

Decision No. C24-0669

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24AL-0275E

IN THE MATTER OF ADVICE LETTER NO. 871 FILED BY BLACK HILLS COLORADO ELECTRIC, LLC DOING BUSINESS AS BLACK HILLS ENERGY TO INCREASE BASE RATES FOR RESIDENTIAL AND SMALL COMMERCIAL CUSTOMER CLASSES, TO BECOME EFFECTIVE JULY 15, 2024.

**COMMISSION DECISION
DENYING MOTION TO DISMISS AND/OR STRIKE
AND GRANTING MOTION FOR PRO HAC VICE**

Issued Date: September 17, 2024

Adopted Date: September 11, 2024

I. BY THE COMMISSION

A. Statement

1. On June 14, 2024, Black Hills Colorado Electric, LLC, doing business as, Black Hills Energy (“BHCOE” or the “Company”) filed Advice Letter No. 871 (“AL 871”) with tariff sheets to revise base rate revenue for all electric service in the Company’s Colorado P.U.C. No. 11 Tariff, along with certain other changes to its tariff. Black Hills filed the direct testimony of 13 witnesses in support of its request.

2. By Decision No. C24-0489, issued July 9, 2024, the Commission set for hearing and suspended the effective date of the tariff sheets filed with Advice Letter No. 871 for 120 days, to November 12, 2024, pursuant to § 40-6-111(1), C.R.S.

3. By Decision No. C24-0581-I,¹ issued on August 13, 2024, the Commission suspended the effective date of the tariff sheets filed with Advice Letter No. 871, extending an

¹ Decision No. C24-0581-I was initially issued in error as Decision No. C24-0580-I. An Errata correcting that error issued on August 20, 2024.

additional 130 days, to March 22, 2025, pursuant to § 40-6-111(1), C.R.S. By the same Decision the Commission established the parties to this Proceeding.²

4. On August 16, 2024, the Colorado Solar and Storage Association and the Solar Energy Industries Association (“COSSA/SEIA”) filed a Motion to Strike and/or Dismiss (“Motion”) testimony related to BHCOE’s statements regarding net metering as one cause of the Company’s revenue requirement deficiency.

5. On August 30, 2024, BHCOE filed its Response to COSSA/SEIA’s Motion to Strike and/or Dismiss Testimony and Empirical Evidence Regarding Net Metering-Caused Revenue Deficiency and Cost Shifts Between Customers (“BHCOE Response”).

6. On August 20, 2024, Sierra Club filed its Out of State Counsel’s Verified Motion Requesting *Pro Hac Vice* Admission for Nihal Shrinath.

7. By this Decision, the Commission denies COSSA/SEIA’s Motion and grants Nihal Shrinath’s *pro hac vice* request in accordance with the discussion below.

B. Discussion, Findings and Conclusions

1. Motion to Strike and/or Dismiss

8. In its Motion, COSSA/SEIA states that in its initial filing in this Proceeding BHCOE includes materials related to net metering in its service territory, the cost shifts the Company contends are attributable to net metering in its service territory, and policy proposals for

² Parties to this Proceeding are: BHCOE; Staff of the Commission (“Staff”); the Colorado Office of Utility Consumer Advocate (“UCA”); the City of Pueblo, County of Pueblo, and Pueblo Economic Development Corporation (collectively “Pueblo”); Energy Outreach Colorado (“EOC”); Laborers International Union of North America, Local 720; Colorado Solar and Storage Association and the Solar Energy Industries Association (jointly “COSSA/SEIA”); Board of Water Works of Pueblo, The Fountain Valley Authority, and Colorado Springs Utilities/Southern Delivery System (collectively “Public Utility Intervenors”); City of Canon City and City of Florence (jointly “Canon City/Florence”); Electrify America, LLC; Western Resource Advocates/Sierra Club (jointly “WRA/Sierra Club”); Holcim (U.S.), Inc.

changes to net metering in Colorado. COSSA/SEIA notes that BHCOE does not request the Commission take any action on net metering in this Proceeding.

9. COSSA/SEIA requests the Commission strike or dismiss the following portions of direct testimony and attachments, (the “Net-Metering Materials”):

- Hearing Exhibit 101, Direct Testimony of Michael J. Harrington, Page 7 (final paragraph), Page 8 (first paragraph), 40:15-19, 72:7-85:14, Attachment MJH-1, Attachment MJH-2;
- Hearing Exhibit 102, Direct Testimony of Floyd Wolf, 13:1-7, 25:10-26:15;
- Hearing Exhibit 110, Direct Testimony of Douglas N. Hyatt, Page 7, 30:11-13, 35:19-36:2, 74:4-96:16, Attachment DNH-11, Attachment DNH-12, Attachment DNH-13, Attachment DNH-14, Attachment DNH-15;
- Hearing Exhibit 111, Direct Testimony of Ethan J. Fritel, 18:23-19:18, Attachment EJF-4.

10. COSSA/SEIA contends that the Net-Metering Materials are not relevant in this proceeding and the issue is nothing more than a distraction in a very large proceeding.

11. COSSA/SEIA argues that the Net Metering Materials fail the Colorado Rules of Evidence, which requires that evidence: 1) be legally material to an issue in the case, 2) make the existence of a consequential fact more or less likely, and 3) not be unfairly prejudicial. Noting that Black Hills acknowledges the Net Metering Materials will not have an effect on the Company’s requested relief in this Proceeding, COSSA/SEIA holds that the provisions of Commission Rule 1501(a) of the Commission’s Practice and Procedure Rules, 4 *Code of Colorado Regulations* (“CCR”) 723-4, which allows the Commission to consider evidence that is not strictly admissible under Colorado Rules of Evidence if that evidence possesses reliable probative value, do not apply.

12. COSSA/SEIA rejects as irrelevant Black Hills’ statement that the net metering discussion is informational for customers to understand why the Company’s current rates are insufficient to recover its revenue requirement, stating that neither statute or Commission Rule

requires an explanation of why the company has a revenue deficiency and that there are many factors in this deficiency.

13. COSSA/SEIA also argues that inclusion of the net-metering materials will improperly and unnecessarily expand the scope of this Proceeding, noting that there are 12 parties to this case and some 40 witnesses. COSSA/SEIA contends that allowing testimony related to net metering in this proceeding will open up a statewide discussion of the issue, even though any changes to the policy are prohibited by current statute. On this point, COSSA/SEIA further notes that a working group led by the Colorado Energy Office is currently discussing modifications to the statutory provisions for net metering and states that that working group is the appropriate venue for net metering discussions.

14. Additionally, COSSA/SEIA argues that if the Company raises a claim related to net metering, that claim should be dismissed because it is foreclosed by law.

15. COSSA/SEIA states that it conferred with counsel for Black Hills and with each of the intervenors in this proceeding. COSSA/SEIA reports that Black Hills opposes the Motion; Holcim (U.S.) Inc. supports it; Staff, UCA, the Public Utility Intervenors, Electrify America, LLC, and the Cities of Florence and Cañon City take no position. EOC takes no position on the motion, but also acknowledges that stakeholders including EOC, COSSA and SEIA, and Black Hills are taking part in the Colorado Energy Office's net-metering working group which may ultimately result in statutory changes to Colorado's net-metering policies. EOC further states that the resulting process from the Colorado Energy Office's proposal(s) to the Governor may provide a more appropriate venue for the Commission to explore some of the issues flagged by BHCOE regarding the current net-metering framework.

16. In its Response, BHCOE argues that because this Proceeding will review the Company's revenue requirement, evidence that explains the cause of ten percent of the revenue deficiency is relevant, as is evidence of subsidization of net-metered customers by low-income and disproportionately impacted customers.

17. The Company acknowledges that the Commission cannot change net metering statutes but offers that the Commission can require changes to the Company's rate structure, including elimination of tiered rates and allowing optional time-of-use rates, addressing some of the subsidization of net-metered customers. Additionally, Black Hills cites Senate Bill 21-272, which modifies § 40-2-108, C.R.S., to require the Commission to "consider how best to provide equity, minimize impacts, and prioritize benefits to disproportionately impacted communities and address historical inequalities" when the Commission reviews filings before it. The Company contends that the Commission should consider cost-shifting that adversely affects disproportionately impacted and low-income customers in adjudicated proceedings, not leave these discussions to stakeholder discussions outside of a proceeding in which evidence can be sufficiently vetted.

18. The Company refutes COSSA/SEIA's statement that nothing will change based on the Net-Metering Materials, contending that the Commission could make findings affirming Black Hills' analysis and conclusions, recognize the effects of cost shifts to low-income and non-net metered customers, or open a miscellaneous or informational proceeding to explore net metering effects on cost causation, cost shifting, and equity.

19. BHCOE notes that COSSA/SEIA cites to rules of evidence that apply to adjudicatory court proceedings and that the applicable reference is the Rule 1501(a) that the Commission "shall not be bound by the technical rules of evidence" but shall conform "to the

extent practical,” which the Company contends is consistent with the Administrative Procedure Act, § 24-4-105(7), C.R.S., that states “the proponent of an order shall have the burden of proof, and every party to the proceeding shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

20. In the same vein, the Company disputes COSSA/SEIA’s argument that Black Hills failed to state a claim upon which relief is sought, stating that there are no “claims” in a rate case; a claim is more properly used in a complaint case.

21. As to COSSA/SEIA’s argument that addressing net metering in this proceeding will “short circuit” the stakeholder discussions led by CEO, Black Hills provides an August 29, 2024, email from CEO to the stakeholders indicating that because of disagreements amongst the working group members, there will not be legislative action on net metering in 2025. Therefore, the Company asserts, Commission findings in this Proceeding as to whether net metering results in cost-shifting will be useful in the stakeholder discussions in the future.

22. Black Hills acknowledges that some of the testimony, specifically the Buy-All/Sell-All tariff,³ relates to a possible public policy solution and would have to be addressed outside of this Proceeding because of the need for statutory changes. If the Commission wishes to strike this specific testimony, the Company would not object.

23. We decline to strike or dismiss the Net Metering Materials from this Proceeding and therefore deny COSSA/SEIA’s Motion. Given the size of the requested revenue requirement

³ Hr. Ex. 101, Harrington Direct, p. 84:6-22. Under this proposal, the customer would buy all of their energy used from the Company and would sell all energy that they produce to the Company, at a Commission-determined price; Black Hills contends this would address the fixed-cost recovery issue.

increase in this Proceeding, we find it will be beneficial to consider the whole of the information provided. We will evaluate relevant evidence and assign it the appropriate weight.

2. Request for *Pro Hac Vice* Appearance

24. An Attorney who is not licensed to practice law in Colorado must be granted permission to appear *pro hac vice* in a Commission proceeding. Rule 1201(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, governs the admission of out-of-state attorneys. Rule 1201(a) requires compliance with Colorado Rule of Civil Procedure ("CRCP") 205.4, which itself expressly incorporates CRCP 205.3. As pertinent here, CRCP 205.3(2)(a) details what an out-of-state attorney must do to be permitted to appear *pro hac vice* and includes these requirements:

- a) File a verified motion with the administrative agency requesting permission to appear;
 - a) Designate an associated attorney who is admitted and licensed to practice law in Colorado;
 - b) File a copy of the verified motion with the Clerk of the Supreme Court Office of Attorney Regulation at the same time the verified motion is filed with the administrative agency;
 - c) Pay the required fee to the Clerk of Supreme Court collected by the Office of Attorney Regulation;
 - d) Obtain permission from the administrative agency for such appearance.

25. On August 20, 2024, Nihal Shrinath filed a motion to appear *pro hac vice* on behalf of Sierra Club. Nihal Shrinath states they are a licensed attorney in good standing in California and has never previously participated in a Colorado Public Utilities Commission proceeding. Mr. Jim Dennison, a member of the Colorado Bar, signed the motion and was designated as the associate attorney for Nihal Shrinath. On August 22, 2024, the Colorado Office of Attorney Registration filed a notification in this Proceeding stating that Nihal Shrinath has filed a copy of their verified motion for *pro hac vice* appearance and paid the required fee.

26. Nihal Shrinath has satisfied the requirements of CRCP 205.4. Therefore, we grant Nihal Shrinath's request to appear *pro hac vice*.

II. ORDER

A. The Commission Orders That:

1. The Motion to Strike and/or Dismiss filed by the Colorado Solar and Storage Association and the Solar Energy Industries Association on August 16, 2024, is denied.

2. The Out of State Counsel's Verified Motion Requesting *Pro Hac Vice* Admission filed by Sierra Club for Nihal Shrinath on August 20, 2024, is granted.

3. This Decision is effective immediately on its Issued Date.

B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 11, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners