

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

PROCEEDING NO. 19A-0660E

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IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR APPROVAL OF AN AMENDMENT TO ITS 2016 ELECTRIC RESOURCE PLAN CONCERNING A COMPETITIVE SOLICITATION FOR UP TO 200 MW OF RENEWABLE ENERGY AND ENERGY STORAGE.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
ROBERT I. GARVEY  
GRANTING MOTION TO APPROVE  
SETTLEMENT AND GRANTING APPLICATION**

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Mailed Date: September 3, 2020

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**I. STATEMENT**

1. On November 22, 2019, Black Hills Colorado Electric, LLC (Black Hills or the Company) filed an Application for Approval of an Amendment to its 2016 Electric Resource Plan Concerning a Competitive Solicitation for Up to 200 MW of Renewable Energy and Energy Storage (Application). Black Hills filed the Application with an initial procedural motion (Omnibus Motion) requesting that the Commission: (1) agree to hear this Proceeding *en banc*; (2) adopt the procedural schedule proposed within the motion; (3) grant all necessary waivers and variances from the Commission's Rules as set forth in the motion or as otherwise deemed necessary by the Commission; and (4) grant extraordinary protection for certain information the Company claims to be highly confidential.

2. On December 6, 2019, by Decision No. C19-0981-I, the Commission rejected the Company's request for a shortened notice and intervention period as set forth in the Omnibus Motion and instead, following its regular business meeting on December 4, 2019, issued a standard Notice of Application Filed establishing a notice and intervention period ending January 3, 2020. The Commission further set a deadline of January 3, 2020 for responses to the remaining components of the Omnibus Motion.

3. On January 29, 2020, by Decision No. C20-0064-I, the Commission denied the Company's request for an *en banc* hearing and referred the matter to an Administrative Law Judge (ALJ) for a recommended decision pursuant to § 40-6-109, C.R.S.

4. By the Application, Black Hills seeks to amend its previously approved 2016 Electric Resource Plan (ERP)<sup>1</sup> by conducting a new competitive solicitation for renewable energy and storage of up to 200 MW to determine whether new resources can be added to the Company's system and result in annual customer savings. Black Hills states that, unlike the typical ERP process, the Company is proposing "Renewable Advantage" to take place on an expedited basis. Within a year, the Company would issue a request for proposals (RFP), evaluate the bids, make acquisition recommendations to the Commission, and then—if the Commission approves procurement—facilitate the entering of an energy purchase agreement. In the event that Renewable Advantage results in bids that require bill increases, Black Hills states that the Company will recommend to the Commission that no procurement take place and that the Commission delay procurement decisions until Black Hills' next ERP filing.

5. The Application requested that the Commission:

- Approve the amendment to the 2016 ERP to conduct Renewable Advantage;
- Approve the Company's request to establish a regulatory asset account to record the third-party costs associated with Renewable Advantage for prudence review and recovery in the Company's next rate case;
- Grant a presumption of prudence provided pursuant to Rule 3617(d) of the Commission's ERP Rules, 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*, to the Company's acquisition of any bids approved by the Commission in this Proceeding;
- Grant the Omnibus Motion; and
- Approve an Independent Evaluator as proposed in a separate motion filed on November 22, 2019.

6. On December 6, 2019, the Colorado Independent Energy Association (CIEA) filed a Motion to Intervene. As a non-profit corporation and trade association of independent

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<sup>1</sup> Decision Nos. R17-0039, issued January 17, 2017, and C18-0462, issued June 14, 2018, Proceeding No. 16A-0436E.

power producer member companies, CIEA states that its members routinely participate in RFPs associated with the ERP processes of public utilities to bring their projects to market in Colorado.

7. On December 20, 2019, the Colorado Office of Consumer Counsel (OCC) timely filed a Notice of Intervention of Right and Request for Hearing.

8. Also, on December 20, 2019, the City of Pueblo, Colorado (Pueblo or the City) filed a Motion to Intervene.

9. On December 30, 2019, Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention of Right and Request for Hearing.

10. Also, on December 30, 2019, the Board of County Commissioners of Pueblo County, Colorado (Pueblo County or the County) filed a Motion to Intervene.

11. On January 3, 2020, the Colorado Energy Office (CEO) filed a Notice of Intervention by Right.

12. LafargeHolcim US Inc. (Lafarge) filed a Petition for Leave to Intervene on January 3, 2020. Lafarge states that it operates a cement manufacturing facility in Florence, Colorado. Lafarge further states that it is a transmission level customer of Black Hills and one of the Company's largest retail electric customers.

13. Also on January 3, 2020, the Board of Water Works of Pueblo, Colorado (Pueblo Water) filed a Motion to Intervene.

14. Western Resource Advocates (WRA) filed a Petition for Leave to Intervene and Response to Omnibus Motion on January 3, 2020. WRA states that it is a nonprofit conservation organization dedicated to protecting the land, air, and water of the West.

15. Also on January 3, 2020, Staff and the OCC each separately filed a Response to the Omnibus Motion.

16. On January 10, 2020, Black Hills filed an Unopposed Motion for Leave to Reply and Reply to Staff, the OCC, and WRA's Responses to the Omnibus Motion.

17. During its weekly meeting on January 15, 2020, the Commission referred this matter to an ALJ.

18. On February 12, 2020, by Decision No. R20-0094-I, the permissive interventions of CIEA, Pueblo, Pueblo County, LaFarge and Pueblo Water were granted, the Request for Highly Confidential Protection set forth in the Omnibus Motion was granted, and a prehearing conference was scheduled for February 27, 2020.

19. On February 14, 2020, WRA filed its Unopposed Motion Seeking Modification of Decision No. R20-0094-I.

20. On February 20, 2020, Unopposed Motion Seeking Modification of Decision No. R20-0094-I was granted by Decision No. R20-0111-I.

21. On February 28, 2020 WRA filed its Motion Contesting Interim Decision No. R20-0094-I.

22. On March 6, 2020, the Parties<sup>2</sup> filed their Joint Motion for a Procedural Schedule (Motion).

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<sup>2</sup> Staff did not join in the Motion.

23. On March 12, 2020, the Parties<sup>3</sup> filed their Revised Joint Motion to Adopt a Procedural Schedule.

24. On March 13, 2020, Staff filed its Motion to Dismiss and Response in opposition to Black Hills Revised Motion to Adopt a Procedural Schedule (Motion to Dismiss).

25. On March 27, 2020, Black Hills joined by Pueblo and CIEA filed their joint Response to Staff's Motion to Dismiss.<sup>4</sup>

26. Also, on March 27, 2020 Pueblo Water, CEO and OCC each filed their own Response to Staff's Motion to Dismiss.

27. On April 3, 2020, Staff filed its Motion for Leave to Reply and Reply to Responses to Trial Staff's Motion to Dismiss.

28. On April 10, 2020, by Decision No. R20-0240-I, the Revised Joint Motion to Adopt a Procedural Schedule was granted; Staff's Motion to Dismiss was denied and Staff's Motion to for Leave to Reply was denied.

29. On April 15, 2020, by Decision No. C20-0248-I, WRA's Motion Contesting Interim Decision No. R209-0094-I was granted in part and denied in part. WRA was granted an intervention based on policy considerations and denied an intervention upon legal grounds.

30. On July 31, 2020, the Parties filed their Notice of Settlement, Unopposed Motion to Vacate Rebuttal and Cross-Answer Testimony Deadline Notice of Settlement and Request for Waiver of Response Time (Unopposed Motion).

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<sup>3</sup> Staff did not join in the Motion.

<sup>4</sup> WRA was also listed as joining in this Motion but they were not yet a party to this proceeding.

31. On August 4, 2020, by Decision No. R20-0569-I, the Unopposed Motion was granted.

32. On August 10, 2020, the Parties filed their Joint Motion to Approve Settlement Agreement and Settlement Agreement (Joint Motion).

33. On August 13, 2020, Staff, Black Hills, Pueblo, Pueblo County, WRA, CEO, and OCC filed testimony supporting the Settlement Agreement.

## **II. DISCUSSION**

### **A. Testimony and Terms of Settlement Agreement**

34. The Settlement Agreement, attached to this Decision as Attachment A, explains that the Settling Parties<sup>5</sup> negotiated a resolution of all disputed issues in this proceeding. The Settling Parties assert that the application, as modified by the terms of the Settlement Agreement, is in the public interest and supported by the testimony of Black Hills, Staff, the OCC, the CEO, Pueblo, Pueblo County, and WRA. Below is a summary of some of the terms agreed upon by the Settling Parties.

### **B. Amendment to 2016 ERP**

35. The Settling Parties agree that the Company's proposal to amend its previously approved 2016 ERP to conduct the Renewable Advantage competitive solicitation for up to 200 MW of renewable energy and storage should be approved by the Commission.

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<sup>5</sup> The Settling Parties include Staff, the OCC, the CEO, Pueblo, Pueblo County, CIEA, and WRA. The Joint Motion states that Lafarge does not oppose the Settlement Agreement and that Pueblo Water takes no position on the Settlement Agreement.

**C. Independent Evaluator (IE)**

36. The Settlement Agreement seeks approval of Mr. Harry Judd of the Accion Group as the designated IE in this matter.

**D. Bid 128-03 as the Preferred Bid**

37. The Settling Parties agree that the Company's pursuit and acquisition of Bid 128-03 (Preferred Bid) is in the public interest and should be approved by the Commission. Further, the Settling Parties request that a presumption of prudence for Black Hills to proceed with negotiating and executing a Power Purchase Agreement with Bid 128-03 should be granted, consistent with Rule 3617(d), 4 CCR 723-3.

**E. Back-Up Bids**

38. In the event of any of the three scenarios identified in the Settlement Agreement, the Settling Parties agree that Black Hills will proceed with the back-up bids (*i.e.*, Bids 229-01 and 128-01) in accordance with the respective scenario as memorialized in the Settlement Agreement. The Settling Parties further agree that Bid 232-01 will not be a back-up bid. The Settlement Agreement seeks approval of the two back-up bids (*i.e.*, Bids 229-01 and 128-01), as described therein, asserting that approval is in the public interest.

39. Additionally, the Settling Parties agree that the Commission should grant a presumption of prudence for the Company's acquisition of the back-up bids, consistent with Rule 3617(d), 4 CCR 723-3, in the event that circumstances warrant replacing the Preferred Bid with the back-up bids pursuant to the Settlement Agreement.

40. In the event that the Company needs to replace the Preferred Bid or back-up Bid 229-01 in accordance with the scenarios set forth in the Settlement Agreement, Black Hills



agrees to file notice with the Commission providing an explanation of the need to replace the bid at issue and its plan to proceed with negotiations with the applicable back-up bidder.

**F. Regulatory Asset Account**

41. The Settling Parties agree that Black Hills: (a) should track, record, and defer all incremental third-party costs associated with Renewable Advantage in a regulatory asset account; and (b) may only seek recovery in rates of any costs in the regulatory asset account after the actual commercial operation date of the Renewable Advantage resource.

**G. Social Cost of Carbon (SCC) and Carbon Emissions**

42. The Settlement Agreement provides that the calculated SCC and carbon emission reductions by 2030, have been provided by the Company for informational purposes only and do not establish any precedential value in other proceedings.

**H. Recovery of Resource Energy Cost of Renewable Advantage**

43. The Settling Parties agree that the resource energy costs associated with Renewable Advantage be exclusively recovered through the Company's Energy Cost Adjustment (ECA) rider. In light of the exclusive recovery from the ECA, the Company's Renewable Energy Standard Adjustment rider is not applicable to this acquisition.

44. The Settling Parties also agree that as necessary, a partial temporary variance from, or waiver of, Rule 3661(h), 4 CCR 723-3, is reasonable and appropriate for the duration of any contracts executed to implement Renewable Advantage under the circumstances in this matter.

**I. Quarterly Status Reporting**

45. No later than 45 days after the conclusion of the quarter being reported on, the Company agrees to file in this proceeding quarterly status reports that address the status of: (a) bid negotiations; and (b) necessary transmission updates to facilitate the project.

**J. Testimony in Support of the Settlement**

46. The testimony filed by Black Hills in support of the Settlement Agreement establishes that the settlement is in the public interest.

47. The testimony filed by Staff, the OCC, the CEO, Pueblo, Pueblo County, and WRA in support of the Settlement Agreement establishes that the settlement is in the public interest and fully explains why the Settling Parties support the Preferred Bid and two backup bids.

**III. FINDINGS AND CONCLUSIONS**

48. The parties have the burden of proving by a preponderance of the evidence that the settlement is just and reasonable. In reviewing the terms of the Settlement Agreement, the ALJ applied the Commission's direction and policy with respect to a review of settlement agreements as found in, *e.g.*, Decision No. C06-0259 in Proceeding No. 05S-264G issued March 20, 2006.

49. 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).

50. The undersigned ALJ has reviewed the Direct, Rebuttal and Settlement Testimony filed by Black Hills; the Answer and Settlement testimony of the Intervenors; and the recitations of the Settling Parties in the Joint Motion and Settlement Agreement. The ALJ has duly considered the positions of all parties in this matter.

51. Based on the entire record, the ALJ finds that approval of the Application, as modified by the terms of the Settlement Agreement, is in the public interest.

52. The ALJ further finds that the parties have established by a preponderance of the evidence that the Settlement Agreement is just, is reasonable, and should be accepted by the Commission.

**IV. ORDER**

**A. The Commission Orders That:**

1. The Joint Motion to Approve Settlement Agreement filed by Black Hills Colorado Electric, LLC (Black Hills) on August 10, 2020, is granted, consistent with the discussion above.

2. The Settlement Agreement filed by Black Hills on August 10, 2020, and attached to this Decision as Attachment A, is approved, consistent with the discussion above.

3. The Application for Approval of an Amendment to its 2016 Electric Resource Plan Concerning a Competitive Solicitation for Up to 200 MW of Renewable Energy and Energy Storage filed by Black Hills on November 22, 2019, is granted, consistent with the discussion above.

4. Black Hills shall comply with, and make all filings required by, the Settlement Agreement and this Decision.

5. 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

6. 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.

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

8. 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

9. 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

10. 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

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Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,  
Director