

BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF COLORADO

Proceeding No. 23N-0232GPS

IN THE MATTER OF THE NOTICE OF PROBABLE VIOLATION ISSUED TO
BLACK HILLS COLORADO GAS, INC. ON MAY 9, 2023.

UNANIMOUS COMPREHENSIVE SETTLEMENT AGREEMENT

This Unanimous Comprehensive Settlement Agreement (“Settlement Agreement” or “Agreement”)¹ is entered into between Black Hills Colorado Gas (“Black Hills,” “the Company,” or “Respondent”) and Trial Staff of the Colorado Public Utilities Commission (“Trial Staff” or “Staff”),² each a “Settling Party,” and collectively the “Settling Parties.” There are no parties to this proceeding other than the Settling Parties. This Settlement Agreement is intended to resolve all issues raised in this proceeding.

Trial Staff and Respondent agree as follows:

The Notice of Probable Violation

1. The May 9, 2023, Notice of Probable Violation (“NPV”) concerns 7 alleged violations of the Code of Federal Regulations (“CFR”) and recommends a civil penalty of \$130,000.

¹ The Settling Parties submit this Settlement Agreement under Commission Rule 11504(c)(II)(B) which permits Black Hills and the PSP Chief to “jointly file a stipulation and settlement agreement pursuant to Rule 11508, resolving these allegations in the NPV for the Commission’s consideration.”

² For purposes of this Settlement Agreement, “the PSP Chief” and “Trial Staff” are synonymous.

2. The NPV concerns an unplanned November 11, 2022 event occurring in the Morgan Hill System, under the Frederick Division of Operations within Black Hills, resulting in a service outage of approximately 12 hours to 100 or more customers.

3. The Settling Parties agree Black Hills' response to the NPV, dated June 12, 2023 (and filed in the docket for this proceeding) ("the June 12th Response"), contains a request by Black Hills to reach a compromise resolution to the NPV.

4. The first page of the June 12th Response states in relevant part, "Black Hills looks forward to working cooperatively with . . . Staff to address the concerns raised in the NPV and discuss or enhance Black Hills processes regarding the proposed violations."

5. Additionally, paragraph 51 of the June 12th Response states:

Black Hills takes its obligation with respect to safety very seriously. It views the PSP Staff as a partner in this effort and welcomes the PSP Staff's input and insight into how Black Hills can improve its processes. Black Hills has worked diligently throughout the investigation into this event, and willingly engaged in productive discussions with PSP Staff. Black Hills is hopeful that the parties can reach a mutually satisfactory resolution of this matter and either (a) a dismissal of the violations set forth in this NPV or (b) a reduction of the proposed civil penalty. Black Hills is willing to discuss these proposed violations further in order to resolve this proposed NPV.

6. The Settling Parties agree the statements in the initial paragraph and in paragraph 51 of the June 12th Response constitute, under Rule 11504(c)(II), a request by Black Hills for the Commission to consider an offer in compromise to the NPV through the joint filing of a stipulation and settlement agreement pursuant to Rule 11508 resolving the allegations in the NPV.

Negotiated Reduction of Civil Penalties

7. The Settling Parties engaged in lengthy negotiations to arrive at a mutually agreeable civil penalty reflecting both Respondent's willingness to improve its gas distribution system and recordkeeping practices as well as Staff's assessment of its potential to prevail if this proceeding were fully litigated.

8. To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for violations 2 through 7.

9. **Violation No. 1:** To achieve resolution of this proceeding, Respondent and Trial Staff also negotiated and agree to a \$5,000 civil penalty for the remaining violation (*i.e.*, violation 1) as follows:

- a. Respondent and Trial Staff agree, while Trial Staff could make a plausible argument the November 11, 2022 outage on the Morgan Hill System resulted in public endangerment (and, thus, justify an impact factor of 10 for violation 1), Trial Staff also recognizes if this proceeding were fully litigated, the Commission may not agree circumstances warrant an impact factor of 10 and/or could reduce the civil penalty for violation 1 via the factors in Rule 11504(f);
- b. Respondent and Trial Staff agree Black Hills could have acted more expeditiously to address the capacity issue it identified in February 2022, and if it had done so, the November 11, 2022 outage would not have occurred;

- c. Respondent and Trial Staff agree both Rule 11504(f)(III) and C.R.S. § 40-7-117(2)(c) are consistent with a \$5,000 total civil penalty in this proceeding.

10. **Violation No. 2:** To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for this violation because, as mutually recognized by the Settling Parties, Black Hills ultimately provided complete and adequate records sought by Trial Staff concerning the pressure at the end of each incremental increase within each segment of the pipeline.

11. **Violation No. 3:** To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for this violation because, as mutually recognized by the Settling Parties, Black Hills ultimately provided complete and adequate records sought by Trial Staff concerning leak detection and work performed.

12. **Violation No. 4:** To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for this violation because, as mutually recognized by the Settling Parties, Black Hills ultimately provided the Form 48-4216 to Trial Staff.

13. **Violation Nos. 5 and 6:** To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for this violation because, as mutually recognized by the Settling Parties, Black Hills' O&M Manual also permits Respondent to consult with

and receive approval from an engineer to uprate in a different manner (*i.e.*, to open the valves simultaneously instead of sequentially).

14. **Violation No. 7:** To achieve resolution of this proceeding, Respondent and Trial Staff negotiated and agree Trial Staff will neither seek civil penalties nor a judgment for this violation because, as mutually recognized by the Settling Parties, Black Hills ultimately provided the complete and adequate records sought by Trial Staff concerning its service restoration details and purging times.

15. To achieve resolution of this proceeding, and resulting from negotiations between Respondent and Trial Staff, Respondent has taken the following measures to improve its gas distribution system and recordkeeping practices in light of the November 11, 2022 Morgan Hill System outage:

- a. Black Hills will, going forward, complete its uprate plan documentation within seven business days following completion of all uprate procedures.
- b. Black Hills will, going forward, accurately date and store its pressure charts.
- c. Black Hills will endeavor to expedite processes and responses concerning system reliability following cold weather system analysis that determines system reliability risks.

16. To achieve resolution of this proceeding, and resulting from negotiations, Trial Staff and Respondent agree the ultimate objective of the resolution to this NPV is the improved safety of Black Hills' distribution system for the benefit

of customers and their communities, and to that end, the Settling Parties agree to continue working together wherever possible on safety programs related to the Company's plans.

17. The Settling Parties agree a reduction of the total civil penalty from \$130,000 to \$5,000 represents a just and reasonable result and comports with the public interest because:

- a. Trial Staff agrees Black Hills ultimately addressed the under-pressurization issues after the November 11, 2022 outage on the Morgan Hill System in a manner making it unlikely a similar under-pressurization incident will occur in that location in the foreseeable future;
- b. Respondent has agreed to take additional measures (*see* paragraph 15 above) which it would not be obligated to take if the NPV were fully litigated;
- c. There is a mutual recognition by Trial Staff and Respondent as to the time requirements and costs inherent in fully litigating the NPV to both themselves and to the Commission; and
- d. There is a possibility the Commission could determine Trial Staff could not meet its burden of proof at hearing on the violations at issue in the NPV.

18. The Settling Parties agree measures taken by Black Hills are not in lieu of a civil penalty and nothing in this Settlement Agreement shall affect the recoverability associated with any of these measures.

19. The Settling Parties agree the \$5,000 civil penalty shall not be included in Black Hills' rate base and accordingly shall not be an allowable expense for rate-making purposes.

Payment of Negotiated Civil Penalty

20. Respondent shall pay \$5,000 within 7 calendar days of a final Commission decision in this proceeding.

21. Undersigned counsel for Respondent shall make appropriate arrangements with counsel for Trial Staff to ensure delivery of the \$5,000 check to the Commission in a manner acceptable to Trial Staff.

22. If Respondent fails to timely make payment required under this Settlement Agreement, Respondent shall be liable for the full penalty amount of \$130,000 less any payments made, which shall be due immediately.

Commission Rule 11508 (Consent Stipulations)

23. The Settling Parties enter into this Agreement as permitted by Commission Rule 11508(a).

24. Regarding specific requirements for Consent Stipulations in Commission Rule 11508(b):

- a. Rule 11508(b)(I): Black Hills admits to the facts articulated in paragraph 9 above regarding violation number 1;

- b. Rule 11508(b)(II): Black Hills expressly waives further procedural steps, including (without limitation) its right to a hearing; its right to seek judicial review, or otherwise to challenge or to contest the validity of the consent stipulation; and its right to seek judicial review of the Commission order accepting the consent stipulation;
- c. Rule 11508(b)(III): Black Hills acknowledges the NPV may be used to construe the terms of the settlement agreement; and
- d. Rule 11508(b)(IV): the only action Black Hills must take under the Agreement is contained in paragraph 20, and the deadline to do so also appears in paragraph 20.

General Provisions

25. Except as expressly set forth herein, nothing in this Settlement Agreement is intended to have precedential effect or bind the Settling Parties with respect to positions they may take in any other proceeding regarding any of the issues addressed in this Settlement Agreement. No Settling Party concedes the validity or correctness of any regulatory principle or methodology directly or indirectly incorporated in this Settlement Agreement. Furthermore, this Settlement Agreement does not constitute agreement, by any Settling Party, that any principle or methodology contained within or used to reach this Settlement Agreement may be applied to any situation other than the above-captioned proceeding, except as expressly set forth herein.

26. The Settling Parties agree the provisions of this Settlement Agreement, as well as the negotiation process undertaken to reach this Settlement Agreement, are just, reasonable, and consistent with and not contrary to the public interest and should be approved and authorized by the Commission.

27. The discussions among the Settling Parties that produced this Settlement Agreement have been conducted in accordance with Rule 408 of the Colorado Rules of Evidence. Nothing in this Settlement Agreement shall constitute a waiver by any Settling Party with respect to any matter not specifically addressed in this Settlement Agreement.

28. The Settling Parties agree to use good faith efforts to support all aspects of the Settlement Agreement embodied in this document in any hearing conducted to determine whether the Commission should approve this Settlement Agreement, and/or in any other hearing, proceeding, or judicial review relating to this Settlement Agreement or the implementation or enforcement of its terms and conditions. Each Settling Party also agrees that, except as expressly provided in this Settlement Agreement, it will take no formal action in any administrative or judicial proceeding that would have the effect, directly or indirectly, of contravening the provisions or purposes of this Settlement Agreement. However, except as expressly provided herein, each Settling Party expressly reserves the right to advocate positions different from those stated in this Settlement Agreement in any proceeding other than one necessary to obtain approval of, or to implement or enforce, this Settlement Agreement or its terms and conditions.

29. The Settling Parties do not believe any waiver or variance of Commission rules is required to effectuate this Settlement Agreement but agree jointly to apply to the Commission for a waiver of compliance with any requirements of the Commission's Rules and Regulations if necessary to permit all provisions of this Settlement Agreement to be approved, carried out, and effectuated.

30. This Settlement Agreement does not constitute agreement, by any Settling Party, that any principle or methodology contained within or used to reach this Settlement Agreement may be applied to any situation other than this proceeding, except as expressly set forth herein.

31. This Settlement Agreement is an integrated agreement that may not be altered by the unilateral determination of any Settling Party. There are no terms, representations or agreements among the parties which are not set forth in this Settlement Agreement.

32. This Settlement Agreement shall not become effective until the Commission issues a final decision addressing the Settlement Agreement. In the event the Commission modifies this Settlement Agreement in a manner unacceptable to any Settling Party, that Settling Party may withdraw from the Settlement Agreement and shall so notify the Commission and the other Settling Parties in writing within ten (10) days of the date of the Commission order. In the event a Settling Party exercises its right to withdraw from the Settlement Agreement, this Settlement Agreement shall be null and void and of no effect in this or any other proceeding.

33. There shall be no legal presumption that any specific Settling Party was the drafter of this Settlement Agreement.

34. This Settlement Agreement may be executed in counterparts, all of which when taken together shall constitute the entire Agreement with respect to the issues addressed by this Settlement Agreement. This Settlement Agreement may be executed and delivered electronically, and the Settling Parties agree that such electronic execution and delivery, whether executed in counterparts or collectively, shall have the same force and effect as delivery of an original document with original signatures, and that each Settling Party may use such facsimile signatures as evidence of the execution and delivery of this Settlement Agreement by the Settling Parties to the same extent that an original signature could be used.

Dated June 3, 2024

Agreed on behalf of: **Trial Staff of the Colorado Public Utilities Commission**

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