

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

PROCEEDING NO. 22A-0230E

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IN THE MATTER 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.

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**INTERIM DECISION GRANTING, IN PART, AND  
DEFERRING, IN PART, THE MOTION FOR WAIVERS  
AND VARIANCES; GRANTING, IN PART, AND  
DEFERRING, IN PART, THE MOTION FOR APPROVAL  
OF AN INDEPENDENT EVALUATOR AND PARTIAL  
WAVIER OF RULE 3612(A); AND DIRECTING BLACK  
HILLS TO FILE A SCOPE OF WORK CONTRACT**

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Mailed Date: September 21, 2022

Adopted Date: September 14, 2022

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

1. Through this Decision, we address both the Motion for Waivers and Variances (Motion for Waivers) and the Motion for Approval of an Independent Evaluator (IE) and Partial Waiver of Rule 3612(a) (Motion for IE Approval) that Black Hills Colorado Electric, LLC (Black Hills or the Company) filed on May 27, 2022, concurrent with its Verified Application for approval of (1) its 2022 Electric Resource Plan (ERP) and Clean Energy Plan (CEP), and (2) its 2023-2026 Renewable Energy Standard (RES) Compliance Plan.

2. Regarding the Motion for Waivers, we grant the Company's requests for partial waivers of Rule 3658(f)(II), Rule 3658(f)(VIII), and Rules 3652(ff), 3664(a), and 3878(b) of the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3. We defer ruling on Black Hills' remaining requested waivers in the Motion for Waivers.

3. We similarly defer ruling on the request Black Hills makes in the Motion for IE Approval to approve Accion Group, LLC (Accion) as the IE, and we direct Black Hills to file by January 16, 2023, a scope of work contract per Rule 3612(b), 4 CCR 723-3. We grant Black Hills' request in the Motion for IE Approval to waive Rule 3612(a).

**B. Motion for Waivers**

4. In its Motion for Waivers, Black Hills seeks waivers and variances from several of the Commission's Rules associated with both the Company's ERP/CEP and its RES Plan. Regarding its ERP/CEP, Black Hills seeks waivers of Rule 3606(a)(II), Rule 3606(a)(V), and Rule 3606(a)(VI), 4 CCR 723-3. These rules relate to certain information the utility must provide regarding energy and demand forecasts. Black Hills further seeks any additional waivers the Commission deems necessary for approval of the ERP and CEP.

5. As for the RES Plan, the Company seeks waivers of Rule 3658(f)(II), Rule 3658(f)(VIII), Rule 3660(e), Rule 3661(d), Rules 3652(ff), 3664(a), and 3878(b), and Rules 3660 and 3661, 4 CCR 723-3. Black Hills also asks the Commission to grant any additional waivers the Commission deems necessary for approval of its RES Plan.

6. In Decision No. C22-0449, issued August 1, 2022, we directed that responses to the Motion for Waivers could be filed through August 15, 2022. We further directed that in any responses to the Motion for Waivers, parties shall include whether the Company's requested relief is most appropriately addressed early in this Proceeding, or if it is best to consider the request as part of a future Commission decision after further testimony and evidence is presented, including in the expected Phase I decision. Trial Staff of the Commission (Staff) and the Colorado Energy Office (CEO) timely filed responses to the Motion for Waivers on August 15, 2022.

**1. Rules 3606(a)(II), 3606(a)(V), and 3606(a)(VI)**

**a. Rule 3606(a)(II)**

7. Beginning with Rule 3606(a)(II), this rule requires an energy and demand forecast showing annual sales of energy and peak demand on a system wide basis for each major customer class. Black Hills states that it prepared a system-level peak demand forecast rather than a major customer class-level demand forecast because the Company does not have a sufficient set of historic data on which to provide this information at the customer class level. Black Hills states that the Commission granted a similar waiver request in the Company's last ERP proceeding (Proceeding No. 16A-0436E).<sup>1</sup>

8. In its Response, CEO states that it does not oppose Black Hills' request to waive Rule 3606(a)(II) based on Black Hills' statement that it does not have the data required to comply

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<sup>1</sup> Motion for Waivers, p. 3.

with the rule. CEO argues, however, that the Commission should order Black Hills to develop or at least propose a pathway towards developing this data for future proceedings. CEO notes that it “intends to file more extensive comments” on this rule and the Company’s data handling capabilities as part of its Answer Testimony.<sup>2</sup>

9. Staff advocates for a different approach. Staff argues that it is unnecessary to rule on this waiver request at this early stage and requests the opportunity to respond later in the Proceeding. Staff notes, however, that the Company’s assertion that it lacks the necessary data is questionable “given that Black Hills has had smart meters in place for over a decade.”<sup>3</sup>

**b. Rule 3606(a)(V)**

10. Rule 3606(a)(V) requires an energy and demand forecast that allocates annual system losses to the transmission and distribution components of the system. Black Hills states that it does not have separate transmission and distribution system loss data. Consequently, for the annual energy forecast, the Company combined the transmission and distribution losses.

11. CEO does not oppose Black Hills’ requested waiver of Rule 3606(a)(V).

12. In contrast to CEO, Staff questions the validity of Black Hills’ assertion that it lacks the necessary data given that Black Hills has smart metering and likely has substation voltage and current monitoring. Staff argues that it is unnecessary to rule on this waiver request at this early stage and requests the opportunity to respond later in the Proceeding.

**c. Rule 3606(a)(VI)**

13. Turning to Rule 3606(a)(VI), this rule similarly requires an energy and demand forecast for typical day load patterns on a system-wide basis for each major customer class. Black

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<sup>2</sup> CEO Response, p. 2.

<sup>3</sup> Staff Response, p. 3.

Hills states that it prepared a system-level peak demand forecast rather than a major customer class-level demand forecast because the Company does not have a sufficient set of historic data on which to provide this information at the customer class level. Black Hills asserts that the Commission granted a similar waiver request in the Company's last ERP proceeding (Proceeding No. 16A-0436E).<sup>4</sup>

14. As it did with Black Hills' request for waiver of Rule 3606(a)(II), CEO does not oppose the waiver request but recommends that the Commission order Black Hills to develop or at least propose a pathway towards developing this data for future proceedings. CEO states that it intends to file more extensive comments on the Company's general data handling capabilities in its Answer Testimony.<sup>5</sup>

15. In its Response, Staff reiterates its skepticism of Black Hills' claim that it does not have sufficient data. Staff again argues that it is unnecessary to rule on this waiver request at this early stage and requests the opportunity to respond later in the Proceeding.<sup>6</sup>

**d. Findings and Conclusions on Rules 3606(a)(II), 3606(a)(V), and 3606(a)(VI)**

16. We will defer ruling on Black Hills' requested waivers of Rules 3606(a)(II), 3606(a)(V), and 3606(a)(VI) until after the evidentiary hearing. This will provide Staff the opportunity it seeks to respond to Black Hills requests later in this Proceeding and will allow all parties the opportunity during Phase I to further analyze the Company's claims that it does not have sufficient data to comply with the rules. Any testimony submitted related to these requested waivers and Black Hills' general data handling capabilities will help inform our future decision.

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<sup>4</sup> Motion for Waivers, p. 5.

<sup>5</sup> CEO Response, p. 2.

<sup>6</sup> Staff Response, p. 4.

**2. Rule 3658(f)(II), Rule 3658(f)(VIII), and Rules 3652(ff), 3664(a), & 3878(b)**

**a. Rule 3658(f)(II)**

17. Rule 3658(f)(II) requires that standard rebate offers and standard offers to purchase renewable energy credits (RECs) from on-sight solar systems be made available based upon the date of contract execution. Black Hills wants authorization to offer to purchase RECs based upon the date an application is submitted rather than based upon the date of contract execution, ensuring that customers who first apply are the ones who can first enroll. Black Hills states that the Commission granted a similar waiver for the Company's 2018-2021 RES Plan.<sup>7</sup>

18. CEO takes no position on the Company's requested waiver of Rule 3658(f)(II).<sup>8</sup> Staff does not oppose the requested waiver.<sup>9</sup>

**b. Rule 3658(f)(VIII)**

19. Rule 3658(f)(VIII) requires that to purchase RECs from customers, the utility must offer a one-time payment in addition to the standard rebate payment. Black Hills is requesting a partial waiver of this provision, arguing that doing so will allow for greater administrative efficiency for the Company. Black Hills further notes that it received a waiver of this rule for the Company's 2018-2021 RES Plan, so a waiver in this Proceeding will ensure alignment between past and present RES plan offerings.<sup>10</sup>

20. As with Rule 3658(f)(II), CEO takes no position on Black Hills' request for a waiver from Rule 3658(f)(VIII),<sup>11</sup> and Staff does not oppose the waiver.<sup>12</sup>

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<sup>7</sup> Motion for Waivers, p. 6.

<sup>8</sup> CEO Response, p. 4.

<sup>9</sup> Staff Response, p. 5.

<sup>10</sup> Motion for Waivers, p. 7.

<sup>11</sup> CEO Response, p. 4.

<sup>12</sup> Staff Response, p. 5.

**c. Rules 3652(ff), 3664(a), and 3878(b)**

21. Rules 3652(ff), 3664(a), and 3878(b) all reference a 120 percent maximum sizing limit for retail distributed generation (DG) facilities. Senate Bill 21-261 changed the 120 percent sizing limit to 200 percent. Black Hills requests a waiver to allow the Company to size retail renewable DG facilities to supply up to 200 percent of a net metering customer's or community solar garden subscriber's reasonably expected average annual electricity consumption. The Company similarly seeks the appropriate variances from its Electric tariffs to accommodate this change.<sup>13</sup>

22. CEO does not oppose Black Hills request for a variance from Rules 3652(ff), 3664(a), and 3878(b).<sup>14</sup> Staff supports these requested waivers because they align with statutory preemption principles.<sup>15</sup>

**d. Findings and Conclusions on Rule 3658(f)(II), Rule 3658(f)(VIII), and Rules 3652(ff), 3664(a), & 3878(b)**

23. We grant Black Hills requested waivers of Rule 3658(f)(II), Rule 3658(f)(VIII), and Rules 3652(ff), 3664(a), & 3878(b). Unlike the other waivers that Black Hills requests, the waivers of Rule 3658(f)(II), Rule 3658(f)(VIII), and Rules 3652(ff), 3664(a), & 3878(b) are all unopposed and Staff recommends that the Commission rule on the waivers early in the Proceeding.<sup>16</sup> Moreover, the Commission granted similar waivers of Rule 3658(f)(II) and Rule 3658(f)(VIII) in Black Hills' 2018-2021 RES Plan, and the requested waivers of Rules 3652(ff), 3664(a), & 3878(b) are supported by the statutory changes caused by Senate Bill 21-261. In short, we see no reason to defer deciding these requests and find them to be appropriate.

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<sup>13</sup> Motion for Waivers, p. 10.

<sup>14</sup> CEO Response, p. 6.

<sup>15</sup> Staff Response, p. 7.

<sup>16</sup> *Id.* at 1-2.

**3. Rule 3660(e), Rule 3661(d), and Rules 3660 and 3661****a. Rule 3660(e)**

24. Rule 3660(e) provides that interest on the deferred balance of the RESA account (whether the balance is positive or negative) should accrue at the weighted average cost of capital (WACC). The Company requests a partial, permanent waiver of Rule 3660(e) so that interest on any positive RESA balance accrues at the Commission-approved customer deposit rate. Black Hills argues that this will help preserve funds to support RES and CEP programming and acquisitions going forward. Black Hills also states that it was granted a similar waiver in its last two RES Plan proceedings.<sup>17</sup>

25. CEO supports Black Hills' request for a partial waiver of Rule 3660(e). CEO reasons that any interest paid on a positive RESA account is paid to customers, by customers, creating complications with no tangible benefit. CEO concludes that the requested partial waiver of Rule 3660(e) will not negatively impact the Company's customers.<sup>18</sup>

26. Citing CEO's Response, Staff notes that it interprets the impact of Black Hills' requested waiver of Rule 3660(e) differently than CEO. Staff sees the requested waiver as allowing the Company to apply a lower interest rate to funds it over collects from ratepayers and a higher interest rate to funds it under collects. Based on the different interpretations, Staff argues that the Commission should defer a decision on the requested waiver of Rule 3660(e) to allow for additional analysis of Black Hills' requested accounting mechanisms. Without a clear understanding of the effect of granting this waiver, Staff argues that the appropriate response is deferral.<sup>19</sup>

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<sup>17</sup> Motion for Waivers, p. 8.

<sup>18</sup> CEO Response, pp. 4-5.

<sup>19</sup> Staff Response, pp. 5-6.



**b. Rule 3661(d)**

27. Rule 3661(d) requires that a utility's administrative costs of implementing the RES rules are capped at ten percent per year of the total annual collection. Black Hills requests that if the Commission allows the Company to decrease RESA collections from two percent to one percent, the Commission should also allow Black Hills to increase the administrative cost cap to 20 percent per year of the total annual RESA collections. Black Hills reasons that this increase from ten percent to 20 percent will help maintain stability in the Company's RES program funding.<sup>20</sup>

28. CEO opposes the Company's requested partial waiver of Rule 3661(d) at this time, arguing that the Commission should defer ruling on this request until after the hearing in this Proceeding. CEO argues that granting this partial waiver at this early state is inappropriate when requesting a blanket approval for funds that will be expended to administer RES programs that the Commission has not yet approved. CEO contends that the Company's proposal for decreasing the RESA and increasing the cost cap should be addressed more thoroughly in Answer and Cross-Answer Testimony.<sup>21</sup>

29. Staff similarly argues that the Commission should defer ruling on Black Hills' requested partial waiver of Rule 3661(d) until the close of evidence. Staff notes that if the Commission wishes to rule on this request early in the Proceeding, Staff opposes the request because Black Hills has not yet shown why it is necessary to double the cost cap.<sup>22</sup>

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<sup>20</sup> Motion for Waivers, p. 9.

<sup>21</sup> CEO Response, pp. 5-6.

<sup>22</sup> Staff Response, pp. 6-7.

**c. Rules 3660 and 3661**

30. At a high level, under Rules 3660 and 3661, RES incremental costs must be recovered through the RESA and avoided costs must be recovered through the Energy Cost Adjustment (ECA). Black Hills requests, to the extent necessary, a waiver of these rules so that the Company can exclusively recover costs associated with the Busch Ranch I and Busch Ranch II wind facilities exclusively through the ECA, rather than both the RESA and the ECA. The Company is pursuing this approach because it asserts that the combined actual costs of the Busch Ranch I and II wind facilities are less than, and are forecasted to be less than, the avoided costs.<sup>23</sup>

31. CEO asks that the Commission defer ruling on the requested waivers of Rules 3660 and 3661 until after the evidentiary hearing in this Proceeding. CEO states that it is unclear whether Black Hills needs the requested waiver to recovery all of the Busch Ranch I and II costs through the ECA and concludes that the issue should be explored more through testimony.<sup>24</sup>

32. Like CEO, Staff argues that the Commission should defer ruling on the requested waiver until the close of evidence, arguing that it would be premature to decide this issue now. Staff notes, however, that if the Commission rules on this issue at this stage, Staff is supportive of the request because the Company's accounting approach results in savings for ratepayers.<sup>25</sup>

**d. Finding and Conclusions on Rule 3660(e), Rule 3661(d), and Rules 3660 and 3661**

33. We defer ruling on Black Hills' requested waivers of Rule 3660(e), Rule 3661(d), and Rules 3660 and 3661. Although CEO supports Black Hills' request for a partial waiver of Rule 3660(e), CEO and Staff have different interpretations on the requested waiver's impact. We see no

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<sup>23</sup> Motion for Waivers, pp. 10-12.

<sup>24</sup> CEO Response, p. 9.

<sup>25</sup> Staff Response, pp. 7-8.

reason why this request should be granted early in the Proceeding, especially when there is disagreement regarding the effect of the waiver. Deferring a decision on the requested waiver of Rule 3660(e) will allow for additional analysis of Black Hills' requested accounting mechanisms.

34. Regarding the requested waivers of Rule 3661(d) and Rules 3660 and 3661, CEO and Staff both recommend the Commission defer ruling on these requests until after the evidentiary hearing. We agree with CEO and Staff that parties should have the opportunity to further analyze the issues surrounding these requested waivers through the course of the Proceeding. We therefore defer ruling on these requested waivers.

#### **4. Other Waivers**

35. The Company asks the Commission to grant any additional waivers or variances that the Commission deems necessary to fully implement both the Company's 2022 ERP and CEP and the Company's 2023-2026 RES Plan.<sup>26</sup>

36. Staff asserts that the Commission cannot rule on unidentified waiver and variance requests. Staff asserts that a decision on any such requests would be appropriate for the Phase I and RES Plan decisions but not sooner.

37. We agree with Staff that the Commission cannot rule on Black Hills' catchall requests for waivers and variances at this stage and without more specificity. If the Commission decides to rule on Black Hills' catchall requests, we will do so once the parameters of the Company's ERP and CEP and RES Plan are more fully developed.

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<sup>26</sup> Motion for Waivers, pp. 5, 12.

**C. Motion for IE Approval**

38. In its Motion for IE Approval, Black Hills asks that the Commission approve the appointment of Accion to serve as the IE for the Company's ERP/CEP and grant a partial waiver from Rule 3612(a). Black Hills notes that Staff, UCA, and Black Hills jointly propose Accion as the IE in accordance with Rule 3612(a). The Company has not, however, negotiated a scope of work contract with Accion. Black Hills states that once the scope of work has been agreed to, and assuming the Commission grants its Motion, Black Hills will file for Commission approval of the IE contract pursuant to Rule 3612(b).<sup>27</sup>

39. Rule 3612(a) states that, prior to filing an ERP per Rule 3603, 4 CCR 723-3, the utility shall file for Commission approval the name of the IE who the utility, Staff, and the UCA jointly propose. Black Hills requests a partial waiver of Rule 3612(a) "because this Motion is being filed contemporaneously with Black Hills' 2022 ERP and CEP," rather than prior to the filing of the plan.<sup>28</sup>

40. In Decision No. C22-0449, issued August 1, 2022, we directed that responses to the Motion for IE Approval could be filed through August 15, 2022. No parties filed a response to the Motion for IE Approval.<sup>29</sup>

41. We defer ruling on Black Hills' request to approve Accion as the IE for the Company's 2022 ERP and CEP. While we appreciate the consensus Black Hills reached with Staff and the UCA regarding Accion, as Black Hills acknowledges the Company has not yet negotiated a scope of work with Accion. We find it appropriate to defer approving an IE until Black Hills has

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<sup>27</sup> Motion for IE Approval, p. 2.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> Although no parties filed a response to the Motion for IE Approval, in the Motion Black Hills states that it conferred with Staff and the UCA and "both have indicated they support [the] Motion." (Motion for IE Approval, pp. 1-2).

also submitted a scope of work contract pursuant to Rule 3612(b). While Black Hills has used Accion as an IE in the past, this Proceeding is different in that Company is seeking approval of both an ERP and CEP. Given the early stage of the Proceeding and the fact that the IE's primary duties will not begin until Phase II, we see no reason to approve Accion as the IE prior to reviewing the scope of work contract.

42. Black Hills shall have up to and including January 16, 2023—two weeks before the scheduled start of the evidentiary hearing—to file a scope of work contract pursuant to Rule 3612(b). This deadline enables the parties and Commission to address any issues with the proposed IE and scope of work during the hearing and will allow the Commission to rule on the selection of an IE as part of our Phase I deliberations.

43. In connection with our decision to defer approving an IE, we waive Rule 3612(a) and its requirement that Black Hills move for approval of an IE prior to filing an ERP plan. This waiver is warranted given there is no need for an IE to participate in Phase I of this Proceeding and the fact that Black Hills has not yet submitted a scope of work contract.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The Motion for Waivers and Variances that Black Hills Colorado Electric, LLC (Black Hills) filed on May 27, 2022, is granted, in part, and deferred, in part, consistent with the discussion above.

2. The Motion for Approval of an Independent Evaluator and Partial Waiver of Rule 3612(a) that Black Hills filed on May 27, 2022, is granted, in part, and deferred, in part, consistent with the discussion above. Black Hills shall have up to and including January 16, 2023, to file a scope of work contract per Rule 3612(b).

3. This Decision is effective upon its Mailed Date.

**I. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
September 14, 2022.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

ERIC BLANK

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JOHN GAVAN

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MEGAN M. GILMAN

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Commissioners