

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22AL-0046G

IN THE MATTER OF ADVICE LETTER NO. 993 – GAS OF PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS COLORADO PUC NO. 6 – GAS TARIFF TO INCREASE JURISDICTIONAL BASE RATE REVENUES, IMPLEMENT NEW BASE RATES FOR ALL GAS RATE SCHEDULES, AND MAKE OTHER PROPOSED TARIFF CHANGES TO BECOME EFFECTIVE FEBRUARY 24, 2022.

**INTERIM DECISION GRANTING MOTIONS FOR PRO
HAC VICE; GRANTING RULE 1101(H) MOTION;
ADDRESSING MOTIONS TO STRIKE; REQUIRING
CONFERRAL ON EXHIBIT LIST AND UPDATED CROSS-
EXAMINATION MATRIX; AND PROVIDING
PROCEDURAL GUIDANCE**

Mailed Date: August 12, 2022
Adopted Date: August 10, 2022

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I. BY THE COMMISSION**A. Statement**

1. Public Service Company of Colorado (Public Service or Company) initiated this proceeding by filing advice letter No. 993-Gas in which it seeks to amend its Colorado P.U.C. No. 6 – Gas tariff to initiate a comprehensive rate case for its gas utility operations. Through Decision No. C22-0247, issued April 20, 2022, we established a procedural schedule in this matter, including setting an evidentiary hearing set to begin August 17, 2022.

2. By this Decision, the Colorado Public Utilities Commission (Commission) addresses certain motions in advance of the evidentiary hearing. We grant requests for *pro hac vice* appearance filed separately by Trial Staff of the Commission (Staff) and the Federal Executive Agencies (FEA). In addition, and consistent with the discussion below, we grant the motion filed by the Office of the Utility Consumer Advocate (UCA) on July 20, 2022, regarding certain confidential information in Proceeding No. 21A-0192EG under Rule 1101(h) of the Commission's Rules of Practice and Procedure 4 *Code of Colorado Regulations* (CCR) 723-1 (Rule 1101(h) Motion). We grant in part, and deny in part, the motion requesting time to the Public Service Company Motion to Strike Testimony and Attachments (Company's Motion to Strike) filed July 27, 2022, by Public Service and deny the Motion to Strike Portions of the Rebuttal Testimony of Stephen G. Martz (Staff's Motion to Strike) filed by Staff on July 27, 2022.

3. In addition to addressing these motions, we provide procedural guidance, remind parties to review the Commission rules and orders in this proceeding, and order certain actions to improve at hearing. Public Service shall confer with parties and provide the Commission a combined exhibit list no later than 5:00 p.m. Monday, August 15, 2022, consistent with the discussion below. All parties shall come to the evidentiary hearing prepared to discuss whether they stipulate to admission of pre-filed testimony into the record. Parties are further required to

confer on a revised cross-examination matrix which better accommodates known schedule constraints, Commissioner questions, and redirect, which may be refiled by 5:00 p.m. Monday August 15, 2022, consistent with the discussion below.

B. Discussion

1. *Pro Hac Vice* Motions

4. An attorney who is not licensed to practice law in Colorado must be granted permission to appear *pro hac vice* in Commission proceedings. Rule 1201(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, governs the admission of out-of-state attorneys, and 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 the requirements an out-of-state attorney must follow to be permitted to appear *pro hac vice*.

5. On July 22, 2022, Captain Marcus Duffy, an attorney representing FEA, filed a motion requesting *pro hac vice* admission before the Commission. Captain Duffy includes that he is a licensed attorney in good standing in Florida and that he has not participated in any past Commission proceedings. He designates Mr. James K. Tart¹ as a Colorado-licensed associate attorney, states that he has provided his motion to the Colorado Office of Attorney Registration, and that the required fee has been paid, with confirmation provided to the Commission on July 26, 2022.

6. On July 27, 2022, Staff filed a motion requesting *pro hac vice* admission for six attorneys employed by Steptoe & Johnson LLP to practice before the Commission in this proceeding: Mr. Daniel Mullen; Mr. Mark Johnson; Mr. John Perkins; Ms. Karen Bruni; Mr.

¹ The Commission previously granted FEA's request to excuse Mr. Tart's attendance in this proceeding in Decision No. C22-0232-I at ¶ 31, issued on April 15, 2022, with respect to the *pro hac vice* admission in this proceeding of FEA's other counsel, Major Holly Buchanan and Thomas Jernigan.

Thomas Donadio; and Ms. Megan McDowell. Staff states that on July 14, 2022, these attorneys were each appointed as a Special Assistant Attorney General to represent Staff. Each attorney attests that he or she is a licensed attorney in good standing in various states, and designate Kevin L. Opp as a Colorado-licensed associate attorney. Staff states that it provided a copy of the motion to the Colorado Office of Attorney Registration and that the required fee has been paid, with confirmation provided to the Commission on August 4, 2022.

7. We find that Captain Duffy, on behalf of FEA, and Mr. Mullen, Mr. Johnson, Mr. Perkins, Ms. Bruni, Mr. Donadio, and Ms. McDowell, on behalf of Staff, each have satisfied the requirements of CRCP 205.4. We therefore grant the respective motions for *pro hac vice* appearance for the listed counsel.

2. Rule 1101(h) Motion

8. Through its Rule 1101(h) Motion, UCA requests the Commission issue an order permitting it to use certain confidential information from Proceeding No. 21A-0192EG. Specifically, UCA requests it be able to use the transcript of Public Service witness Joni Zich's testimony from the evidentiary hearing as well as the exhibits introduced or used during her testimony.

9. UCA claims that the testimony and exhibits relate to the Company's actions concerning interruptible and transport gas customers, which are part of the factual basis underlying certain tariff revisions the company has proposed in this Proceeding. UCA states that the request is narrow – all parties would retain rights to raise objection to the use, introduction, or administrative notice of such information and that granting the instant motion would simply place UCA on the same footing as Staff and the Company with respect to the use of these materials.

10. No party filed objection to UCA's request; however, Public Service responded on August 3, 2022. While the Company does not object to the motion, it notes that UCA does not clarify what portions of Ms. Zich's transcript or exhibits it seeks to use, and that many topics were resolved in Proceeding No. 21A-0192EG or otherwise are not at issue in this case. The Company states it is important to make clear that the parties rights are reserved to make any evidentiary, relevancy, or other non-Rule 1101(h) objections.

11. Rule 1101(h) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1 states that "[u]pon motion approved by the Commission, the UCA may be permitted to use information subject to this rule in a proceeding or for a purpose unrelated to the specific proceeding in which the information was obtained." We are persuaded by UCA's arguments that it is reasonable for the testimony requested to be available to UCA in this proceeding. We further agree that the clarifications raised by the Company are appropriate and that, in allowing UCA to access and offer the materials requested from Proceeding No. 21A-0192EG under Rule 1101(h) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, parties retain their rights to object to the materials or arguments raised on other grounds.

3. Motions to Strike

12. On July 27, 2022, the Commission received two prehearing motions requesting that the Commission strike certain testimony and attachments. Staff's Motion to Strike requests that the Commission strike portions of Public Service Witness Stephen G. Martz's rebuttal testimony,² including with regard to relocation projects pertaining to the Marshall Fire. Staff argues that these provisions present new evidence that should have instead been presented in the Company's direct testimony. The Company timely responded on August 5, 2022, in which it noted among other

² Hearing Exhibit 134, filed by Public Service on July 13, 2022. Staff seeks to strike the following portions of this exhibit: Table SGM-R-1 at 15:4-6, 15:11-12, 16:6-8, and 17:2-18:20.

arguments, that it indicated it would update this information in rebuttal, that striking partial testimony here would create a messy and incomplete record, and that striking the testimony is unnecessary where Staff can continue to argue the weight of the evidence presented before the Commission.

13. For its part, the Company's Motion to Strike seeks to exclude specific portions of testimony provided by the following: (1) Staff witness Mr. David Pitts;³ (2) UCA witnesses Mr. Cory Skluzak⁴ and Mr. Joseph M. Pereira;⁵ (3) Conservation Advocates witnesses Mr. Dylan Sullivan⁶ and Ms. Meera Fickling⁷; and (4) Atmos Energy Corporation (Atmos) witness Mr. Paul H. Raab.⁸ The Company argues that portions of the testimony and specific related attachments indicated in the Company's Motion to Strike regarding these witnesses should be stricken on evidentiary grounds, including hearsay, relevance, or "friendly cross" grounds. Responses to these provisions of the Company's Motion to Strike were filed by UCA, Staff, Conservation Advocates, and Atmos. Responses filed by the various parties in opposition to the Company's requests on striking the portions of timely filed testimony at issue point to a number of cases⁹ in which the

³ Hearing Exhibit 605, filed by Staff on June 15, 2022. The Company seeks to strike the following portions of this exhibit: 5:16 to 6:2; 7:22 to 8:2; and 9:19 to 10:2.

⁴ Hearing Exhibit 300, Rev. 1, filed by UCA on June 23, 2022. The Company seeks to strike the following portions of this exhibit: Attachments CSW-48 and CSW-87; Testimony at 64:3-14; and 114:12 to 115:5; Attachments CWS-53 – 56, 58, 64 Rev. 1, and 66-68; Testimony at 72:15-18; 73:9-74:7; 75:1-6 and 11-18; 78:11- 80:1; 81:9-82:13; 83:14-84:7; and 84:9- 85:10.

⁵ Hearing Exhibit 301, filed by UCA on June 15, 2022. The Company seeks to strike the following portions of this exhibit: Attachment JMP-3; Testimony at 6:3 to 8:5.

⁶ Hearing Exhibit 1202, Rev. 1, filed by Conservation Advocates on July 13, 2022. The Company seeks to strike the following portions of this exhibit: Attachment DS-1, Rev. 1; Testimony at 4:10-12; 4:19 to 5:5; 5:18- 22; 12:10; 15:9-13; 15:16 to 17:3; 17:8- 9; 17:10-12; and 22:8-11.

⁷ Hearing Exhibit 1203, filed by Conservation Advocates on July 13, 2022. The Company seeks to strike the following portions of this exhibit: Testimony at 4:12-22; 5:9-14, and Section IV.

⁸ Hearing Exhibit 402, filed by Atmos on July 13, 2022. The Company seeks to strike the following portions of this exhibit: Testimony at 5:16 to 6:2; 7:22 to 8:2; and 9:19 to 10:2.

⁹ See e.g., *Durango Transportation, Inc., v. Colorado Public Utilities Comm'n*, 122 P.3d 244, 252 (Colo, 2005); and citing *Contact-Colorado Springs, Inc., v. Mobile Radio Tel. Serv.*, 551 P.2d 203, 205 (Colo. 1976) ("The Court has observed that Commission decisions that rely in part on hearsay are not for that reason invalid.")

Commission properly included and weighed testimony and evidence that may not be admissible under hearsay or other evidentiary grounds, and also note that concurrently filed testimony is not “friendly cross.” Parties argue that to strike the portions of timely filed testimony as requested would be contrary to Commission practice, or otherwise create new standards and confusion.

14. The Company further seeks to exclude the Supplemental Answer Testimony of Tiger Natural Gas, Inc. (Tiger) witness, Mr. Kenneth Thompson (Supplemental Answer Testimony).¹⁰ The Company notes that Tiger filed the Supplemental Answer Testimony on July 13, 2022, concurrent with the deadline for filing rebuttal and cross-answer testimony and nearly a month after the deadline for Answer Testimony set forth in Decision No. C22-0247. The Company argues that the Supplemental Answer Testimony should be stricken in its entirety because it is contrary to the permitted process and procedural schedule and adds new arguments with neither a notification to the Commission nor a showing of good cause for the supplemental filing. The Company claims that including the Supplemental Answer Testimony is unfair to Public Service and, regardless of whether the Commission strikes the entirety of the Supplemental Answer Testimony, asks that the Commission strike Mr. Thompson’s Attachment KTB-4, which is a Tiger discovery response as both improper supplemental testimony, and untimely. Tiger responds claiming that Rule 1202 of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1, permits it to file “non-minor” revisions to testimony, so long as it does so “promptly.”¹¹ Among its other arguments, Tiger further claims that, discovery responses on June 10, 2022, and conversations the week of June 13, 2022, compelled the supplemental testimony filing in mid-July, and should not have surprised the Company.

¹⁰ Hearing Exhibit 1000, filed by Tigers on July 13, 2022. The Company seeks to strike all Supplemental Answer Testimony and Attachments, including KTB-4.

¹¹ Tiger Response to Company’s Motion to Strike at pg. 4.

15. Under § 40-6-101(4), C.R.S., the Commission is not strictly bound by the technical rules of evidence. As stated in Rule 1501(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, the Commission may receive and consider evidence not admissible under the Colorado Rules of Evidence if the evidence possesses reliable probative value. The Commission can also find that objections to evidence go to the weight of the evidence, not to its admissibility.

16. While the Commission has latitude in how it conducts its proceedings, its proceedings must provide due process, including the right to be heard and to respond to evidence. §§ 40-6-101(1) and 40-6-109(1), C.R.S.

17. Regarding the requests filed by Staff and the Company to strike timely filed testimony filed by Staff and the Company, we agree with the responses filed. The testimony filed has probative value in this case and the Commission is well able to weigh the evidence presented. We therefore deny Staff's Motion to Strike in its entirety, and deny, in part, Public Service's Motion to Strike on its requests regarding portions of testimony from Staff, UCA, Conservation Advocates, and Atmos.

18. Tiger's response to the Company's motion, that it is permitted "non-minor" revisions without leave from the Commission, is inaccurate and illogical in its reading of Commission Rule 1202 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. Not only are the updates to testimony provided by Tiger not mere "revisions," but updated, supplemental testimony. Tiger's response here is unconvincing to find that there is good cause for the filing additions in mid-July concurrent with rebuttal testimony, even if there was a delay given discussions or discovery in mid-June. For the reasons pointed out by the Company, Tiger's own discovery and additional testimony on its position could have been provided closer to the June 15, 2022, deadline. Further still, the timing of the filing concurrent with cross-answer and rebuttal

testimony deadlines in July provides no meaningful opportunity for response or rebuttal from the Company. Substantively, we agree with the Company's response that Tiger's inclusion of its own discovery response and further reiterations of its position provides limited probative value in this instance. Therefore, the Company's request to strike Tiger's Supplemental Testimony is granted.¹²

4. Procedural Direction

19. An evidentiary hearing in this matter is scheduled by Decision No. C22-0247 for August 17 through 31, 2022. Particularly given the parties' recent filings that indicate a number of out of state attorneys, anticipated use of confidential and highly confidential information, and motions that mischaracterize the Commission's rules and processes, we remind the parties that they are to review fully Commission rules and orders in this case, follow best practices at hearing, and seek efficiencies where possible.

20. To facilitate an efficient evidentiary hearing, counsel shall coordinate respectfully with the Commission's legal assistants and in particular, follow the guidance issued in Attachment B to Decision No. C22-0247 as well as any additional requests from the legal assistants that arise prior to and during the evidentiary hearing. We request that counsel use the same naming conventions for the box.com exhibits that they use in their hearing exhibit filings. When identifying a document for the legal assistants to raise at hearing, counsel is encouraged to identify whether the document is included in pre-filed testimony (*i.e.*, included on the hearing exhibit spreadsheet) or found in their respective box.com folder, and to be specific regarding the document and page number or numbers that will be discussed.

¹² For clarity, Hearing Exhibit 1000, filed by Tiger on June 15, 2022 remains admissible, as does attachments KBT-1, KBT-2, and KNT-3, as filed on June 15, 2022.

21. If counsel anticipates they will address confidential or highly confidential information, they must indicate for the record and for the legal assistants' preparation that they intend to initiate a confidential or highly confidential session. When possible, parties are encouraged to conduct discussion and presentation of documents through non-confidential information, which assists the clarity and transparency of the public record, particularly so information and arguments can more easily be reflected in a public Commission decision. Counsel is also encouraged to begin or end their cross-examination with a confidential or highly confidential session, with the material grouped as appropriate to facilitate the flow of the evidentiary hearing.

22. On August 9, 2022, parties filed individual exhibit lists and a joint cross-examination matrix as required by Decision No. C22-0247. The Commission's legal assistants are preparing a combined exhibit list, which they anticipate circulating to parties on Friday, August 12, 2022, consistent with typical Commission practice for remote hearing that includes pre-filed testimony and exhibits. Parties shall confer on the circulated exhibit list and Public Service shall file the combined exhibit list reviewed by all parties in the proceeding no later than 5:00 p.m. August 15, 2022. All corrections to the exhibit list should be aggregated by the Company and provided to the Commission in a red-lined document or similar presentation. Parties shall come prepared to discuss stipulation of admission to the record of pre-filed exhibits as indicated in the combined exhibit list at the beginning of hearing.

23. Given the Commission's significant caseload and other regular business, we may adjust the beginning and end times for the evidentiary hearing as necessary. Given the constraints of the Commission's schedule, we do not anticipate that additional dates of hearing in this matter can be accommodated. All parties were aware of and supported the unanimous procedural

schedule,¹³ including the hearing dates established through Decision No. C22-0247, issued April 20, 2022. Parties are reminded that, consistent with Decision No. C22-0247 and Decision No. C22-0394, the Commission will continue its regular business through its weekly Wednesday meetings on August 17, 24, and 31, 2022, and it will convene a public comment hearing in this proceeding on August 18, 2022, from 4:00 p.m. to 6:00 p.m. Hearing is scheduled to begin at 1:00 p.m. August 17, 24, and 31, 2022 to accommodate the Commission Weekly Meetings, as set forth in Decision No. C22-0247. The evidentiary hearing on August 18, 2022, must conclude for the day by 3:45 p.m. such that the Commission can prepare and admit members of the public for the scheduled comment hearing at 4:00 p.m. All other days of hearing are currently set to begin at 9:00 a.m. and conclude by 5:00 p.m.

24. The cross-examination matrix filed by Public Service on August 9, 2022, includes 60 hours of cross examination—which equates 10 full 6-hour days. The proposed cross-examination matrix provides no allowance for Commissioner questions, redirect, or necessary breaks. As such, we direct Public Service to confer with the parties and provide to the Commission an updated cross-examination matrix that reduces the cross times by a total of at least 10 hours to better and more reasonably accommodate the known schedule parameters and other procedural matters that occur during hearing. The Company shall provide an updated cross-examination matrix no later than 5:00 p.m. on Monday, August 15, 2022. Should the parties not reach a reasonable timetable on a cross-examination schedule, the Commission will consider and take appropriate action to ensure an appropriately managed and efficient hearing.

¹³ See Unopposed Joint Motion Pursuant to Decision No. C22-0534-I for Approval of Consensus Procedural Schedule, Provisions for Discovery, and Request to Vacate April 22, 2022 Prehearing Conference, filed by Public Service on April 20, 2022.

II. ORDER:**A. The Commission Orders That:**

1. The Rule 1101(h) Motion Regarding Certain Confidential Information in Proceeding No. 21A-0192EG, filed July 20, 2022, by the Office of Utility Consumer Advocate is granted, consistent with the discussion above.

2. The Out of State Counsel's Verified Motion Requesting *pro hac vice* Admission, filed on July 26, 2022 on behalf of Federal Executive Agencies, is granted.

3. The Verified Motion Requesting *pro hac vice* Admission for Out-of-state Counsel and Request for Waiver of Response Time, filed on behalf of Trial Staff of the Colorado Public Utilities Commission (Staff) on July 27, 2022, is granted.

4. The Motion to Strike Portions of the Rebuttal Testimony of Stephen G. Martz filed by Staff on July 27, 2022, is denied, consistent with the discussion above.

5. The Motion to Strike Certain Attachments and Intervenor Testimony filed by filed on July 27, 2022, by Public Service Company of Colorado (Public Service) is granted in part, and denied in part, consistent with the discussion above.

6. Public Service shall confer with all parties on a combined exhibit list and provide any corrections by 5:00 p.m., Monday, August 15, 2022, consistent with the discussion above.

7. Public Service shall confer with all parties regarding revisions to the cross-examination matrix and provide any updated matrix by 5:00 p.m., Monday, August 15, 2022, consistent with the discussion above.

8. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 10, 2022.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners