of the replacement project will not be reasonable.

E. PIM Development

1. CtC PIM

33. While Staff is supportive of the CtC PIM concept, Staff argues the Commission should defer finalizing the PIM until a follow-on CPCN proceeding. Staff raises several unanswered questions regarding how the CtC PIM will be implemented. For instance, Staff notes that it is unclear whether the five percent deadband is included in the incentive/disincentive calculation. Staff also raises the issue of whether and how transmission, interconnection, and network upgrades will be included in the CtC.[39]

34. As for the Company's force majeure proposal, Staff argues that it and other intervenors have had limited time to consider the issue. Staff agrees that a force majeure clause based on a model PPA will likely improve the CtC PIM but argues that additional details—such as the imposition of federal tariffs—should be evaluated in a future CPCN proceeding.[40]

35. As a preliminary matter, the Commission clarifies that if Black Hills ultimately moves forward with either Bid 223-03b or Bid 223-01b, the project shall be subject to the same CtC PIM parameters as Bid 245-01: (1) the baseline is the construction costs, (2) there is a five percent deadband around the baseline in which there is no sharing of costs or savings, and (3) once the deadband is exceeded Black Hills will bear 25 percent of all overage or savings including the deadband amounts. Recognizing the updated pricing information Black Hills reported in its RRR,

[39] Staff's Response Comments, p. 12.
[40] Staff's Response Comments, p. 13.

the construction cost baseline for Bid 223-03b and Bid 223-01b will be derived from the build transfer price listed on Attachment A to the Company's Supplemental RRR Filing.

36. Turning to Staff's questions regarding the CtC PIM, the Commission clarifies that the five percent deadband *is* included in the incentive/disincentive PIM calculation. We further clarify that the sharing percentage should be applied to the overage/underage and not on the total project amount. Thus, if a project with a $100 million baseline construction cost is actually constructed for $112 million, Black Hills would incur a $3 million disincentive; *i.e.*, the 12 percent deviation is outside of the 5 percent deadband, so the Company bears 25 percent of the entire 12 percent overage (25 percent of $12 million is $3 million).

37. Regarding Staff's questions about whether and how transmission, interconnection, and network upgrades will be included in the CtC PIM, it does not appear that these transmission-related costs are included in the construction cost baseline. Accordingly, such costs should likely be excluded from the CtC PIM calculation. Nevertheless, the Commission defers final resolution of this issue to the follow-on CPCN proceedings, consistent with Staff's recommendation.

38. The Commission similarly defers to the follow-on CPCN proceedings the details of how force majeure events and changes in federal law impact the CtC PIM. To provide Black Hills sufficient certainty, however, we approve the concept that events meeting the definition of force majeure in the model PPA will generally warrant adjustments to the CtC PIM. Likewise, changes in federal law such as the imposition of additional tariffs that directly increase the cost of project components for a selected project will also generally warrant adjustments to the CtC PIM.

39. The basic requirements for the CtC PIM set forth in this Decision apply to any and all utility-owned projects arising from this Proceeding (*e.g.*, Bid 245-01 and Bid 223-03b/Bid 223-01b).

40. In addition to Staff's questions, as referenced above, we previously established a CtC PIM on Bid 245-01 (the 50 MW storage BTA). No party opposes this PIM, but we find it necessary to make one clarification to the baseline. In the Phase II Decision, we specified that the baseline for the CtC PIM is the "construction costs set forth in Appendix A to the 120-Day Report (*i.e.*, the build transfer price)."[41] In its Supplemental RRR Filing, however, Black Hills sets forth a specific construction cost for Bid 245-01 that is slightly higher than the construction cost set forth in Appendix A to the 120-Day Report.[42] Although the actual construction cost has been marked highly confidential, we emphasis that the appropriate baseline for the CtC PIM is derived from the build transfer price on Appendix A, which is slightly lower than the number Black Hills puts forth in its Supplemental RRR Filing.

2. Operations PIM

41. As set forth above, Black Hills' proposed operations PIM is comprised of two components and would be in effect for the first 10 years of operations. The first component would be focused on the PTC transfer price, and the second component would address the annual energy production from the facility. For this second component, the baseline generation would be the park potential of the facility, which would largely remove factors such as cloud cover, weather, and other environmental conditions from the PIM calculation. Black Hills argues the PIM should exclude any factors that are beyond the Company's control.[43]

[41] Phase II Decision, ¶ 101.
[42] Black Hills' Supplemental RRR Filing, p. 5.
[43] Black Hills' Supplemental RRR Filing, pp. 6-8.

42. Staff argues the proposed operations PIM focuses on maximizing the value of PTCs but does not account for lost PTCs due to poor generation performance. Staff also opposes the 10-year life of the operations PIM, arguing that poor performance could continue to impact ratepayers after the 10-year expiration. Finally, Staff is concerned that the Company attempted to slip an unrefined deferred tax asset ("DTA") proposal into the operations PIM. Staff recommends the Commission require the Company to obtain explicit Commission authorization before applying any carrying charge to a DTA associated with PTCs as these costs are not anticipated or included in the as-bid project revenue requirements. Staff again urges the Company to defer consideration of these and other issues to a CPCN proceeding, and notes that because construction cannot begin until after completion of the CPCN proceeding, the Commission "need not rush."[44]

43. The Commission disagrees with the fundamental design of Black Hills' proposed operations PIM. Black Hills designed its proposed operations PIM to exclude factors such as cloud cover, weather, and other environmental conditions that may adversely impact solar production. Black Hills reasons that such factors are beyond the Company's control.[45] However, environmental conditions such as weather and cloud cover are critical components of the economics of a solar bid. Such environmental conditions factor into the capacity factors of each solar bid that was evaluated in Phase II. Even slight variations in the capacity factor that a bid uses can have significant impacts to a project's economics and can largely determine whether a particular bid is selected in the Phase II process. In short, weather and other environmental conditions are critical assumptions in the Phase II bid evaluation and selection process. Ratepayers should not bear the risk that BTA bids rely on unrealistically optimistic assumptions.

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[44] Staff's Response Comments, pp. 13-15.
[45] Black Hills' Supplemental RRR Filing, p. 8.

44. Under Black Hills' proposed operations PIM, the baseline for electricity generation would be created by meteorological equipment located at the solar facility. We reject this baseline—which has no apparent connection to the Phase II assumptions underlying the bid—and clarify that the baseline for the operations PIM will instead be derived from the LEC used in the Phase II modeling.[46] Using the LEC assumption will inherently incorporate factors such as O&M costs, capacity factor, and the PTC transfer rate (*i.e.*, how expensive it is for Black Hills to monetize the PTCs generated from the product).[47] Moreover, grounding the operations PIM baseline in the Phase II modeling assumptions is consistent with the Commission's initial directives in the Phase I Decision:

> Regarding the utility-ownership PIM, the PIM shall track the expected costs of any utility-owned generation projects that are included in the approved portfolio. Such costs shall consider both capital costs and operations and maintenance (O&M) expenses and anticipated availability. The expected costs that were assumed in Phase II shall be compared to the final cost of the project after construction is complete and it begins operating. The PIM shall incentivize final capital, O&M, and availability costs that are lower than what was assumed in the Phase II bid and disincentivize final costs that are higher than what the Phase II bid assumed.[48]

45. Although based on the LEC values put forth in Phase II, we acknowledge that the baseline for the operations PIM will need to be adjusted to remove the capital-based costs and account for curtailments. The Commission defers resolution of these details to the follow-on CPCN proceeding.

46. The operations PIM shall have a two percent deadband around the LEC-derived baseline. This two percent deadband, which is narrower than the CtC deadband and what Black

[46] To be clear, the revised LEC figures provided in Attachment A to the Supplemental RRR Filing will be the starting point for the baseline.

[47] Because an LEC-derived baseline inherently incorporates the PTC transfer rate, we reject the other component of Black Hills' proposed operations PIM that focuses on PTCs.

[48] Phase I Decision, ¶ 61.

Hills proposed for the operations PIM, is justified based on how close other available solar projects are on price. Slight deviations in a project's LEC could result in the project becoming more expensive than an alternative project. A relatively narrow deadband helps ensure that customer and utility incentives are aligned.

47. The operations PIM functions just like the CtC PIM, though the deadband and sharing percentage are different. For any variances more than two percent above or below the baseline, 50 percent of any costs or savings shall be allocated to Black Hills. This 50 percent sharing is simple and helps ensure that the interests of customers and the Company are aligned. Finally, we expressly reject Black Hills' proposal to limit the life of the operations PIM to the first 10 years of the project's life. The economics of the Phase II bid examined the entire life of the project. Removing the PIM after 10 years would leave ratepayers at risk if, for example, the O&M costs or degradation rate escalate more than forecast in the project's later years.

48. As with the CtC PIM, we acknowledge that this Decision leaves certain details unresolved, and these details will need to be worked out in the appropriate follow-on CPCN proceeding. Nevertheless, the basic requirements of the operations PIM as set forth in this Decision will apply to any Company-owned solar project that arises from this Proceeding.[49] If Black Hills is unwilling to move forward with such an operations PIM, it may elect to propose a PPA alternative pursuant to the established 30-day notice and protest process.

49. And finally, consistent with Staff's proposal, we clarify that the Company must obtain explicit authorization before applying any carrying charge to a DTA associated with PTCs.

[49] Unlike energy resources like solar projects, Bid 245-01 (the 50 MW storage BTA) is a capacity resource. Given the fundamental differences between energy and capacity resources, at this juncture we decline to subject Bid 245-01 to the operations PIM. We defer to the follow-on CPCN proceeding the decision of whether any operations PIM should or could apply to Bid 245-01.

We agree with Staff that DTA associated costs do not appear to be included in the as-bid project revenue requirements.

3. Emissions PIM

50. In the Phase II Decision, the Commission directed Black Hills to submit an emissions reduction PIM 14 days after any decision ruling on an application for RRR.[50] The submission of the proposed emissions reduction PIM would then trigger the stakeholder process set forth in our Phase I Decision.[51]

51. Instead of waiting 14 days after the RRR Decision, Black Hills proposed an emissions PIM in its Supplemental RRR Filing. The proposed emissions reduction PIM focuses exclusively on incentivizing an earlier in-service date. Black Hills reasons that bringing projects online sooner will reduce emissions to an even greater extent than proposed in the CEP.[52] The Company indicates that the baseline for the emissions PIM will be the in-service dates for the projects determined in their respective BTA contracts. The Company proposes a three-month deadband around this baseline in-service date with a flat penalty amount for each month outside of that deadband. For Bid 114-05a, the incentive/disincentive would be capped at $600,000. For Bid 245-01, the incentive/disincentive would be capped at $150,000.[53]

52. Staff argues that—like the CtC and operations PIMs—the emissions PIM also contains defects that require additional time to address. Staff argues it is actually just a timing PIM, and that Black Hills has not connected it to actual emissions reductions. Staff asserts that a future

[50] Phase II Decision, ¶ 102.
[51] *See* Phase I Decision, ¶ 58.
[52] Black Hills' Supplemental RRR Filing, pp. 10-11.
[53] Black Hills' Supplemental RRR Filing, p. 10.

CPCN proceeding represents the best way for the Commission to develop an effective package of PIMs.[54]

53. The Commission rejects Black Hills' proposed emissions/timing PIM. It appears the baseline for the proposed PIM would be the in-service dates for the projects as determined in their respective BTA contracts. This proposed baseline, however, has little apparent connection to the Phase II modeling assumptions and could be susceptible to gaming. It is unclear what would prevent the Company and the developer from agreeing to push back the in-service date in a BTA contract to make it easier for the project to be completed ahead of schedule.

54. Although a PIM that incentives an earlier in-service date would likely be beneficial, we decline to craft such a PIM on this record. Moreover, given the fundamental issues present in the Company's proposed emissions PIM and the busy calendar for the Commission and many of the parties in the coming months, we vacate the directive in the Phase II Decision for a stakeholder process to develop an emissions PIM. Instead, the Commission directs Black Hills to propose a revised emissions PIM in the follow-on CPCN proceeding. Deferral of the timing/emissions PIM to the follow-on CPCN proceedings will allow parties to analyze and vet various proposals, including, for instance, whether a baseline could be derived from the timing assumptions that were used in the Phase II modeling.

F. Black Hills' Flexibility to Pursue Resource Acquisitions

55. In its RRR, Black Hills seeks clarification as to the flexibility the Company has to enter into PPA and BTA contracts with revised pricing.[55] The Company specifically requests that it be allowed to negotiate with and select backup bidders if the primary bid fails, which would

[54] Staff's Response Comments, p. 16.
[55] Black Hills' RRR, pp. 1-2.

include a price increase of more than what is listed in the Company's RRR. The Company clarifies that it would not pursue bids that have price increases of five percent or more.[56] In addition, the Company asks that bidders be allowed the flexibility to consolidate two separate projects into one aggregate project and to allow a single project to have divided ownership between an IPP and the Company.[57] Black Hills suggests that any changes to the authorized resources would be subject to the 30-day notice and protest process.

56. Staff agrees that the Company should be allowed to negotiate and enter into contracts for the selected bids up to—but not above—the revised pricing for those bids as set forth in the RRR filings, excluding bids that saw a price increase of five percent or more.[58] In contrast, Staff recommends against the Company's proposal to allow bidders to consolidate separate project bids into one bid, arguing that this proposal goes beyond the scope of the decision and the proposed flexibility would undermine the Commission's ERP bid evaluation process.[59] Staff likewise recommends rejecting the Company's proposal to allow the ownership structure of a bid to be changed. While Staff is open to allowing the ownership of a BTA project to be split between the IPP and the Company, it strongly objects to the ability to convert an IPP-owned PPA project into one partially owned by the Company.[60]

57. The Commission confirms that moving forward with the projects at or below the revised pricing put forth in the Company's RRR filings will entitle Black Hills to the typical presumption of prudence under Rule 3617(d) so long as doing so is otherwise consistent with the Commission's decisions, and provided that projects that have experienced a price increase of five

[56] Black Hills' RRR, p. 23.
[57] Black Hills' RRR, p. 23.
[58] Staff's Response Comments, p. 7.
[59] Staff's Response Comments, p. 8.
[60] Staff's Response Comments, p. 8.

percent or more are deemed to have failed and acquisition of such projects will not be entitled to a presumption of prudence. Any changes to the approved resource portfolio will be subject to the 30-day notice and protest process that Staff proposed and the Commission adopted in our Phase II Decision.[61] In this 30-day notice process, the Commission may proactively require additional analysis or process if it has concerns that the resulting costs would be unreasonable.

58. In contrast, we deny the Company's requests to be allowed to consolidate two separate projects or allow a single project to have divided ownership. We largely agree with Staff that these proposals are beyond the scope of the decision and the proposed flexibility would undermine the Commission's ERP bid evaluation process.[62] Similarly, the Commission and parties have thoroughly analyzed the appropriate balance of utility ownership, and the Company should not have the flexibility to unilaterally change this balance by acquiring divided ownership in a PPA project.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0634 filed by Black Hills Colorado Electric, LLC d/b/a Black Hills Energy on September 24, 2024, is granted, in part, and denied, in part, consistent with the discussion above.

2. The 20-day time period provided by § 40-6-114, 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.

[61] For clarity, the approved resource portfolio consists of Bid 114-08 (the 200 MW solar PPA), Bid 245-01 (a 50 MW storage BTA), and either Bid 223-03b or Bid 223-01b (each of which is a 100 MW solar BTA).

[62] Staff's Response Comments, p. 8.

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

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING November 6, 2024.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners