

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0082E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE HIGH POINT SUBSTATION PROJECT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY**

Mailed Date: October 12, 2020

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I. STATEMENT

1. On March 2, 2020, Public Service Company of Colorado (Public Service or Company) filed its Verified Application for approval of a Certificate of Public Convenience and Necessity (CPCN) for the High Point Distribution 230/13.8 kV, 50 Mega Volt Ampere Substation Project, which includes approximately 3.5 miles of new 230 kV double-circuit transmission line that will tap into the existing 5277 Spruce-Green Valley 230 kV transmission line (High Point Project or Project). Public Service also requests that, in granting this CPCN, the Commission: (a) grant a presumption of prudence for the estimated costs the Company will incur related to the Project; and (b) make specific findings with respect to the reasonableness of the noise and magnetic field levels that result from operating the Project.

2. On April 2, 2020, the Colorado Office of Consumer Counsel (OCC) filed its Notice of Intervention of Right, Entry of Appearance, and Request for Hearing. The OCC is an intervenor as of right and a party in this proceeding. The OCC listed a series of issues they wish to investigate.

3. On April 6, 2020, Trial Staff of the Commission (Staff) timely filed its Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1403(b), and Request for Hearing. The intervention is of right, and Staff is a party in this matter.

4. On April 15, 2020, by minute order, Proceeding No. 20A-0082E was referred to an Administrative Law Judge (ALJ).

5. On April 27, 2020, by Decision No. R20-0300-I, a prehearing conference was scheduled for May 26, 2020.

6. On May 14, 2020, Public Service filed its Unopposed Motion to Adopt Procedural Schedule and Vacate Prehearing Conference, and Request for Waiver of Response Time.

7. On May 21, 2020, by Decision No. R20-0394-I, the prehearing conference was vacated and a procedural schedule was adopted.

8. On September 3, 2020, the evidentiary hearing in the above-captioned proceeding was held via video conferencing at 9:00 a.m.¹

9. At the start of the hearing, Exhibits 100 through 103, 300, 301, 302, 400, 401, 500, 102C, 203C, 104C, 300C, and 400C were admitted by stipulation of the parties.

10. Public Service offered the testimony of Brooke Trammell. Staff offered the testimony of Adam Gribb. At the conclusion of the evidence, the record was closed. The matter was then taken under advisement.

11. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this proceeding.

II. FINDINGS OF FACT

12. Betty L. Mirzayi is employed by Xcel Energy Services (XES) as Manager, Distribution System Planning and Strategy South.

13. XES is a wholly-owned subsidiary of Xcel Energy Inc.

14. The application in the above-captioned proceeding is for the High Point Substation and the proposed interconnecting transmission line.

¹ The hearing was held via video conferencing due to the Covid-19 pandemic.

15. The substation is proposed to be near the intersection of East 56th Avenue and E-470, south-southwest of the Denver International Airport, in the City of Aurora, Colorado.

16. The Project will include a single 50 Mega Volt Ampere (MVA) distribution transformer and switchgear for five distribution lines, or “feeders.” The substation will be designed to accommodate a total of up to three 50 MVA 19 transformers and 15 new distribution feeders. The Project also includes approximately 3.5 miles of 230 kV double-circuit transmission line, which is necessary to connect the substation to the Company’s existing 5277 Spruce–Green Valley 230 kV transmission line.

17. The purpose of the Project is to serve projected new load growth in the area surrounding the proposed High Point Substation, which includes the City of Aurora and a portion of Denver.

18. There are several large developments being planned for the area between Pena Boulevard and Powhaton Road, which include the following: Pena Station, High Point, Painted Prairie, Harvest Mile, Porteos, Aurora Highlands, and others. Situated on over 7,500 acres, these developments will include approximately 24 million square feet of commercial space, 5,000 hotel rooms, and 22,000 residential dwelling units for a projected load of over 100 MVA.

19. Public Service does not have other nearby facilities to serve the projected new load.

20. The Company, or a contractor under its direct control and supervision, will construct the Project. The Company will own and operate the High Point Substation and the associated transmission tap line, and all associated distribution lines and equipment.

21. The testimony and the exhibits filed with the application provide detail into the High Point Project.

22. Adam Gribb is a Professional Engineer employed by the Commission.
23. Mr. Gribb recommends approval of the High Point CPCN.
24. Chris Neil is a Rate/Financial Analyst for the OCC.
25. Mr. Neil recommends approval of the High Point CPCN.

III. ISSUES

26. Should the Commission approve a CPCN for the High Point Project?
27. Should the cost estimate of the High Point Project include a contingency, and if so, what should be the percentage of the contingency?
28. Should the Commission approve a presumption of prudence for the cost estimate of the High Point Project?

IV. APPLICABLE LAW

29. As the proponent of a Commission order, Public Service has the burden of persuasion in this proceeding pursuant to 4 *Code of Colorado Regulations* 723-1-1500 of the Rules of Practice and Procedure.

30. The evidence must be “substantial evidence,” which the Colorado Supreme Court has defined as: “such relevant evidence as a reasonable [person’s] 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.” *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)). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of*

Revenue, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

31. The Commission has an independent duty to determine matters that are within the public interest. *See Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984).

V. **ARGUMENTS OF THE PARTIES**

A. **Public Service**

1. **The CPCN Should be Granted**

32. All parties agree that the CPCN for the High Point project should be granted.

33. The cost estimates of the High Point Project have not been contested by any party.

34. No party has questioned that the public convenience and necessity require granting the Company's application, or that the noise and electromagnetic field levels of the Project should be deemed reasonable.

35. Public Service argues that the CPCN application should be granted.

2. **Assigning a Presumption of Prudence is in the Public Interest**

36. Public Service argues that Public Utilities Law and the Commission's Rules do not expressly address presumptions of prudence for projects granted a CPCN but believe it is appropriate to decide that at this time.

37. Public Service states the Commission has recognized that the issues of whether to grant a CPCN and the recovery of related costs are intertwined, with a CPCN proceeding as the appropriate forum to consider issuance of a presumption of prudence for the estimated project costs. Public Service states it seeks a presumption of prudence in order to receive a presumed level of certainty with regard to future cost recovery.

38. Public Service asserts that because the High Point Project serves the public convenience and necessity, and its detailed cost estimates are unrebutted, a rebuttable presumption of prudence for costs associated with the Project, including the 20 percent contingency, is reasonable, appropriate, and consistent with Supreme Court precedent and past Commission decisions.

39. Specifically, the Company contends that under *City of Boulder v. Colorado PUC*, 996 P.2d 1270, 1278 (Colo. 2000), Public Service has “a vested right” to recover the costs of the facilities at issue and thus, should have a vested right to receive a presumption of prudence for the uncontested reasonable cost estimates presented with the instant CPCN application. That is, according to Public Service, a presumption of prudence remains an appropriate mechanism to provide the required regulatory assurance in accordance with the Colorado Supreme Court’s holding in *City of Boulder* that utilities are to be “assured” cost recovery for facilities that received a CPCN.

40. Public Service argues that establishing a presumption of prudence in this proceeding benefits consumers by reducing litigation costs and conserving Commission, intervenor, and Company resources in the next cost recovery proceeding.

41. The Company further contends that a presumption of prudence does not automatically entitle the Company to recover the estimated costs up to the amount presumed prudent. Rather, any party may challenge the actual Project costs and demonstrate that any such costs were imprudent during an appropriate cost recovery proceeding.

42. Public Service asserts that because construction costs cannot be determined down to the precise penny prior to completion of the Project, the presumption of prudence should include a 20 percent contingency to account for minor cost deviations. A reasonable

contingency, according to the Company, assures that costs within its estimated range are presumed prudent.

43. Public Service acknowledges that in Decision No. C20-0648 (Mailed September 10, 2020), issued in Consolidated Proceeding Nos. 19A-0728E and 20A-0063E (Consolidated Proceedings), the Commission recently denied the Company's request for a presumption of prudence for the estimated costs for two projects, the Voltage Control CPCN and the GDT CPCN. The Company, however, states that the Commission is not bound by its prior decisions or by *stare decisis*.

44. Public Service further attempts to distinguish this proceeding from the Consolidated Proceedings. The Company, among other things, asserts that: (a) unlike the Consolidated Proceedings involving the two projects and the portfolio concept (*i.e.*, aggregation of contingency across multiple projects), only the High Point Project is at issue here; and (b) there is a substantial cost differential between the High Point Project (cost estimate of \$34 million, including a 20 percent contingency) and the projects at issue in the Consolidated Proceedings (collective cost estimate of \$160.05 million, including a 10 percent contingency).

3. OCC

45. The OCC states that the Commission should grant the CPCN approving the need for the project, but deny the request for a rebuttable presumption of prudence for the estimated costs and contingencies for the High Point Project.

46. The OCC argues that the granting of a CPCN is not a cost recovery process and that a presumption of prudence does not provide a benefit to ratepayers.

47. The OCC urges the Commission to follow Decision No. C20-0648 recently issued in the recent Consolidated Proceeding No. 19A-0728E.

4. Staff

48. Staff states that because the High Point Project is necessary to implement the Colorado Energy Plan Portfolio approved by the Commission as part of the Company's last Electric Resource Planning case, the CPCN should be approved.

49. Staff does not contest any portion of the Company's projected construction costs.

50. Staff, relying on the same policy considerations it cited in Proceeding No. 19A-0728E, originally argued that the Commission should approve a presumption of prudence in this case for any costs that fall within plus or minus 8 percent of the Company's cost estimate. Staff, however, changed its position after the Commission rejected those policy arguments during its oral deliberations in the Consolidated Proceedings. Specifically, Staff withdrew its request for a presumption of prudence in this matter. Staff contends the Commission should reject the Company's request for a presumption of prudence for the same reasons it rejected the similar request in the Consolidated Proceedings.

51. Staff further asserts that an 8 percent contingency level is in line with industry standards and should be approved by the Commission in this proceeding.

VI. DISCUSSION AND CONCLUSIONS

A. The Commission Should Grant the Company's Application and Approve the CPCN for the High Point Project

52. In a CPCN proceeding such as this one, the Commission must determine whether "the present or future public convenience and necessity require, or will require, the [proposed

facilities].”² That is, to grant the CPCN sought, the Commission must find that there is a present or future need for the facilities associated with the High Point Project.

53. The record establishes that the High Point Project is necessary to support load growth and to support the distribution system, and that it should be approved without additional mitigation or prudent avoidance measures.

54. Moreover, the need for the Project is uncontested and the Company’s detailed cost estimates for the Project are unrebutted. Staff and the OCC agree that the Project is necessary and the CPCN should be approved.

55. The ALJ finds that the Commission should approve the CPCN for the High Point Project because the Project is needed to support load growth as well as the distribution system. The ALJ further finds that the expected maximum magnetic field and noise levels associated with the CPCN are reasonable and require no further mitigation or prudent avoidance measures.

B. The Commission Should Approve an 8 Percent Contingency for the Estimated Cost of the High Point Project in Addition to the Risk Reserve

56. While the cost estimates for the High Point Project are unrebutted, there is some dispute as to the contingency percentage and the associated risk reserve.

57. Public Service requests that the Commission approve a 20 percent contingency in addition to the risk reserve that is already included in the total cost estimate of \$28.3 million.³ Specifically, the Company seeks approval of Project costs in the amount of \$34 million, which include the 20 percent contingency (*i.e.*, \$28.3 million x 1.2 = approximately \$34 million). The

² § 40-5-101(1)(a), C.R.S.

³³ As explained in Hearing Exhibit 103, Rebuttal Testimony of Byron R. Craig, the base level cost estimate of \$28.3 million includes the risk reserve, which applies to anticipated project risks at the time of estimation.

Company asserts that the contingency is intended to account for “unknown unknowns,” whereas the risk reserve accounts for “known unknowns.”

58. The OCC does not appear to dispute the specific percentage of the contingency. Rather, the OCC contends the CPCN should be approved based on the costs and contingencies set forth in the Company’s Application, not including the costs and contingency of the distribution-associated assets.

59. Staff recommends an eight percent contingency based on the ASTM E2516-11 Standard Classification for Cost Estimate Classification System (ASTM Standards), consistent with its position in the Consolidated Proceedings. Staff takes issue with the Company’s attempt to include a 20 percent contingency and a risk reserve in the Project’s cost estimate. Staff asserts the risk reserve and the 20 percent contingency together result in a “Total Contingency” that far exceeds what is reasonable for the Project. Staff provides the approximate percentage level of the risk reserve as confidential information (see HE 400C Gribb Answer 13:3).

60. The ALJ agrees with Staff that Public Service’s proposed 20 percent contingency is not reasonable when the additional risk reserve is considered. Despite the Company’s arguments regarding “known knowns” and “unknown unknowns” the ALJ fails to see any material distinction between a risk reserve and a contingency for purposes of reaching an appropriate cost estimate in this CPCN proceeding. Ultimately, the risk reserve that is included as a part of the estimate and the contingency applied to the total amount both result in a “total contingency” to the base estimate. The ALJ is also not persuaded by Staff’s arguments that the ASTM Standards are an appropriate criterion to determine the proper contingency or that Staff properly applied those ASTM Standards in this particular case. Moreover, Staff has failed to put forth any

legitimate justification for breaking with past Commission practice and determining the appropriate contingency based entirely on ASTM Standards.

61. Ideally, the risk reserve amount would be subtracted from the estimate of \$28.3 million and a reasonable contingency level would be awarded as a percentage of the new estimate. However, this calculation cannot be recorded in this Recommended Decision because the exact amount of the risk reserve is confidential. Accordingly, the ALJ finds that the estimate of \$28.3 million, which includes the confidential risk reserve amount, plus a contingency of 8 percent is the appropriate outcome in this situation. The confidential risk reserve, which is already included in the \$28.3 million, plus the 8 percent contingency together result in a “total contingency” that is reasonable based on industry standards and past Commission practices. Therefore, the CPCN for the High Point Project will be approved at an estimated cost of \$28.3 million with an 8 percent contingency (*i.e.*, +/- 8% of \$28.3 million), including the Company’s proposed risk reserve.

C. The Commission Should Not Approve a Presumption of Prudence for the Estimated Cost of the High Point Project

62. The remaining issue is whether the Commission should approve a presumption of prudence for the estimated cost of the High Point Project. That is, whether the estimated cost of \$28.3 million with an 8 percent contingency should be presumed prudent in a future cost recovery proceeding.

63. Public Service requests a presumption of prudence for the estimated cost of the High Point Project, arguing that it is reasonable and appropriate, and serves the public interest.

64. The OCC, on the other hand, contends that granting a presumption of prudence at the time of CPCN approval is not in the public interest.

65. Staff asserts that consistent with the Commission's recent policy considerations in the Consolidated Proceedings, the Commission should deny the Company's request for a presumption of prudence in this proceeding.

66. In Decision No. C20-0648 (Mailed September 10, 2020), issued in the Consolidated Proceedings, the Commission rejected Public Service's request for a presumption of prudence. The Commission specifically stated:

Even without a presumption of prudence, Public Service has assurance that it will recover all costs that it reasonably and prudently incurs to construct these approved projects. In other words, the Commission does not need to grant the CPCNs *and* a presumption of prudence in order to send constructive regulatory and policy signals to Public Service. As with the other instances in which Public Service has obtained a CPCN without a presumption of prudence, the Company can rely on simply the CPCNs to move forward with the projects.⁴

67. Although the Commission is not bound by *stare decisis*, the undersigned ALJ believes that the Commission's Decision in the Consolidated Proceedings denying the Company's request for a presumption of prudence stands on firm legal ground. The ALJ further finds that the policy considerations in support of that Decision are relevant and applicable in the instant CPCN proceeding.

68. While there is only one CPCN (*i.e.*, the High Point Project) at issue here, much of the Commission's reasoning and policy considerations in Decision No. C20-0648 still rings true here. Even setting aside the Commission's concerns in the Consolidated Proceedings regarding the prudence of costs for multiple projects under the portfolio concept, it remains that "[h]aving evidence of the actual costs incurred [for the High Point Project] will help clarify the evaluation

⁴ Decision No. C20-0648 in Consolidated Proceeding Nos. 19A-0728E and 20A-0063E, p. 30, ¶ 68. (Footnotes omitted)

because parties will be able to focus on prudence instead of debating the accuracy and refinement of cost estimates” and that “[t]here is a significant difference between vetting cost estimates and evaluating whether actual costs were prudently incurred.”⁵

69. With respect to the Company’s argument that establishing a presumption of prudence will ultimately benefit customers by conserving Commission, intervenor, and Company resources, the ALJ finds that any such gain in administrative efficiency is overestimated and minimal at best. As the Commission stated in the Consolidated Proceedings, “at a future rate recovery proceeding Public Service must put forth its actual costs regardless of whether it has a presumption of prudence, and granting the CPCNs without a presumption of prudence will not, by itself, require the Company to litigate *de novo* the reasonableness and accuracy of its prior cost estimates.”⁶ Rather, “the cost estimates and evidence presented in this proceeding—along with the positions of the parties—will serve as important reference points when Public Service eventually seeks cost recovery.”⁷

70. Moreover, the ALJ is not persuaded that “[s]ince the cost estimates for the High Point Project are not contested by any party, the Company should have a vested right to receive a presumption of prudence in this CPCN proceeding similar to having a vested right to recover prudently incurred costs in a subsequent rate proceeding if the Commission grants the CPCN.”⁸ The ALJ finds that the Company’s reliance on *City of Boulder*, 996 P.2d at 1278, is misplaced and that a CPCN applicant is not endowed with a finding of a presumption of prudence. Rather,

⁵ *Id.* at p. 26, ¶ 60.

⁶ *Id.* at p. 25, ¶ 58.

⁷ *Id.* at p. 26, ¶ 59.

⁸ Public Service’s Statement of Position, p. 9.

in *City of Boulder*, the Colorado Supreme Court merely advises such utilities that a CPCN is a prerequisite to the recovery of construction costs.⁹

71. Consistent with the Commission's rationale and policy considerations in Decision No. C20-0648, the ALJ declines to establish a presumption of prudence for the estimated cost of the High Point Project and will order that: (1) the estimated cost and contingency level (*i.e.*, +/- 8% of \$28.3 million) established in this proceeding will be used as a reference point during Public Service's next base rate case; and (2) that the Company will need to demonstrate at its next base rate case that all actual costs incurred are prudent and reasonable, regardless of whether such costs are below the \$28.3 million estimate plus or minus the contingency of 8 percent. Further, Public Service will be ordered in its next base rate case filing following the date that all facilities associated with the High Point Project CPCN are in service, to specifically identify the actual costs for the Project, individually and in total, in at least as much detail as provided in this proceeding.

VII. ORDER

A. The Commission Orders That:

1. The verified Application for approval of a Certificate of Public Convenience and Necessity for the High Point Distribution 230/13.8 kV, 50 Mega Volt Ampere Substation Project filed by Public Service Company of Colorado, on March 2, 2020, is granted.
2. An estimated cost and contingency level +/- 8% of \$28.3 million is established.
3. The request of a presumption of prudence is denied.

⁹ *City of Boulder v. Colorado PUC*, 996 P.2d 1270, 1278 (Colo. 2000) ("Certainly section 40-5-101 requires a utility to file for a CPCN prior to initiating a facility extension if the utility wants assurance that its investment will be recoverable through rates and charges to consumers. If, as here, a utility does not obtain prior approval, it has no vested right to recover for the cost of expanded facilities or service areas and therefore proceeds at its own risk.").

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

5. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

6. Response time to exceptions shall be shortened to seven days.

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

8. If a party seeks to amend, modify, annul, or reverse a basic finding 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

9. If exceptions to this Recommended 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

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director