

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0394E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER APPROVING EXPENSES INCURRED FOR THE PERIOD JANUARY 2022 THROUGH DECEMBER 2022 THAT ARE RECOVERED THROUGH THE ELECTRIC COMMODITY ADJUSTMENT AND PURCHASED CAPACITY COSTS RECOVERED THROUGH THE PURCHASED CAPACITY COST ADJUSTMENT FOR THE SAME PERIOD AND APPROVING OF THE CALCULATION OF 2022 SHORT TERM SALES MARGINS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
EXTENDING TIME FOR A COMMISSION DECISION,
GRANTING HIGHLY CONFIDENTIAL PROTECTIONS,
SETTING PROCEDURAL SCHEDULE,
SCHEDULING EVIDENTIARY HEARING, AND
WAIVING RESPONSE TIME**

Mailed Date: October 24, 2023

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I. STATEMENT AND PROCEDURAL BACKGROUND

1. On August 1, 2023, Public Service Company of Colorado (Public Service or the Company) filed its verified application seeking approval of the following: (1) the fuel, purchased energy, purchased wheeling, and other expenses incurred from January 1, 2022 through December 31, 2022, that have been reflected in the Company's Electric Commodity Adjustment (ECA); (2) the purchased capacity expenses incurred by the Company from January 1, 2022, through December 31, 2022 and, (3) the Company's calculation of the 2022 Short-Term Sales Margins that have been used to adjust the 2023 ECA Deferred Account Balance.

2. Contemporaneously with its Verified Application, the Company filed the direct testimony of the following individuals, along with numerous exhibits:

- a) Jason J. Peuquet;
- b) Mark G. Schultz;
- c) Kyle L. Williams;
- d) Jeffrey R. Knighten;
- e) Michael A. Rein; and
- f) Greg P. Ryan.

3. Also on August 1, 2023, the Company filed its Motion for Extraordinary Protection of highly confidential information.

4. On August 2, 2023, the Commission's Notice of Application Filed was sent to all interested persons and entities. The Notice stated that Public Service had filed direct testimony with its Verified Application and was seeking a Commission decision within 120 days of the Application being deemed complete.¹ In addition, the Notice set a 30-day window within which interested

¹ Notice of Application Filed, filed Aug. 2, 2023.

persons could intervene, and a 37-day window within which Commission Staff was to file its Intervention.

5. On August 14, 2023, the Colorado Office of Utility Consumer Advocate (UCA) filed its Notice of Intervention of Right, Request for Hearing, and Entry of Appearances. The UCA listed thirteen issues it seeks to investigate.

6. On September 1, 2023, the Trial Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1401, and Request for Hearing. Staff identified eleven issues it intends to raise and address in this proceeding.

7. On September 13, 2023, the Commission deemed the Application complete by minute entry and referred it to an Administrative Law Judge (ALJ) for disposition. Subsequently, this Proceeding was assigned to the undersigned ALJ.

8. The interventions by right of UCA and Staff are noted. The parties to this Proceeding are thus Public Service, UCA, and Commission Trial Staff.

9. On October 4, 2023, Public Service filed an Unopposed Motion to Approve Procedural Schedule and for Waiver of Response Time. In its Unopposed Motion, Public Service represented that that parties had agreed to a proposed procedural schedule and evidentiary hearing.

10. Because the timeline proposed by the parties would impose undue pressure on the Commission to issue a final decision before the statutory deadline set by § 40-6-109.5, C.R.S., the ALJ initially rejected the parties' proposed schedule and suggested moving the proposed dates up several weeks. Alternatively, the ALJ suggested the parties waive the statutory deadlines set by § 40-6-109.5.

11. In a responsive email dated October 11, 2023, the parties jointly suggested and stipulated to a third option: the further extension of the statutory deadline by an additional 130 days pursuant to

§ 40-6-109.5(4), for a total time period of 380 days from the date Public Service's Application was deemed complete for the Commission to issue a final decision in this Proceeding.

12. Because the adoption of an extended, 380-day statutory timeline requires a finding that "extraordinary conditions" exist justifying the further extension of the time period, by Decision No. R23-0688-I, issued October 12, 2023, the ALJ scheduled a prehearing conference for Friday, October 13, 2023, at 11:00 a.m. to discuss the procedural timeline.

13. On October 13, 2023, the ALJ convened the prehearing conference as scheduled. All parties appeared through the following representatives:

- Chris Irby appeared on behalf of Public Service;
- Thomas Dixon, Michel Singer-Nelson, and Leslie Henry-Sermos appeared on behalf of UCA; and
- Kristine Roach and Justin Cox appeared on behalf of Commission Staff.

14. This decision memorializes issues discussed at the prehearing conference and pending issues.

II. TIME FOR A COMMISSION DECISION

15. Public Service's Verified Application was accompanied by the direct, supporting testimony of six individuals. As the Commission noted in its Notice of Application², Public Service is therefore seeking a Commission decision within 120 days of the date on which its Verified Application is deemed complete.

16. Since the filing falls under § 40-6-109.5(1), C.R.S., the time for a Commission decision to issue is 120 days after the Application is deemed complete. The Commission deemed

² Notice of Application Filed, p. 1.

Public Service's Verified Application complete on September 13, 2023. Pursuant to § 40-6-109.5, C.R.S., a Commission decision is therefore due on or before January 11, 2024.

17. However, if the Commission in its discretion finds that additional time is required for a decision, the time period within which a Commission decision shall issue may be extended an additional 130 days.³

18. In order to facilitate the unopposed procedural schedule proposed by the Company, it is found necessary to extend the time for issuance of a Commission decision by an additional 130 days (for a total of 250 days) as provided by § 40-6-109.5(1), C.R.S.

19. Section 40-6-109.5(4), C.R.S., creates an exception to the presumed maximum 250-day timeline discussed above. Specifically, it provides that when the Commission holds a properly noticed hearing at which the existence of extraordinary conditions is established to the Commission's satisfaction, the statutory deadline for a final Commission decision may be further extended by an additional 130 days, for a total maximum of 380 days from the date an application is deemed complete.⁴ The parties and their counsel simply being busy does not establish the existence of extraordinary conditions.

20. As noted, the parties first presented their position that they collectively believe extraordinary conditions exist justifying an additional 130-day extension of the deadline for a final Commission decision per § 40-6-109.5(4), C.R.S., via email on October 11, 2023.

21. As required by § 40-6-109.5(4), C.R.S., the ALJ scheduled a duly noticed prehearing conference for October 13, 2023.⁵ Decision No. R23-0688-I which scheduled the

³ Id.

⁴ § 40-6-109.5(4), C.R.S.

⁵ Decision No. R23-0582-I at 4.

prehearing conference explicitly provided notice that during the hearing, the parties would be given an opportunity to establish that extraordinary circumstances exist justifying a 130-day extension of the statutory deadline for a final Commission decision, per § 40-6-109.5(4), C.R.S.⁶

22. During the prehearing conference, counsel for Public Service, Mr. Irby, explained that extraordinary conditions exist due to an unusually high volume of other Commission proceedings involving all three of the parties to this Proceeding which are scheduled for a hearing or will be scheduled for a hearing in the coming months. This, they explained, makes it nearly impossible to identify hearing dates for this Proceeding that could accommodate a 250-day deadline for a final Commission decision to issue. Mr. Irby cited upcoming hearings in Proceedings Nos. 23AL-0188E, 22A-0563E, 23A-0330E, 23AL-0243E, and 23A-0242E, as well as substantial work requiring the time and attention of the parties in Proceeding Nos. 21A-0141E and 23A-0392EG.

23. Mr. Dixon, on behalf of UCA, corroborated Mr. Irby's assessment, concurred that extraordinary conditions exist, and noted that moving the hearing date up, as the undersigned ALJ had suggested, would conflict with the already-schedule evidentiary hearing in Proceeding No. 23A-0242E.

24. Ms. Roach, on behalf of Commission Staff, likewise agreed.

25. As the parties and undersigned ALJ noted, a finding of extraordinary conditions was recently made in Decision No. R23-0617-I, issued September 13, 2023, in Proceeding No. 23A-0356E, which also involves these three parties as well as other Intervenors. Decision No. R23-0617-I found that the high volume of other pending matters and the crush of upcoming

⁶ *Id.* at 3

hearings made scheduling a hearing in that proceeding nearly impossible unless extraordinary conditions were found justifying a 380-day statutory timeline. In support of that finding, the ALJ cited as examples of pending or conflicting Proceedings the following:

Proceeding Nos.: 23A-0244E (October 23, 24, and 26, 2023 evidentiary hearing); 22A-0563E (November 7 and 9, 2023 evidentiary hearing); 23A-0330E (November 16, 17, and 20, 2023 evidentiary hearing); 23AL-0325G (November 20, 2023 evidentiary hearing); 23AL-0231G (November 28, 29, 30 and December 1, 2023 evidentiary hearing); 23AL-0243E (December 11 to 19, 2023 evidentiary hearing); 23A-0357E (January 8 and 9, 2024 evidentiary hearing); and 23A-0242E (January 10-12, 16-19, and 22-24 evidentiary hearing).

The undersigned ALJ finds that Decision No. R23-0617-I further establishes the unusually high volume of proceedings currently pending before the Commission and involving these parties.

26. Finally, the ALJ notes that her schedule is similarly full for the next several months, which would render it difficult to issue a final Commission decision within the 250-day statutory time period.

27. Based on the parties' representations, the high volume of proceedings as established by Decision No. R23-0617-I, the scheduling difficulties created by the parties' and the undersigned's full calendars, and the need to ensure adequate time to issue a thorough and thoughtful final Commission decision, the undersigned ALJ finds and concludes that extraordinary conditions, as contemplated under § 40-6-109.5(4), exist justifying an additional 130-day extension of the statutory deadline for a final Commission decision. Accordingly, the deadline for a final Commission decision will be extended by an additional 130-days — for a total of 380 days post-completion of the Application — up to and including September 27, 2024, per § 40-6-109.5(4), C.R.S.

III. MOTION FOR EXTRAORDINARY PROTECTION OF HIGHLY CONFIDENTIAL INFORMATION

28. On August 1, 2023, contemporaneously with its Verified Application, the Company filed its Motion for Extraordinary Protection. In the Motion, Public Service asks for protection of the following information:

- (1) Attachment JJP-3 and the two amendments to power purchase agreements contained in this attachment.
- (2) Attachment MGS-1 and the hourly datasets contained in the attachment, including: system load (wholesale and retail); interchange energy; energy sales/exports and purchases/imports; system lambda and joint dispatch sales and purchases; all resources used to serve system load, including owned fossil and renewable generation, PPAs [power purchase agreements], purchases and sales, and any other load-serving resources; and estimated renewable curtailment volumes;
- (3) Attachment K LW-1 and the information contained in the attachment, including: complete GADS data and unit-level Equivalent Availability Factor (“EAF”) percentages for the Company’s owned fossil generation assets; complete GADS data and xEEAF for the Company’s owned renewable resources; and a comparison of forecasted annual generation to actual production for those same Company-owned renewable resources;
- (4) Workpapers supporting Attachments MGS-1 and K LW-1;
- (5) Any other documents or information that could be used to derive the information contained in Attachments JJP-3, MGS-1 and K LW-1; and,
- (6) Any other information protected by a confidentiality clause of an existing PPA where the Company has contractually committed to keep certain terms and conditions confidential, and the Company is bound to maintain such confidentiality, absent an order from this Commission to the contrary. This request includes PPAs where, even though the PPA itself is public, Public Service has committed to the power producer to keep confidential various data with respect to the performance by the producer under the PPA; and,
- (7) Any future testimony, oral or written, other documents, or discovery responses, including responsive documents, containing any of this Highly Confidential Information.

29. Public Service seeks an order imposing highly confidential protections for the above-listed categories of Highly Confidential Information. Based upon extraordinary

circumstances, Public Service requests that access be restricted to the Commission, Trial Staff, and the UCA, and attorneys representing these entities. In accordance with Rule 1101(b)(V), 4 CCR 723-1, the motion was accompanied by a specific form of nondisclosure agreement requested.

30. No objections to the Motion for Extraordinary Protection have been filed.

31. Indeed, on August 2, 2023, the UCA filed its non-disclosure agreement (NDA) agreeing “to be bound by the terms of those protective provisions with respect to all evidence and information produced or arising in the course of this Proceeding No. 23A-0394E.” The NDA was executed by the UCA’s Director, Deputy Director, Administrative Assistant, five Rate/Financial Analysts, an Economist, a Paralegal, and Legal Counsel.

32. The Company notes that highly confidential protections have been afforded similar documents that were found to be highly confidential in a prior ECA review proceeding, including its 2021 ECA Annual Prudence Review and 2022 ECA and PCCA Annual Prudence Review.

33. Under Rule 1100(b) CCR 723-1, information filed with the Commission is presumed to be a public record, including (I) annual reports; (II) rates, terms and conditions for regulated services; (III) tariffs and price lists; (V) aggregate data regarding informal consumer complain information; (VI) all compliance filings that the Commission has ordered to be filed as public record; (VIII) performance reports demonstrating compliance or lack of compliance with Commission rules or decisions; and (X) safety inspection reports or information filed with the Commission or compiled by Commission staff. Rule 1101 provides the procedure and requirements for filing and seeking highly confidential protections for a document. Rule 1101(c) governs records that are presumed to be public under Rule 1100(b) and allows an entity or person to file a motion requesting highly confidential protection for records in accordance with Rule

1101(b). Rule 1100(d) specifies that the party requesting highly confidential protection carries the burden of proof to establish the need for highly confidential protection.

34. Under Rule 1101(b), 4 CCR 723-1, a motion seeking highly confidential protection:

- (I) shall include a detailed description and/or representative sample of the information for which highly confidential protection is sought;
- (II) shall state the specific relief requested and the grounds for seeking the relief;
- (III) shall advise all other parties of the request and the subject matter of the information at issue;
- (IV) shall include a showing that the information for which highly confidential protection is sought is highly confidential; that the protection afforded by the Commission's rules for furnishing confidential information provides insufficient protection for the highly confidential information; and that, if adopted, the highly confidential protections proposed by the movant will afford sufficient protection for the highly confidential information;
- (V) shall be accompanied by a specific form of nondisclosure agreement requested;
- (VI) shall be accompanied by an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain subject to highly confidential protection, if known; and
- (VII) shall include an exhibit, filed in accordance with the procedures established in paragraph (a), containing the information for which highly confidential protection is requested. Alternatively, the movant may show why providing the subject information would be overly burdensome, impractical, or too sensitive for disclosure.

35. Public Service provides a detailed description of the information for which it seeks protection and a showing that it deserves and needs highly confidential protection. Its Motion for Extraordinary Protection also includes two proposed forms of nondisclosure agreement for legal counsel and for experts in the subject matter. It has also provided the affidavit of Jason J. Peuquet, the Director of Regulatory Administration for the Company, identifying the individuals within Public Service that have access to the information.

36. The Company did not attach the highly confidential information to its Motion. Rule 1101(e) specifies that “[i]nformation which is subject to highly confidential protection and that is provided in response to discovery or in response to Commission staff audit shall not be filed with the Commission.” Rather, the Company provided attachments MGS-1 and KIW-1 “as part of its direct case and the workpapers provide supporting information for the already-filed information.”

37. Public Service has thus satisfied each of the requirements of Rule 1101(b) and has shown good cause for highly confidential protection of the identified information. Accordingly, Public Service’s Motion for Extraordinary Protection will be granted.

IV. PROCEDURAL SCHEDULE AND EVIDENTIARY HEARING

A. Procedural Schedule

38. As noted above, on October 4, 2023, the Company filed an Unopposed Motion to Approve Procedural Schedule and for Waiver of Response Time. In its Unopposed Motion, Public Service represents that it has conferred with Commission Staff and the UCA regarding agreeing to a proposed, unopposed procedural schedule to govern this proceeding.

39. In the Unopposed Motion, Public Service, UCA, and Trial Staff unanimously agreed to the following proposed procedural schedule:

Answer Testimony	December 15, 2023
Rebuttal Testimony and Cross-Answer Testimony	January 26, 2024
Stipulations and Settlement Agreements	February 6, 2024
Evidentiary Hearing	February 28-29, 2024
Statements of Position	March 13, 2024

B. Evidentiary Hearing

40. The Company specified the parties' preference for a hybrid hearing, indicating that its counsel and witnesses intend to appear in person. The undersigned will therefore schedule a hybrid hearing. If circumstances change, the parties may request a different hearing format or the ALJ may change the hearing format.

41. The ALJ notes that the Commission can conduct in-person, remote, or hybrid hearings. A remote hearing is one in which all of the participants appear and participate from remote locations over the Zoom web conferencing platform. A hybrid hearing involves the ALJ and at least one party and/or witness participating from one of the Commission's hearing rooms in Denver, and the remaining party(ies) and witness(es) participating from one or more remote locations using the Zoom web conferencing platform. An in-person hearing is one in which the ALJ and all parties and witnesses participate in the hearing at the same location.

42. The Parties are further advised and are on notice that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1. The ALJ expects the Parties to be familiar with and to comply with these rules. The rules are available on the Commission's website (puc.colorado.gov/pucrules).

43. The parties are also on notice that failure to appear at the scheduled evidentiary hearing may result in decisions adverse to their interests, including granting the complete relief opposing parties seek, dismissing interventions, and dismissing or granting the Application.

44. The ALJ has reviewed the parties' proposed schedule and finds that it reasonable. It will be adopted, as order below.

C. Unified Numbering System for Hearing Exhibits

45. In order to efficiently organize the numbering and preparation of exhibits for the hearing, the parties shall use a unified numbering system for all hearing exhibits. Blocks of hearing exhibit numbers are assigned as follows:

- a) Public Service Company of Colorado Hearing Exhibits 101-199
- b) Commission Staff: Hearing Exhibits 201-299
- c) The Office of the Utility Consumer Advocate: Hearing Exhibits 301-399

46. **Informal Video-Conference Practice Session:** The ALJ will hold an informal practice video-conference session if requested by any party to give the parties an additional opportunity to practice using Zoom and box.com before the hearing.

47. The parties may contact a Commission Legal Assistant by email at casey.federico@state.co.us and stephanie.kunkel@state.co.us, to schedule an informal practice video-conference session.

48. The parties will receive information and a link to participate in the informal practice session by email.

V. WAIVER OF RESPONSE TIME

49. Pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, a responding party “shall have 14 days after service of the motion . . . in which to file a response.” Thus, under Rule 1400(b), any response to the parties’ Joint Motion is currently due on or before July 20, 2023.

50. However, Rule 1308(b), 4 CCR 723-1, permits the Commission to “shorten or waive response time to a motion upon motion of a party or on its own motion upon a finding that

time is of the essence. . . . The Commission can act immediately where response time is waived and after expiration of the shortened response time.”

51. An unopposed motion such as this Unopposed Motion to Approve Procedural Schedule may be granted before expiration of the time within which to respond to the motion. *See* Rule 1400(a)(II), 4 CCR 723-1. As the Motion to Approve the Procedural Schedule is unopposed, the ALJ finds that waiving the response time to the Unopposed Motion will not prejudice any party. The ALJ will therefore waive response time to the Unopposed Motion to Approve Procedural Schedule.

VI. ORDER

A. It Is Ordered That:

1. Pursuant to § 40-6-109.5(1) and (4), C.R.S., the applicable period for issuance of a Commission decision is extended by an additional 260 days, up to and including September 27, 2024.
2. The Motion for Extraordinary Protection filed by Public Service Company of Colorado on August 1, 2023, is granted.
3. Pursuant to Rule 1308(b), 4 *Code of Colorado Regulations* (CCR) 723-1, the response time to Public Service of Colorado’s Unopposed Motion to Approve Procedural Schedule, filed October 4, 2023, is waived.
4. A **hybrid** hearing is scheduled as follows:

Date: **February 28 and 29, 2024**

Time: **9:00 a.m.**

Location: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

METHOD: In-person and by videoconference using Zoom at the link to be provided to counsel and the parties via email prior to the hearing.

Optionally, any party may participate remotely by joining a video conference using Zoom at the link provided to the established parties in an e-mail prior to the scheduled hearing, as addressed above.

5. The parties and witnesses may not distribute the Zoom link and access code to anyone not participating in the remote hearing.

6. The following procedural schedule is adopted:

Answer Testimony	December 15, 2023
Rebuttal Testimony and Cross-Answer Testimony	January 26, 2024
Stipulations and Settlement Agreements	February 6, 2024
Evidentiary Hearing	February 28-29, 2024
Statements of Position	March 13, 2024

7. **Video-Conference Participation.** Counsel for the parties, parties, and witnesses may attend in person or participate in the evidentiary hearing by videoconference using the Zoom platform.

8. **Instructions for Remote Hearings Via Zoom:** Detailed instructions governing participation in and procedures for remote hearings conducted via Zoom are set out in Attachment A to this order, which is incorporated into and made part of this order.

9. **Evidence Presentation at the Evidentiary Hearing.** Because the hearing may accommodate remote participation by videoconference, all evidence must be presented electronically. Each party is responsible for ensuring that they and their respective witnesses: (a) have access to all pre-filed exhibits; and (b) can download and view documents available from box.com during the hearing.

10. **Instructions for Preparation and Presentation of Exhibits at Hearing:** In addition to other requirements of the Commission's Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1 (*e.g.*, Rule 1202 regarding pre-filed testimony), detailed additional instructions

governing the preparation and presentation of exhibits at the hearing are set out in Attachment B to this order, which is incorporated into and made part of this order.

11. The parties shall adhere to the following numbering system for their respective exhibits:

- a) Public Service Company of Colorado: Hearing Exhibits 101-199
- b) Commission Staff: Hearing Exhibits 201-299
- c) The Office of the Utility Consumer Advocate: Hearing Exhibits 301-399

12. **Instructions for Remote Hearings Via Zoom:** Detailed instructions governing participation in and procedures for remote hearings conducted via Zoom are set out in Attachment A to this order, which is incorporated into and made part of this order.

13. The ALJ will hold an informal Zoom practice session upon request.

14. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

Rebecca E. White,
Director