C10-1193Decision No. C10-1193

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

10M-245EDOCKET NO. 10M-245E

IN THE MATTER OF COMMISSION CONSIDERATION OF PUBLIC SERVICE COMPANY OF COLORADO PLAN IN COMPLIANCE WITH HOUSE BILL 10-1365, "CLEAN AIR - CLEAN JOBS ACT".

ORDER GRANTING MOTION FOR ACCEPTANCE OF  
SUPPLEMENTAL TESTIMONY, ADDRESSING RELATED  
MOTIONS AND RESPONSES THERETO, AND  
ESTABLISHING ADDITIONAL HEARINGS  
AND PROCEDURES

Mailed Date: November 4, 2010

Adopted Date: November 3, 2010

## BY THE COMMISSION

### Statement

1. On October 19, 2010, Public Service Company of Colorado (Public Service) filed a Motion for Leave to File Additional Testimony (Motion on Additional Testimony). By the Motion on Additional Testimony, Public Service sought leave to file supplemental direct testimony on October 27, 2010, and suggested a procedural schedule to address this supplemental direct testimony, including additional hearing dates in mid-November. Public Service stated that its supplemental direct testimony would set forth what it characterized as a “cost effective ‘back-up’” scenario that would include the retirement of Cherokee 4 by December 31, 2017.
2. After receiving responses to the Motion on Additional Testimony, we issued Decision No. C10-1135 (October 22, 2010). By Decision No. C10-1135, we recognized the increased procedural pressure the supplemental testimony would place on this proceeding, but balanced this procedural pressure against our belief that there may be value from the opportunity to consider a scenario that includes retirement of Cherokee 4 by December 31, 2017. As a result, rather than agreeing to accept Public Service’s supplemental direct testimony sight unseen, we established a procedural schedule that accelerated the filing of Public Service’s supplemental direct testimony to October 25, 2010, and set October 27, 2010, as the deadline for all parties to comment on procedural concerns raised by the proffered supplemental direct testimony. We also directed Public Service to identify its new preferred emissions reduction plan.
3. On October 25, 2010, Public Service filed its Motion for Acceptance of Supplemental Testimony (Motion for Acceptance). Public Service also filed a Motion to Accept Late-Filed Exhibits shortly after the close of business that same day. We are aware of no opposition to the Motion to Accept-Late Filed Exhibits and will grant that motion.
4. Accompanying the Motion for Acceptance, Public Service submitted the supplemental direct testimony and exhibits of Karen Hyde, Gary Magno, Gregory Ford, Timothy Sheesley and James Hill. The supplemental testimony addressed not only a plan scenario that achieves the retirement of Cherokee 4 by the end of 2017, but also analyzed the costs of “fuel switching” Cherokee 4 by the end of 2017.[[1]](#footnote-2) Public Service identified these plan scenarios as Scenario 6.2J (retires Cherokee 4 by the end of 2017 and constructs both a 1 x 1 and a 2 x 1 combined cycle plant on the Cherokee site before the end of 2017), Scenario 6E FS (modifies scenario 6E by fuel switching Cherokee 4 at the end of 2017 and completing the retirement and replacement of Cherokee 4 in 2018), and Scenario 6.1E FS (modifies scenario 6.1E by fuel switching Cherokee 4 at the end of 2017 and completing the retirement of Cherokee 4 in 2022). These three additional modeling runs were necessitated by our rejection of Public Service’s original preferred Scenario 6.1E, which rejection accompanied our ruling that House Bill (HB) 10-1365 requires we only consider plan scenarios that are fully implemented by December 31, 2017. *See* Decision No. C10-1067 (September 29, 2010) and Decision No. C10‑1164 (October 27, 2010). Public Service further explained that it was still trying to produce modeling results that considered power purchase offers from two of the independent power producers in a manner that achieved the retirement of Cherokee 4 by the end of 2017; these modeling results were not provided earlier in the process due to a discovery misunderstanding. Finally, in the supplemental direct testimony of Karen Hyde, Public Service identified modified Scenario 5B as its recommended plan. In modified Scenario 5B, Public Service proposes to install a SCR emission control on Cherokee 4 by the end of 2017 rather than 2016 as originally proposed.
5. Responses supporting Public Service’s Motion for Acceptance were filed on October 27, 2010, by the following: the Colorado Department of Health and Environment (CDPHE); Interwest Energy Alliance; the Governor’s Energy Office; and Western Resource Advocates.
6. Responses opposing all or part of Public Service’s Motion for Acceptance were filed on October 27, 2010, by the following: Staff of the Commission; Peabody Energy Corporation; Climax Molybdenum Company and CF&I Steel, LP; EnCana Oil & Gas (USA), Noble Energy, Inc. and Chesapeake Energy Corporation (collectively, Gas Intervenors); Southwest Generation Operating Company, LLC; Colorado Independent Energy Association; Thermo Power & Electric, LLC; Colorado Mining Association; and the Colorado Office of Consumer Counsel. These responses are quite varied in the manner in which they address each party’s concerns with the Commission accepting Public Service’s supplemental direct testimony but the overall theme is one of prejudice due to the fact that we are already in the late stages of the process required by HB10-1365.
7. In addition to addressing procedural concerns raised by the proffered supplemental direct testimony, most responding parties set forth their position regarding the appropriate procedural schedule in the event the Commission granted the Motion for Acceptance.
8. Subsequent to the submission of these responses, CDPHE, shortly after close of business on November 1, 2010, filed the Testimony of Paul R. Tourangeau on behalf of the CDPHE regarding Public Service’s fuel switching emission reduction Scenarios 6E FS and 6.1E FS. In this testimony, CDPHE sets forth its determination that it believes the fuel switching scenarios are consistent with current and reasonably foreseeable requirements of the Clean Air Act.
9. Finally and separately, Public Service offered at hearing on November 3, 2010, to produce additional STRATEGIST model runs that reflect how Public Service would likely operate Cherokee 4 and any new gas-fired peaking generation unit at the Cherokee station for transmission purposes as opposed to economic dispatch.

### Discussion

1. At the outset we recognize that a grant of Public Service’s Motion for Acceptance will impose burdens on the parties to this proceeding. Notably, many of the parties opposing all or part of Public Service’s Motion for Acceptance raise due process arguments as the basis for their opposition to the Motion for Acceptance. However, many of these same parties also recognize the difficult situation that arose upon the Commission’s finding that Public Service preferred Scenario 6.1E was inconsistent with the requirements of HB10-1365 (*see* Decision Nos. C10-1067 and C10-1164) and offer to work with the Commission to ensure that it has evidence supporting a plan scenario that complies with this statute. We find that accepting this additional testimony will not violate the standards of statutory due process that control this proceeding.
2. We also recognize that HB10-1365 is a unique Act within the Colorado Public Utilities Law that imposes very tight deadlines on all involved in this process, including this Commission, which must comply with § 40-3.2.205(2), C.R.S.:

The Commission shall review the plan and enter an order approving, denying, or modifying the plan by December 15, 2010. Any modifications required by the Commission shall result in a plan that the Department [of Public Health and Environment] determines is likely to meet current and reasonably foreseeable federal and state Clean Air Act requirements.

1. In the performance of these duties, we find that development of a full and complete evidentiary record best fulfills them. Now that Public Service has been able to develop a modified plan scenario that allows the retirement of Cherokee 4 by the end of 2017 (Scenario 6.2J) and two Cherokee 4 fuel switching options (Scenarios 6E FS and 6.1E FS), we find that additional proceedings should be conducted so we can develop the best possible record within the constraints of HB10-1365 to meet our duties, including considering all the factors set forth at § 40-3.2-205(1), C.R.S. In addition, as Public Service’s original preferred plan scenario was inconsistent with the requirements of HB10-1365, we find that it is helpful to be informed at this time of Public Service’s new preferred plan scenario. As noted above, Public Service has stated that it now recommends a modified Scenario 5B.
2. Prior to commencing on a path of additional proceedings, we acknowledge the important role played by CDPHE in this process. To that end, it was imperative that CDPHE opine on whether the fuel switching scenarios (Scenarios 6E FS and 6.1E FS) are consistent with the current and reasonably foreseeable requirements of the Clean Air Act prior to announcing our final decision on the scope and deadlines associated with any supplemental proceedings. As noted above, we received that testimony after close of business on November 1, 2010, and considered it in determining to conduct supplemental proceedings addressing all four plan scenarios within the scope of Public Service’s October 25, 2010, supplemental direct testimony.
3. Due to our own calendar constraints, we are able to conduct additional hearings in this matter commencing November 18, 2010. As this date is a few weeks out, we find that all parties and the Commission are best served by a procedural schedule that establishes deadlines for the submission of written pre-filed testimony and exhibits. We therefore adopt a procedural schedule with that in mind.

### Procedural Schedule Findings

1. In its October 19, 2010, Motion on Additional Testimony, Public Service set forth a detailed proposed procedural schedule. This schedule is generally reasonable; however, we find it necessary to modify the answer testimony deadline, hearing dates and discovery deadlines.
2. We make these modifications, which are all set forth fully below, in recognition of the arguments of the parties set forth in the various October 27, 2010, responses.
3. In addition, we establish a deadline for the STRATEGIST model results described above and request that they be filed as a late-filed exhibit(s).

## ORDER

### The Commission Orders That:

1. The Motion to Accept Late-Filed Exhibits filed by Public Service Company of Colorado (Public Service) after close of business on October 25, 2010, is granted.
2. The Motion for Acceptance of Supplemental Testimony filed by Public Service on October 25, 2010, is granted.
3. The following procedural schedule is adopted:

* Additional Answer Testimony is due 5 p.m. on Monday, November 9, 2010.
* Additional Rebuttal and Cross Answer Testimony is due 5 p.m. on Monday November 15, 2010.
* Additional Hearings will commence at 1:00 p.m. on Thursday November 18, 2010, and are scheduled for November 19, and 20, 2010. All parties should be prepared for extended hearing hours on all days.
* Closing Statements of Position are due at 2 p.m. on Monday November 29, 2010.

1. The following additional procedural requirements (mostly associated with discovery) are adopted:

* Workpapers shall be served on the parties on the same date as testimony and exhibits are due.
* Discovery shall be limited to the new issues raised by the additional testimony.
* Discovery directed to Public Service’s October 25, 2010, supplemental direct testimony shall be answered in 3 calendar days
* Discovery directed to the November 2, 2010, Testimony of Paul Tourangeau on fuel switching Scenarios 6E FS and 6.1E FS shall be answered in 3 calendar days.
* Discovery directed to the November 9, 2010, answer testimony shall be answered by 5 p.m. on Friday, November 12, 2010, if such discovery is served before noon on Tuesday, November 10, 2010; otherwise such discovery shall be answered in 3 calendar days.
* Discovery directed to the November 15, 2010, rebuttal and cross-answer testimony shall be answered by 5 p.m. on Wednesday, November 17, 2010, if such discovery is served before noon on Tuesday, November 16, 2010; otherwise such discovery shall be answered in 2 calendar days.
* Discovery cut-off for Public Service’s supplemental direct testimony filed on October 25, 2010, is 5:00 p.m. on November 9, 2010.
* Discovery cut-off for the Testimony of Paul Tourangeau filed on November 2, 2010, is 5:00 p.m. on November 15, 2010.
* Discovery cut-off for the November 9, 2010, answer testimony is 5:00 p.m. on November 15, 2010.
* Discovery cut-off for the November 15, 2010, rebuttal and cross-answer testimony is 5:00 p.m. on November 16, 2010.

1. In applying the discovery deadlines set forth in the preceding paragraph, all days of the week are considered weekdays, and we waive Rule 1203(a) of the Commission’s Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, as well as any portion of Rule 1405 of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1, that addresses the response time to discovery.
2. Additional hearings in this matter shall be held before the Commission as follows:

DATE: November 18, 2010.

TIME: 1:00 p.m.

PLACE: Commission Hearing Room A  
Suite 250  
1560 Broadway  
Denver, Colorado

DATE: November 19, 2010.

TIME: 8:00 a.m.

PLACE: Commission Hearing Room A  
Suite 250  
1560 Broadway  
Denver, Colorado

DATE: November 20, 2010.

TIME: 10:00 a.m.

PLACE: Commission Hearing Room A  
Suite 250  
1560 Broadway  
Denver, Colorado

1. Public Service shall file updated STRATEGIST model runs by noon on Friday, November 5, 2010, that reflect updated assumptions regarding the use of Cherokee 4 on gas. These model runs shall also include the Independent Power Producer Alternative as set forth in a separate order. This material shall be filed as a late-filed exhibit.
2. This Order is effective on its Mailed Date.

### ADOPTED IN THE HEARING November 3, 2010.

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| (S E A L)  PUCw97seal  ATTEST: A TRUE COPY  Doug Dean,  Director | 1. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO   RONALD J. BINZ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 2. JAMES K. TARPEY \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 3. MATT BAKER \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 4. Commissioners |

1. The fuel switching scenarios were prompted by Commissioner interest in this approach following Public Service’s assertion that such scenarios could possibly meet the requirements of HB10-1365. [↑](#footnote-ref-2)