

Decision No. C24-0715-I

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.

**INTERIM COMMISSION DECISION REQUIRING A
SUPPLEMENTAL FILING, WAIVING COMMISSION
RULE 1506(B), SETTING A DEADLINE FOR RESPONSES,
AND GRANTING APPLICATION FOR REHEARING,
REARGUMENT, OR RECONSIDERATION OF DECISION
NO. C24-0634 FOR THE SOLE PURPOSE OF TOLLING
THE STATUTORY TIME LIMIT IN § 40-6-114(1), C.R.S.**

Issued Date: October 4, 2024

Adopted Date: October 2, 2024

I. BY THE COMMISSION

A. Statement

1. Black Hills Colorado Electric, LLC, doing business as, Black Hills Energy (“Black Hills” or the “Company”) filed its Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0634 (“RRR”) on September 24, 2024. Through this Decision, the Commission acknowledges that Black Hills presents new information in its RRR. To address the new information and arguments put forth in the RRR, the Commission requires the Company to file certain supplemental information by October 11, 2024. In addition, the Commission waives Rule 1506(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (“CCR”) 723-1, and sets a deadline of October 18, 2024, by which intervenors may respond to the Company’s RRR and its supplemental information.

2. To accommodate the new information included in the RRR and the additional filings, the Commission grants 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 such applications so that they will not be denied by operation of law. This grant of the Company's RRR is merely procedural.

B. Background

3. On September 4, 2024, the Commission issued Decision No. C24-0634 ("Phase II Decision"), which approved a modified Clean Energy Plan ("CEP").¹ 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")). The Commission reasoned that although Bid 114-08 has a later construction date and 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."² The Commission reasoned that by selecting Bid 114-08, such risks are placed on the IPP, not customers.

4. The modified CEP also contemplates the acquisition of a 50 MW storage BTA (Bid 245-01). However, the Commission directed that this Bid 245-01 would be subject to a cost-to-construct PIM in which the baseline is the construction costs set forth in Appendix A to

¹ In accordance with § 40-2-125.5(4), C.R.S., the CEP reduces the Company's carbon dioxide ("CO₂") emissions by a target of 80 percent by 2030 as compared to 2005 levels and was included in the Electric Resource Plan ("ERP") that Black Hills filed on May 27, 2022.

² Phase II Decision, ¶ 85.

the 120-Day Report, 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.³

5. In addition to modifying the resource portfolio of the CEP, the Phase II Decision approved a portfolio of backup bids and a backup bid check-in process. The Commission 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.⁴

6. 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).⁵

C. Black Hills' RRR

7. 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). Among other reasons, Black Hills notes the BTA project (Bid 114-05a) is less expensive than the PPA version and argues that the ability to control cost increases with BTAs and PPAs is essentially equal.⁶ Black Hills also 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."⁷ The Company asks that it be allowed to submit a PIM for

³ Phase II Decision, ¶ 101.

⁴ Phase II Decision, ¶ 97.

⁵ Phase II Decision, pp. 61-62.

⁶ Black Hills' RRR, p. 1.

⁷ Black Hills' RRR, p. 12 (internal quotations omitted).

cost to construct and operations for Bid 114-05a. Black Hills states a cost-to-construct PIM “could be based on the BTA contract cost, including reasonable force majeure provisions, a reasonable deadband, and cost sharing outside of the deadband.”⁸ Regarding an operations PIM, the Company states it is “amenable to a PIM based on the availability and performance of the facility under normal weather conditions, again with a reasonable deadband and cost sharing outside of the deadband.”⁹

8. Regarding the cost-to-construct PIM, Black Hills states that it “takes no issue with the cost-to-construct PIM ordered for [Bid 245-01].”¹⁰ The Company expects to be able to control the construction costs of Bid 245-01 through the BTA.

9. 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. In its RRR, Black Hills provides the updated pricing information that it received as of September 20, 2024.¹¹ 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.¹² Black Hills is open to “the appropriate procedural approach given the new information” but urges the Commission to expedite its decision making.¹³

10. 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.¹⁴ Black Hills reasons that if it enters into a PPA contract but the bidder cannot maintain its as-bid

⁸ Black Hills’ RRR, p. 14.

⁹ Black Hills’ RRR, p. 14.

¹⁰ Black Hills’ RRR, p. 13.

¹¹ Black Hills’ RRR, pp. 20-21.

¹² Black Hills’ RRR, p. 2.

¹³ Black Hills’ RRR, p. 2.

¹⁴ Black Hills’ RRR, pp. 1-2.

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.¹⁵

11. 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 protest 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.¹⁶

D. Discussion

12. The style and content of Black Hills’ RRR is unusual and requires a unique procedural process. Although we continue to review the merits of Black Hills’ RRR and will deliberate on the requested relief at a later date, after an initial review it appears there might be a way in which the Company could move forward with Bid 114-05a subject to an appropriate cost-to-construct PIM and operational PIM. To facilitate our consideration of this possibility and for a more complete understanding of the new information contained in Black Hills’ RRR, we will require the Company to submit supplemental information as specified below.

13. Although the Company includes certain revised levelized cost of energy (“LEC”) in its RRR, it provides none of the calculations included in Appendix A to the 120-Day Report that support the revised LECs. Moreover, even the information that is included in Appendix A is opaque as to how the levelized annual energy payment for BTA projects are calculated. The Company indicates that levelized annual energy payments are calculated based components

¹⁵ Black Hills’ RRR, p. 23.

¹⁶ Black Hills’ RRR, p. 24.

such as debt service, depreciation, income tax, production tax credits, and bidder supplied operations and maintenance costs,¹⁷ but these figures are not included in Appendix A. We therefore require Black Hills to submit a detailed showing of how it calculates the revised LECs from the construction costs, operating expenses, and other project inputs for all of the BTA projects listed on Table 3 (Updated Levelized Cost of Bids) of the Company's RRR. This supplemental filing shall be made as soon as possible, but no later than October 11, 2024.

14. In addition, Black Hills states it is willing to file a PIM and asks that the Commission allow it to submit a PIM for the cost to construct and operations of Bid 114-05a.¹⁸ As referenced above, an appropriate cost-to-construct PIM and operational PIM similar to others the Commission has developed might ameliorate our concerns and allow us to move forward with Bid 114-05a. To address risks to the Company as project owner, the inclusion of reasonable force majeure provisions in the PIMs—perhaps using the force majeure standards in the model PPA contracts as a reference—may be appropriate. The Commission expressly allows Black Hills to file its proposed cost-to-construct PIM and operational PIM addressing Bid 114-05a in this Proceeding. Given the need to resolve these issues expediently, any such filing shall be made by October 11, 2024.

15. As Black Hills acknowledges itself, the Commission typically does not permit parties to introduce new information through a RRR.¹⁹ Indeed, Commission Rule 1506(b) prohibits responses to a RRR except upon motion. One of the listed grounds for such a motion is the inclusion of facts not in evidence. The Company's admitted inclusion of information obtained after the Phase II Decision could spur motions to file a response. In an effort to prevent future delays,

¹⁷ Black Hills' Supplemental Comments to Interim Decision C24-0509-I, p. 15.

¹⁸ Black Hills' RRR, p. 12.

¹⁹ Black Hills' RRR, p. 2.

provide more procedural certainty, and prevent a scenario in which the Commission must address several motions and responses from intervenors at various times, we waive Rule 1506(b) and invite intervenors to file responses—both as to the RRR and the October 11, 2024 supplemental information—by October 18, 2024.

16. Black Hills filed its RRR on September 24, 2024, and pursuant to § 40-6-114(1), C.R.S., we are required to consider and act upon the RRR within 30 days of its filing or the RRR will be denied by operation of law. To ensure that the Commission has sufficient time to consider the newly included information and any responses that are filed, the Commission grants the RRR for the sole purpose of tolling the statutory time limit in § 40-6-114(1), C.R.S.

17. This grant is procedural, and undertaken only to toll the statutory time limit in § 40-6-114(1), C.R.S. We will further deliberate on the issues raised for consideration in the RRR at a future Commissioners' Weekly Meeting and issue a separate decision ruling upon the merits of the RRR.

18. Although we toll the statutory time limit, we acknowledge the urgency of quickly moving forward with the acquisition of additional resources and the importance of avoiding any unnecessary price increases. The Commission commits to resolving the remaining issues as expediently as possible.

II. ORDER

A. It Is Ordered That:

1. Consistent with the discussion above, Black Hills Colorado Electric, LLC ("Black Hills" or "Company") shall make a supplemental filing no later than October 11, 2024, that includes a detailed showing of how the Company calculates the revised levelized cost of energy for all of the build transfer agreement projects listed on Table 3 (Updated Levelized Cost of Bids)

of the Company's Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0634 ("RRR").

2. Black Hills may file its proposed performance incentive mechanisms for Bid 114-05a by October 11, 2024, consistent with the discussion above.

3. Rule 1506(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, is waived.

4. Any responses from intervenors as to either the RRR or the October 11, 2024 supplemental information shall be filed by October 18, 2024.

5. Black Hills' RRR is granted for the sole purpose of tolling the statutory time limit in § 40-6-114(1), C.R.S., consistent with the discussion above.

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

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 2, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners