

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0242E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS 2024-2026 TRANSPORTATION ELECTRIFICATION
PLAN.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
GRANTING MOTION TO COMPEL, IN PART**

Mailed Date: September 1, 2023

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I. STATEMENT

1. On August 18, 2023, Trial Staff’s Motion to Compel Public Service Company of Colorado to Produce Documents and Information in Response to Staff’s Fourth, Fifth, and Eighth Sets of Data Requests (Motion to Compel) and to Shorten Response Time was filed by Trial Staff of the Colorado Public Utilities Commission (Staff).

2. Between July 7, 2023, and July 26, 2023, Staff propounded its Fourth, Fifth, and Eight Sets of Data Requests. Staff found the Company's answers to CPUC 4-3, CPUC 5-7, and CPUC 8 to be substantially deficient and lacking a valid objection. After conferring with Public Service, the parties were unable to reach a resolution.

3. By Decision No. R23-0564-I, issued on August 22, 2023, response time to the Motion to Compel was shortened.

4. On August 28, 2023, Public Service Company of Colorado's Response in Opposition to Trial Staff's Motion to Compel Public Service Company of Colorado to Produce Documents and Information in Response to Staff's Fourth, Fifth, and Eighth Sets of Data Requests was timely filed.

5. Staff contends that the cost-benefit analysis conducted by the Brattle Group Inc. (Brattle Group) and used by the Company as support for its TEP does not evaluate the benefits of the TEP proposals. Rather, benefits were evaluated based upon an assumption that Colorado achieves the Governor's goal of 940,000 light duty electric vehicles (EVs) on the road by 2030. Staff requests the Company be compelled to provide an estimate of the additional electric vehicle load and number of EVs specifically attributable to the Company's TEP plan, rather than assumed achievement of the Governor's goal.

6. In its response, Public Service first states it has complied with the request because no "final draft" of a cost benefit analysis exists under a methodology other than that provided in Attachment JLJ-2. Second, to the extent that Staff contends that Attachment JLJ-2 fails to meet statutory standards, it should be addressed through answer testimony rather than seeking to compel discovery. Finally, the Company argues attorney-client privilege and opinion-work product doctrines protect the requested information from disclosure.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

A. Principles Governing Discovery.

7. Discovery in Commission proceedings is generally governed by Rule 1405 of the Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1, unless modified by Commission decision or agreement of the parties as provided therein. In Rule 1405(a), the Commission incorporates some, but not all, of the discovery provisions found in the 2012 Colorado Rules of Civil Procedure. See Decision No. C23-0514-I, issued August 7, 2023, and Rules 1405(a) and 1004(h), 4 CCR 723-1.

8. Incorporated portions of Rule 26(b)(1) C.R.C.P. (2012) provide that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Relevant information need not be admissible at hearing if the discovery is reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1) C.R.C.P. "[T]he information sought through discovery must be relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. " *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002).

9. Rule 26(b)(4) C.R.C.P. (2012) limits the discovery of "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

10. "When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material,

the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Rule 26(b)(5) C.R.C.P. (2012).

B. Report in Milestone 4

11. Acting under an engagement agreement with Public Service’s counsel and at the direction of Public Service’s counsel, the Brattle Group was hired to develop expert opinions in anticipation of the within litigation. The scope of that engagement was modified by amendment.

12. Staff makes clear that it does not seek production of iterative drafts of the Brattle Group analysis; the analysis that assesses the costs and benefits of Public Service’s TEP is sought, consistent with the engagement as stated prior to its amendment.

13. The original scope of Brattle Group services was defined in the engagement agreement along with milestones -- including a report as part of Milestone 4. Substantially after scheduled completion of the Milestone 4 report, the scope of services was expanded by amendment without modifying Milestone 4 and adding an additional milestone.

14. In its response, Public Service states that the reports referenced in Milestones 4 and 5 rely upon different methodologies and that there is no final version of the report referenced in Milestone 4 as to the incremental number of EVs directly attributable to the Company’s Transportation Electrification Plan (TEP) proposals. In response to Staff data request CPUC 12-1, in subpart (c) of that request, Public Service stated that there had been a delay in finalizing the final cost-benefit analysis (CBA), and that the CBA was finalized (*i.e.*, no longer in iterative and draft form) leading up to the May 15 filing. See the Company’s Confidential Attachment 1 providing the Company’s response to Staff data request CPUC12-1.

15. The Brattle Group's Transportation Electrification Cost-Benefit Analysis for Public Service Company of Colorado report, dated May 2023 and prepared for Public Service Company of Colorado in accordance with the Brattle Group's engagement terms, was included in the direct testimony of the Direct Testimony of Jean-Baptiste L. Jouve as Hearing Exhibit 105, Attachment JLJ-2.

16. While the scope of engagement was modified, the purpose of the Public Service's engagement of the Brattle Group remained to develop expert opinions in anticipation of litigation. The attachment to Hearing Exhibit 105 is the only opinions of the Brattle Group provided in testimony.

17. Established to protect the adversary system, the work product privilege safeguards from disclosure during discovery "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S. Ct. 385, 394 (1947). Accordingly, Rule 26(b)(3) generally subjects to discovery documents and tangible things prepared in anticipation of litigation only if the opposing party demonstrates a "substantial need" for the materials and cannot obtain the substantial equivalent without undue hardship. *Gall v. Jamison*, 44 P.3d 233, 235 (Colo. 2002).

18. The Colorado Supreme Court has addressed the difficulty in balancing the liberal discovery provided to parties relating to expert testimony versus the strong protections afforded an attorney's work product. *Gall v. Jamison*, 44 P.3d 233, 236 (Colo. 2002).

19. It is appropriate for Staff to conduct discovery in preparation for cross-examination of witnesses at the hearing. Staff argues in anticipation that Public Service is attempting to shield a non-testifying expert behind a testifying expert. However, the case at bar is clearly distinguishable cited cases. Staff does not seek to discover information from the Brattle Group regarding opinions expressed by a testifying witness. Rather, Staff seeks to discover information regarding opinions of the Brattle Group derived for legal counsel in anticipation of this specific litigation that are not expressed by the testifying witness.

20. At page three of its response, the Company states it has already produced its final cost-benefit analysis in full, as well as the underlying facts, assumptions, and information that have informed its development.

21. Although not controlling in Commission proceedings, it is noteworthy that the Colorado Rules of Civil Procedure require some disclosure regarding expert witness reports. In addition to the report of the expert, those rules require, in part, disclosure of “all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions.” Rule 26(b)(2)(B)(I) C.R.C.P. (2012).

22. Staff has shown, more likely than not, that a Milestone 4 report exists in substantial compliance with the engagement agreement based upon the timing, circumstance, and existence of the Brattle Group report presented in testimony.

23. The Company has demonstrated that the attorney work-product privilege protects any Milestone 4 report from disclosure, except to the extent is subject to disclosure based upon the report presented in testimony. If not previously disclosed, the Company will be compelled to produce the most recent version of the Milestone 4 report issued by the Brattle Group to the

extent that it provides the basis and reasons for Hearing Exhibit 105, Attachment JLJ-2; the data or other information not otherwise produced that was considered by the Brattle Group in forming the opinions in Hearing Exhibit 105, Attachment JLJ-2; or contains any exhibits to be used as a summary of or support for the opinions for Hearing Exhibit 105, Attachment JLJ-2. To such an extent the request is reasonable, not protected by privilege, and production will be compelled. Otherwise, any Milestone 4 report is protected from disclosure as attorney work product.

C. CPUC 4-3

24. CPUC 4-3 addresses the Direct Testimony of Company Witness El Mallakh (HE 102) at 13:22-14:5. Subpart d asks, “Has the company produced an estimate of additional EV load specifically attributable to its TEP plan?”

In response, Public Service objected based upon attorney-client and/or work product privileges and that it seeks trial preparation materials protected from disclosure by Colorado Rule of Civil Procedure 26(b)(4)(D). The Company went on to respond: “The Company has estimated additional EV load for the territory as a result of attaining the Colorado state goals for Electric Vehicle adoption. These assumptions are contained within Attachment DSK-3 to the Direct Testimony of Company Witness Klingeman, specifically Rows 5-17 of the ‘EV Forecast.’”

25. The Commission has indicated the relevancy of the subject request by the expression of interest in matching costs and benefits to consider a high-level overview of the business case associated with investments. See *e.g.*, Decision C23-0425-I at paragraph 11. Staff has demonstrated that the request is reasonably calculated to lead to the discovery of admissible evidence.

26. The Company makes no attempt whatsoever to state whether the company has produced such an estimate outside the scope of the privileged Brattle Group engagement and, if it has, to describe the nature of the documents, communications, or things not produced or disclosed in a manner enabling assessment of the applicability of the privilege or protection.

27. The Company will be compelled to provide a complete response to CPUC 4-3.

D. CPUC 5-7

28. CPUC 5-7 addresses the Direct Testimony of Company Witness Jouve (HE 105) at 33:1-2: “The results of the [Cost-Benefit Analysis or “CBA”] study ultimately support greater understanding of the value of the Company’s proposals.” Subparts c and d ask:

c. Did the Company or Brattle estimate the incremental number of EVs that would be added in the Company’s service territory specifically as a result of the TEP proposals? If so, please provide that estimate and any supporting analysis or workpapers.

d. Did the Company or Brattle estimate the incremental EV load that would be added to the Company’s electric system specifically as a result of the TEP proposals? If so, please provide that estimate and any supporting analysis or workpapers.

29. In its response, Public Service objected based upon attorney-client and/or work product privileges and that it seeks trial preparation materials protected from disclosure by Colorado Rule of Civil Procedure 26(b)(4)(D). The Company went on to respond:

c. The CBA does not estimate the incremental number of EVs that would be added in the Company’s service territory specifically as a result of the TEP proposals. That type of estimate is not included in the scope of the engagement with Brattle.

d. The CBA does not estimate the incremental EV load that would be added to the Company’s electric system specifically as a result of the TEP proposals. That type of estimate is not included in the scope of the engagement with Brattle.

30. To the extent discovery is propounded as to the Brattle Group, it is addressed above. However, as otherwise propounded upon the Company, the request is reasonably calculated to lead to the discovery of admissible evidence and the response is not responsive. The Company will be compelled to provide a complete response to CPUC 5-7 subparts c and d as to whether the Company made the specified estimations.

E. CPUC 8

31. CPUC 8-8 addresses the Direct Testimony of Company Witness Klingeman (HE 108) at 21:12-16, which states: “The Company used the EV load forecast undertaken by Guidehouse, Inc. (Guidehouse), as supported by Company witness Mr. Jean-Baptiste Jouve and explained in Attachment JLJ-1. Specifically, that EV load forecast reflects the EV adoption that is consistent with Colorado’s goal of 940,000 light-duty EVs on the road by 2030.” Subpart b, asks: “Is the Company aware of any analysis estimating the number of light-duty EVs in its service territory in 2030 with or without the Company’s proposed TEP investments? If so, please provide.”

32. In response, Public Service generally objected based upon attorney-client and/or work product privileges and that it seeks trial preparation materials protected from disclosure by Colorado Rule of Civil Procedure 26(b)(4)(D). The Company went on to respond:

The Company is aware that the Colorado Energy Office has study information obtained from M.J. Bradley & Associates, LLC on the costs and benefits of increased PEV penetration across Colorado. That study is not publicly available.

Also, the Company’s internal EV forecast through year 2051 is provided in Attachment CPUC8-8.A1. This forecast relies on an average of the results of Bass Diffusion modeling and Econometric modeling. With that methodology, the forecast is primarily independent of the impact of the Company’s TEP proposals, although it reflects to some extent Company investments from the inaugural TEP through the Bass Diffusion aspect of the methodology.

See also the Company’s response to Discovery Request CPUC4-3, subpart (d).

33. Outside of the scope of the Brattle Group engagement addressed above, Staff generally references inadequacy of responses to CPUC 8 seeking the same information sought elsewhere and makes specific reference to CPUC 8-8. While the entire set of CPUC 8 is

attached to the motion, including Public Service responses, Staff failed to meet its burden to show that Public Service failed to respond, and that any specific relief should be granted.

34. The motion to compel will be denied as to CPUC 8.

III. ORDER

A. It Is Ordered That:

1. Trial Staff's Motion to Compel Public Service Company of Colorado to Produce Documents and Information in Response to Staff's Fourth, Fifth, and Eighth Sets of Data Requests filed on August 18, 2023, is granted in part. Public Service is compelled to forthwith provide discovery consistent with the discussion above.

2. This Decision shall be effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

Rebecca E. White,
Director