

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20D-0076E

IN THE MATTER OF THE PETITION OF BLACK HILLS COLORADO ELECTRIC, LLC
FOR A DECLARATORY RULING THAT NO COMMISSION AUTHORIZATION IS
REQUIRED UNDER C.R.S. § 40-5-105 TO SELL AND TRANSFER ALL CAPITAL STOCK
IN THE CAÑON CITY HYDRAULIC AND IRRIGATING DITCH COMPANY AND
DONATE THE FULL NET GAIN TO THE CITY OF CAÑON CITY, OR, IN THE
ALTERNATIVE, APPLICATION FOR AUTHORIZATION TO SELL AND TRANSFER ALL
CAPITAL STOCK IN THE CAÑON CITY HYDRAULIC AND IRRIGATING DITCH
COMPANY AND DONATE THE FULL NET GAIN TO THE CITY OF CAÑON CITY.

**DECISION DENYING PETITION FOR DECLARATORY
ORDER AND GRANTING APPLICATION**

Mailed Date: May 15, 2020
Adopted Date: April 22, 2020

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

1. By this Decision, the Commission denies the Petition for Declaratory Order (Petition) filed by Black Hills Colorado Electric, LLC, doing business as Black Hills Energy (Black Hills or Company) on February 28, 2020, seeking a declaration that the transfer of certain water rights and the donation of the full net gain from the transaction is in the normal course of business for which no authorization is required under § 40-5-105, C.R.S.

2. Additionally, this Decision grants the Company's application for Commission authorization of the transfer of the water rights and donation of the full net gain (Application), which Black Hills filed in the alternative with the Petition.

B. Discussion

3. On February 28, 2020, Black Hills filed its Petition for declaratory order pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1304(i) of the Commission's Rules of Practice and Procedure. Black Hills seeks to transfer certain water rights associated with the decommissioned and demolished W. N. Clark Generating Station in Cañon City, Colorado (Cañon City).

4. Black Hills states that it is no longer using the water rights, and it proposes to sell the water rights to the Cañon City Hydraulic and Irrigating Ditch Company (Ditch Company) via a quitclaim deed. Black Hills also proposes to donate its full net gain from the transaction to Cañon City for the purposes of the betterment of the former W.N. Clark Generating Station site, for the betterment of Cañon City's parks and recreation resources, or for the general beautification of the city.

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

6. Black Hills claims that the transfer should be deemed in the “normal course of business,” and therefore, that no application to authorize the transfer is required pursuant to § 40-5-105, C.R.S. Black Hills states that generally, it considers the disposition of property associated with utility assets that have been removed from service to be in the normal course of business. It also argues that a transaction may be considered to be in the normal course of business where: its cost or value is insubstantial; it does not have a substantial effect on ratepayers; and/or it does not have a large impact on the utility’s system. However, Black Hills acknowledges that there is uncertainty as to whether the proposed transfer is in the normal course of business.

7. In the alternative to the Petition, in the event the Commission determines the sale and transfer not to be in the normal course of business, Black Hills submitted its verified Application pursuant to Rules 4 CCR 723-3-3002(a)(V) and 3104 of the Commission’s Rules Regulating Electric Utilities that requests an order authorizing the proposed sale, transfer, and donation and any necessary waiver of Rule 4 CCR 723-3-3104(c) such that the Ditch Company need not file its own application or become a co-applicant with Black Hills.

8. Black Hills contends that if Commission authorization is required, the Commission should authorize the proposed transfer because it is not contrary to the public interest. Through the Direct Testimony of Michael J. Harrington submitted with the Company’s

February 28, 2020 filing, Black Hills states that the transfer of the water rights and the proposed donation is not contrary to the public interest because: (1) the water rights are not currently used and are not necessary for future utility service; (2) the sale and donation of the full net gain will not harm existing or future customers; and (3) the donation will benefit Cañon City, which is also a Black Hills customer.

9. By Decision No. C20-0141-I, issued March 4, 2020, the Commission noticed the Company's February 28, 2020 filing as a petition for a declaratory order and noted that the Petition contains an application in the alternative. The Commission also established a shortened notice and intervention period, with any interventions and responsive briefs due by March 18, 2020.

10. On March 18, 2020, Western Resource Advocates submitted comments discouraging the Commission from finding the proposed transfer is in the normal course of business but stating that the Commission should approve the alternative Application.

11. No interventions were filed in this proceeding.

C. Proposed Transfer of Water Rights and Donation of the Full Net Gain

12. Black Hills states that it owns 197.5 shares of capital stock in the Ditch Company (the Cañon City Water Rights), that these shares represent 5.64 percent ownership of the water adjudicated and appropriated to the Ditch Company for Arkansas River diversion, and that the Cañon City Water Rights were associated with the decommissioned W. N. Clark Generating Station. Mr. Harrington states that the Company has no need for the Cañon City Water Rights because Black Hills has no plans to build water-cooled electric generation, or other facilities, that require use of the property.

13. Mr. Harrington states that Black Hills hired a Certified General Appraiser, which concluded that the fair market value of the Cañon City Water Rights is \$377,000.¹ Mr. Harrington also explains two inherent risks with the sale of the water rights identified by the appraisal: (1) litigation expense in the event that a Water Court proceeding is necessary to change the decreed use of the water from its current decreed purpose; and (2) the possibility that the water rights will be deemed abandoned by the State on July 31, 2020.

14. Black Hills states that the Ditch Company approached Black Hills in 2019 about the possibility of purchasing the Cañon City Water Rights, and that on February 27, 2020, Black Hills and the Ditch Company entered into an agreement for the sale of the water rights at a purchase price of \$310,000. Mr. Harrington explains that Black Hills accepted the Ditch Company's offer because the offer is reasonably within the appraised value and avoids the two inherent sale risks identified by the appraisal. The Purchase and Sale Agreement for the water rights is conditioned on Commission approval in this proceeding.

15. Black Hills proposes to donate its full net gain from the transaction to Cañon City. It states that the donation is equitable because Cañon City was most adversely impacted by the closure of the W. N. Clark Generating Station, and notes that in Proceeding No. 16A-0757E the Commission approved a similar donation of water rights. Mr. Harrington states that in the Company's accounting records, the income tax expense of the transaction will be reduced by the income tax benefit associated with the donation.

16. Mr. Harrington represents that the net gain to Black Hills from the transaction will be approximately \$267,000, and that after the Company has received final invoices related to its transaction costs, it will calculate the actual net gain amount. Mr. Harrington states that Black

¹ Black Hills provided the certified appraisal with its February 28, 2020 filing as Attachment MJH-2.

Hills will file a notice in this proceeding, a copy of final journal accounting entries, and the final amount donated to Cañon City.

D. Findings and Conclusions

17. Black Hills' Petition and alternative Application for authority to transfer the assets is unopposed within the meaning of 4 CCR 723-1-1403(b). Therefore, we shall consider the Company's Petition and alternative Application pursuant to 4 CCR 723-1-1403(a).

18. The Commission may entertain a petition for declaratory order to terminate a controversy or remove an uncertainty regarding any tariff, statute, or Commission rule, regulation, or order. Rule 4 CCR 723-1-1304(i)(II).

19. As pertinent here, § 40-5-105(1), C.R.S., provides that the assets of a public utility "may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe; except that this section does not apply to assets that are sold, assigned, or leased: (a) [i]n the normal course of business...."

20. In *Mountain State Telephone and Telegraph Co. v. PUC*, 763 P.2d 1020 (Colo. 1988), the Colorado Supreme Court considered whether the transfer of an asset by a public utility was done in the normal course of business under § 40-5-105, C.R.S. The court explained that "the statutory exemption for transfers done in the ordinary course of business is intended to exempt only routine transfers such as the purchase and sale of company vehicles." *Id.* at 1026 n.2.

21. In Decision No. C05-1454, issued December 12, 2005 in Proceeding Nos. 05S-207E and 05D-274E, the Commission also considered whether the transfer of an asset by a public utility was done in the normal course of business under § 40-5-105, C.R.S. There,

the Commission stated that “the value of a transfer as well as its frequency are factors” that should be weighed, and that “what constitutes a sale in the ordinary course of business depends upon the circumstances surrounding a sale, as well as the potential of the transaction to affect ratepayers.” Decision No. C05-1454 ¶ 12.

22. In looking to the circumstances surrounding the water rights transfer proposed in this proceeding, the Commission is not persuaded that the proposed transaction and donation is routine or in the normal course of business. Indeed, Black Hills presents only one example of a similar transaction and donation – the transfer authorized by the Commission in Proceeding No. 16A-0757E.

23. We find that the proposed transfer of the Cañon City Water Rights is not in the normal course of business and that Commission authorization of the transfer is required under § 40-5-105, C.R.S. Therefore, the request of Black Hills for a declaratory order stating that the transfer of the Cañon City Water Rights and the donation of the full net gain is in the normal course of business for which no authorization is required under § 40-5-105, C.R.S., is denied.

24. Having determined that authorization of the proposed water rights transfer and donation of the full net gain is required under § 40-5-105, C.R.S., we turn to consideration of the alternative Application. The standard that shall apply for our review of the Application is that the transfer of assets is not contrary to the public interest.

25. The Colorado Supreme Court addressed the meaning of “public interest” in the context of an asset transfer pursuant to § 40-5-105, C.R.S., in *Mountain State Telephone and Telegraph Co.* The Court stated:

[T]itle 40, articles 3 and 4 of the public utilities law, provide sufficient general standards for guidance relative to the application of section 40-5-105. The setting

of guidelines for utility regulation is within the sole province of the PUC. The PUC has long emphasized and utilized the criterion of “public interest.”

As demonstrated within the context of past commission decisions, the term “public interest” involves a balancing of the interest of the shareholders in a reasonable rate of return and the rights of the ratepayers to receive adequate service at a price which reflects the cost of service.

763 P.2d at 1029 (internal citations omitted).

26. In Decision No. C17-0080, issued January 27, 2017 in Proceeding No. 16A-0757E, and Decision No. C08-0204, issued February 29, 2008 in Proceeding No. 07A-108EG, we found that asset transfers are not contrary to the public interest where the transaction does not harm customers. Decision No. C17-0080 ¶ 25; Decision No. C08-0204 ¶ 74.

27. Upon review of the Company’s February 28, 2020 filings, we find that Black Hills has demonstrated that the transfer is not contrary to the public interest. We are satisfied that approval of the Application for authorization to transfer the Cañon City Water Rights and the donation of the full net gain to Cañon City will not harm ratepayers. The Application is granted.

28. Finally, we find that a waiver of Rule 4 CCR 723-3-3104(c), such that the Ditch Company need not file its own application or become a co-applicant with Black Hills, is not necessary.

II. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order (Petition) filed by Black Hills Colorado Electric, LLC, doing business as Black Hills Energy (Black Hills) on February 28, 2020, is denied, consistent with the discussion above.

2. The application for authority to transfer certain water rights associated with the decommissioned W. N. Clark Generating Station to the Cañon City Hydraulic and Irrigating Ditch Company and to donate the full net gain to Cañon City, Colorado (Cañon City), filed with the Petition by Black Hills on February 28, 2020 is granted, consistent with the discussion above.

3. Once Black Hills has completed its calculation of the actual net gain from the water rights transfer authorized by this Decision and the donation of the full net gain to Cañon City has occurred, Black Hills is directed to file in this proceeding a notice, a copy of final journal accounting entries, and the final amount donated to Cañon City.

4. The 20-day time period provided pursuant to § 40-6-116, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 22, 2020.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners