

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 19A-0660E

---

IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR APPROVAL OF AN AMENDMENT TO ITS 2016 ELECTRIC RESOURCE PLAN CONCERNING A COMPETITIVE SOLICITATION FOR UP TO 200 MW OF RENEWABLE ENERGY AND ENERGY STORAGE.

---

**INTERIM DECISION OF  
ADMINISTRATIVE LAW JUDGE  
ROBERT I. GARVEY  
GRANTING AND DENYING PERMISSIVE  
INTERVENTIONS, GRANTING MOTION  
FOR EXTRAORDINARY PROTECTION,  
AND SETTING PREHEARING CONFERENCE**

---

---

Mailed Date: February 12, 2020

**TABLE OF CONTENTS**

I. STATEMENT.....	2
A. Application and Omnibus Motion .....	3
B. Interventions and Responses to the Omnibus Motion.....	5
II. INTERVENTIONS.....	8
A. Standard for Intervention.....	8
B. Interventions by Right .....	10
C. Permissive Interventions .....	10
1. CIEA.....	10
2. Pueblo, Pueblo County, Lafarge, and Pueblo Water.....	11
3. WRA.....	11
III. UNOPPOSED MOTION FOR LEAVE TO REPLY .....	15
IV. MOTION FOR EXTRAORDINARY PROTECTION .....	16
V. PREHEARING CONFERENCE.....	20
VI. ORDER.....	20
A. It Is Ordered That: .....	20

**I. STATEMENT**

1. On November 22, 2019, Black Hills Colorado Electric, LLC (Black Hills or the Company) filed an Application for Approval of an Amendment to its 2016 Electric Resource Plan Concerning a Competitive Solicitation for Up to 200 MW of Renewable Energy and Energy Storage (Application). Black Hills filed the Application with an initial procedural motion (Omnibus Motion) requesting that the Commission: (1) agree to hear this Proceeding *en banc*; (2) adopt the procedural schedule proposed within the motion; (3) grant all necessary waivers and variances from the Commission's Rules as set forth in the motion or as otherwise deemed necessary by the Commission; and (4) grant extraordinary protection for certain information the Company claims to be highly confidential.

2. On December 6, 2019, by Decision No. C19-0981-I, the Commission rejected the Company's request for a shortened notice and intervention period as set forth in the Omnibus Motion and instead, following its regular business meeting on December 4, 2019, issued a standard Notice of Application Filed establishing a notice and intervention period ending January 3, 2020. The Commission further set a deadline of January 3, 2020 for responses to the remaining components of the Omnibus Motion.

3. On January 29, 2020, by Decision No. C20-0064-I, the Commission denied the Company's request for an *en banc* hearing and referred the matter to an Administrative Law Judge (ALJ) for a recommended decision pursuant to § 40-6-109, C.R.S.

**A. Application and Omnibus Motion**

4. By the Application, Black Hills seeks to amend its previously approved 2016 Electric Resource Plan (ERP)<sup>1</sup> by conducting a new competitive solicitation for renewable energy and storage of up to 200 MW to determine whether new resources can be added to the Company's system and result in annual customer savings. Black Hills states that, unlike the typical ERP process, the Company is proposing "Renewable Advantage" to take place on an expedited basis. Within a year, the Company would issue a request for proposals (RFP), evaluate the bids, make acquisition recommendations to the Commission, and then—if the Commission approves procurement—facilitate the entering of an energy purchase agreement. In the event that Renewable Advantage results in bids that require bill increases, Black Hills states that the Company will recommend to the Commission that no procurement take place and that the Commission delay procurement decisions until Black Hills' next ERP filing.

5. Black Hills explains in the Application that, following the Company's 2016 ERP, Public Service Company of Colorado conducted a competitive solicitation in 2019 for solar and storage resources and received very low median prices for new solar resources. Black Hills also notes that existing tax credits for wind and solar generation resources are expiring and phasing-out after year 2019.

6. Black Hills supports the Application with testimony claiming that customer savings would occur by displacing higher-cost power supplies with lower cost renewable energy supplies. Black Hills' customers would receive the benefits of these savings through the Company's Energy Cost Adjustment. The Company's testimony also states that Renewable

---

<sup>1</sup> Decision Nos. R17-0039, issued January 17, 2017, and C18-0462, issued June 14, 2018, Proceeding No. 16A-0436E.

Advantage has the potential to increase the Company's retail load served by renewable energy resources to approximately 55 to 65 percent.

7. The Application requests that the Commission:
  - Approve the amendment to the 2016 ERP to conduct Renewable Advantage;
  - Approve the Company's request to establish a regulatory asset account to record the third-party costs associated with Renewable Advantage for prudence review and recovery in the Company's next rate case;
  - Grant a presumption of prudence provided pursuant to Rule 3617(d) of the Commission's ERP Rules, 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*, to the Company's acquisition of any bids approved by the Commission in this Proceeding;
  - Grant the Omnibus Motion; and
  - Approve an Independent Evaluator (IE) as proposed in a separate motion filed on November 22, 2019.

8. In addition to the request for an *en banc* proceeding, the Omnibus Motion asks the Commission to adopt a procedural schedule, modeled after the Commission's ERP process, with the following components: "Phase I" Answer Testimony filed on February 7, 2020; "Phase I" Rebuttal Testimony filed on February 21, 2020; a two-day hearing during the week of March 2, 2020; a "Phase I" decision issued by April 10, 2020; a "120-day report" filed in "Phase II" on June 22, 2020; the IE's report filed on July 13, 2020; party comments filed on July 27, 2020; Black Hills' final comments filed on August 10, 2020; and a final "Phase II" decision issuing by September 9, 2020.<sup>2</sup>

9. As stated above, Black Hills further asks the Commission to grant all necessary waivers and variances from the Commission's Rules and to grant extraordinary protection for certain information the Company claims to be highly confidential.

---

<sup>2</sup> Omnibus Motion at p. 6.

**B. Interventions and Responses to the Omnibus Motion**

10. On December 6, 2019, the Colorado Independent Energy Association (CIEA) filed a Motion to Intervene. As a non-profit corporation and trade association of independent power producer (IPP) member companies, CIEA states that its members routinely participate in RFPs associated with the ERP processes of public utilities to bring their projects to market in Colorado. CIEA asserts that it has an interest in monitoring the present proceeding to ensure a fair and transparent bidding and bid evaluation process. CIEA further asserts that it and its members have a specific interest in advocating for Commission decisions and rules that safeguard competitive bidding of renewable resources and market participation by IPPs. Additionally, CIEA states that this proceeding will directly and substantially impact the tangible and pecuniary interests of its IPP members because those members currently operate, or seek to operate, electric generating resources in Colorado.

11. On December 20, 2019, the Colorado Office of Consumer Counsel (OCC) timely filed a Notice of Intervention of Right and Request for Hearing. The OCC states that it may address the following issues: (1) the Phase I process; (2) the natural gas price forecast and its impact on the potential savings; (3) the solicitation process, particularly to ensure the solicitation is conducted fairly and without bias; (4) the expected annual savings, if any, for ratepayers and the amount of the expected savings that will be passed on to ratepayers; (5) the expected costs to be passed onto ratepayers for this Proceeding; (6) the impact of the amended ERP on the Company's next ERP; (7) the proper resources to analyze for Renewable Advantage; (8) the proper size of resources to analyze for Renewable Advantage; (9) the expected utilization of and impact on the Company's existing generating resources if Renewable Advantage projects are placed in service; (10) the reliability concerns of a large amount of renewable resources on the

Black Hills system and the possible reliance on other utilities to ensure reliability; and (11) the impact of the Application on the State of Colorado's clean energy goals.<sup>3</sup>

12. Also on December 20, 2019, the City of Pueblo, Colorado (Pueblo or the City) filed a Motion to Intervene. As a retail electric utility customer of Black Hills, Pueblo states that it has a pecuniary or tangible interest that may be substantially impacted by this proceeding and cannot be adequately represented by any other party. Specifically, Pueblo states that the outcome of this proceeding may result in a corresponding rate impact to the City, which may positively or negatively affect Pueblo's pecuniary interests.

13. On December 30, 2019, Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention of Right and Request for Hearing. Staff seeks to examine: (1) whether the Company's proposed bid evaluation criteria are appropriate; (2) whether the Company's proposed separation policy between the evaluation team and any Black Hills or affiliate company employees is adequate to ensure fairness to all bidders; and (3) whether the Company's request to defer evaluation expenses in excess for bidder fees is appropriate in all circumstances.<sup>4</sup>

14. Also on December 30, 2019, the Board of County Commissioners of Pueblo County, Colorado (Pueblo County or the County) filed a Motion to Intervene. As a large Black Hills electric customer, Pueblo County states that it has pecuniary or tangible interests that may be substantially impacted by this proceeding and cannot be adequately represented by any other party. Specifically, Pueblo County states that the outcome of this proceeding may affect the electric rates for Black Hills customers, including the County and its citizens. Pueblo County

---

<sup>3</sup> OCC Intervention at pp. 2 and 3.

<sup>4</sup> Staff intervention at pp. 1 and 2.

further states that this matter will impact the County's tangible interests in renewable energy policy and sustainability, as well as economic development.

15. On January 3, 2020, the Colorado Energy Office (CEO) filed a Notice of Intervention by Right. The CEO states that it is statutorily charged to promote the development of clean energy and renewable resources in Colorado, which may be impacted the Company's proposal as put forth in its Application in this proceeding.

16. LafargeHolcim US Inc. (Lafarge) filed a Petition for Leave to Intervene on January 3, 2020. Lafarge states that it operates a cement manufacturing facility in Florence, Colorado. Lafarge further states that as a transmission level customer of Black Hills and one of the Company's largest retail electric customers, this proceeding will likely substantially affect Lafarge's tangible and pecuniary interests, which cannot be adequately represented by any other party. Specifically, Lafarge states that Black Hills' proposals in this matter would directly and substantially affect retail electric rates and in turn, Lafarge's electricity costs.

17. Also on January 3, 2020, the Board of Water Works of Pueblo, Colorado (Pueblo Water) filed a Motion to Intervene. As a customer-owned utility and large industrial customer of Black Hills, Pueblo Water states that it has pecuniary or tangible interests that may be substantially impacted by this proceeding and cannot be adequately represented by any other party. Specifically, Pueblo Water states that approximately \$3 million annually, or roughly one-third of its operation and maintenance costs, are attributable to the electric rates charged by Black Hills, and that Pueblo Water passes those costs along to its customers through monthly bills for service. As a result, Pueblo Water asserts a direct, significant and unique pecuniary interest in the rates charged by Black Hills and assuring that the proposed amendment to the Company's 2016 ERP will result in fair, just, and reasonable rates.

18. Western Resource Advocates (WRA) filed a Petition for Leave to Intervene and Response to Omnibus Motion on January 3, 2020. WRA states that it is a nonprofit conservation organization dedicated to protecting the land, air, and water of the West. With respect to its Intervention, WRA states that it was actively engaged in Proceeding No. 16A-0436E, regarding Black Hills' 2016 ERP and Renewable Energy Standard compliance plan filing. WRA asserts that the Commission's decision in this proceeding will directly impact its tangible interest in environmental protection, and no other party will adequately represent its interests in this matter.

19. Also on January 3, 2020, Staff and the OCC each separately filed a Response to the Omnibus Motion.

20. On January 10, 2020, Black Hills filed an Unopposed Motion for Leave to Reply and Reply to Staff, the OCC, and WRA's Responses to the Omnibus Motion (Unopposed Motion for Leave to Reply).

## II. INTERVENTIONS

### A. **Standard for Intervention**

21. Two classes of parties may intervene in proceedings such as this: parties with a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding (permissive intervention). Rule 1401(b) and (c), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure; *see* § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Public Utilities Comm'n*, 702 P.2d 746, 749 (Colo. 1985).



22. Commission Rule 1401(c) of the Rules of Practice and Procedure 4 CCR 723-1, requires persons seeking permissive to show the following:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period.

23. The requirement in Rule 1401(c) requiring persons or entities seeking permissive intervention in a proceeding to represent that their interests "would not otherwise be adequately represented" is similar to Colorado Rule of Civil Procedure 24(a), which provides that even if a party seeking intervention in a case has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties. *See Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n*, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case's judgment. *See Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad

faith, collusion, or negligence on the part of the representative. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

24. The Commission has the right to determine how to conduct a proceeding. Pursuant to § 40-6-101(1), C.R.S., the Commission “shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice.” The Commission may look to the Colorado Administrative Procedure Act (§ 24-4-101 *et seq.*) for guidance. Section 24-4-105, C.R.S. “grants substantial discretion” to agencies such as the Commission “to control the scope and presentation of evidence” in a proceeding. *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989).

25. The Colorado Administrative Procedure Act provides among other things that that an ALJ shall “regulate the course of the hearing,” “issue appropriate orders that shall control the subsequent course,” and “dispose of motions to intervene.”

**B. Interventions by Right**

26. Staff, the OCC, and the CEO are intervenors by right. They are parties in this proceeding.

**C. Permissive Interventions**

27. No objection was filed to any of the requests for permissive intervention.

**1. CIEA**

28. Good cause is found to allow the intervention of CIEA. As a trade organization that represents IPPs that bid on contracts with Black Hills as part of the underlying competitive solicitation for up to 200 MW of renewable energy and energy storage, the results of this proceeding will have a pecuniary and tangible effect on the members of CIEA.

29. The request for permissive intervention filed by CIEA will be granted. It is a party in this proceeding.

## **2. Pueblo, Pueblo County, Lafarge, and Pueblo Water**

30. Good cause is found to allow the interventions of Pueblo, Pueblo County, Lafarge, and Pueblo Water. Each of these entities is a large retail electric customer of Black Hills. As described above, the results of this proceeding will have a pecuniary and tangible effect on each of these entities.

31. The requests for permissive intervention filed by Pueblo, Pueblo County, Lafarge, and Pueblo Water will be granted. They are parties in this proceeding.

## **3. WRA**

32. WRA “seeks to reduce emissions from electricity generation and decarbonize electricity grid.”<sup>5</sup> WRA asserts that “[it] is generally supportive of the Company’s [A]pplication” and that it seeks to intervene “to advocate for Commission approval of renewable energy resources requested in the Company’s application, provided that they will achieve the emissions reductions and ratepayer benefits stated in the Company’s application.”<sup>6</sup>

33. WRA further asserts that it has a substantial tangible interest in protecting the environment and that the Commission has “long recognized” protecting the environment as falling under the definition of Commission Rule 1401(c).<sup>7</sup> WRA, however, fails to provide any citation to a decision where the Commission has recognized “protecting the environment” as falling under the definition of Commission Rule 1401(c) as a tangible interest.

---

<sup>5</sup> WRA Petition for Leave to Intervene, p. 7, ¶ 6.

<sup>6</sup> *Id.* at p. 9, ¶ 7.

<sup>7</sup> *Id.* at pp. 10-11, ¶ 9.

34. With respect to how this proceeding will affect WRA's alleged tangible interest, WRA asserts that the following four components of the underlying Application directly impact its objectives and interests as explained below:

- Reduction of emissions – specifically, “[t]he Application, if approved, will directly impact WRA’s tangible interest in reducing emissions associated with electricity generation.”<sup>8</sup>
- Evaluation of energy storage – specifically, “[s]torage resources that maximize emissions reductions better align with WRA’s mission to decarbonize the electricity grid. ... WRA has a tangible interest in ensuring [the Company’s ELCC methodology] maximizes the emissions reduction potential associated with storage resources.”<sup>9</sup>
- Contract length – specifically, “WRA has a tangible interest in ensuring that any RFP contract entered into by the Company is of sufficient duration to maximize emissions reductions benefits and ensure sufficient financial stability to ensure those projected emission reductions actually occur.”<sup>10</sup>
- Reduced costs from renewable energy – specifically, “[a]cquisition of cost-effective renewable energy resources affects WRA’s objective to encourage decarbonization of the electricity grid in a manner that is also beneficial to ratepayers.”<sup>11</sup>

35. Additionally, WRA states that neither the OCC nor the CEO have interests identical to WRA and that “while there are similarities between WRA’s interests and the stated interests of OCC and CEO, neither of these parties will provide adequate representation of WRA’s distinct interests in this proceeding.”<sup>12</sup>

36. With respect to the CEO, WRA asserts that the “CEO is a government agency with a broad public interest mandate that is not identical to the specific and discrete interest of WRA.”<sup>13</sup> WRA further states that “CEO does not specify how it will balance its broad statutory

---

<sup>8</sup> *Id.* at p. 8, ¶ 6.a.

<sup>9</sup> *Id.* at ¶ 6.b.

<sup>10</sup> *Id.* at p. 9, ¶ 6.c.

<sup>11</sup> *Id.* at p. 9, ¶ 6.d.

<sup>12</sup> *Id.* at pp. 12-13, ¶ 10.

<sup>13</sup> *Id.* at p. 14, ¶ 10.b.

charges with its singular statutory charge of protecting the environment in the context of this proceeding.”<sup>14</sup>

37. WRA makes similar arguments with respect to the OCC, including the assertion that “[the] generalized interests of all residential consumers, agricultural consumers, or small business consumers may share similarities, but are distinct from the interests of [WRA,] an environmental conservation organization.”<sup>15</sup>

38. Finally, WRA states that “[it] has not yet had the opportunity to fully review and evaluate all aspects of the Company’s proposal, which necessitates the submission of discovery requests, evaluation of answers, independent research and the development of answer testimony.”<sup>16</sup>

39. Here, because the Company’s Application seeks to conduct a competitive solicitation for *renewable* energy and storage of up to 200 MW, there is no need to determine whether the bids at issue should be from a renewable energy source or fossil fuel. As a result, the issues in this proceeding are primarily financial, not environmental. Specifically, whether approval of any of the bids submitted in the competitive solicitation provide a just and reasonable outcome, which necessarily includes consideration of any rate impact on Black Hills customers. WRA, on the other hand, does not assert an economic or financial tangible interest in this proceeding, only an interest in protecting the environment.

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 13, ¶ 10.a. (Footnote 26 omitted)

<sup>16</sup> *Id.* at p. 10, ¶ 8.

40. To the extent this proceeding touches on any environmental issues, the CEO is statutorily charged with promoting the development of renewable resources in Colorado,<sup>17</sup> and is a party in this matter as an intervenor by right.

41. While WRA endeavored to differentiate itself from the CEO, the interests of WRA and the CEO are indistinguishable. WRA advocates for environmental protection through “renewable energy resources,” including the “acquisition of emissions-free renewable energy generation resources for a cleaner electric grid.”<sup>18</sup> Similarly, the CEO is charged with environmental protection and works to promote clean and renewable energy as well as the “renewable energy standard.”<sup>19</sup> Moreover, WRA did not sufficiently demonstrate that its stated interests in environmental protection and emissions reduction would not otherwise be adequately represented by the CEO.

42. Additionally, the Commission is not a vehicle for parties who may or may not have a substantially affected pecuniary or tangible interest to conduct fishing expeditions. To allow this would give Rule 1401(c) no effect and thereby open the door to anyone being granted an intervention and propound unlimited discovery upon a utility. Litigation costs (including discovery requests) that provide no benefit to the ratepayers or the Commission are still passed on to the ratepayers. The Commission has a duty to protect ratepayers from the expense of intervenors who add unnecessary litigation costs from parties who do not have a pecuniary or tangible interest or cannot even determine if they support or oppose an application. If WRA supports the Application, a public comment or participation as an *Amicus Curie* would accomplish the same goal with no expense to ratepayers.

---

<sup>17</sup> CEO Notice of Intervention by Right, p. 2, ¶ 4.

<sup>18</sup> WRA Petition for Leave to Intervene, p. 1, ¶ 1.

<sup>19</sup> CEO Notice of Intervention by Right, p. 1, ¶ 1.

43. The issues in this proceeding – specifically, the approval of bids submitted as part of a competitive solicitation for renewable energy and storage of up to 200 MW – are primarily financial issues. The claimed tangible interest stated by WRA, protecting the environment,<sup>20</sup> is not directly at issue in this proceeding. In any event, the CEO is a party charged with environmental protection and promoting renewable energy.

44. Without a pecuniary or tangible interest that may be substantially impacted by the proceeding, the request of permissive intervention of WRA is denied. The undersigned ALJ believes that the denial of this intervention will allow for the scope of the proceeding to be limited to relevant issues, will not unnecessarily increase the costs of litigation, and will allow for a full and clear record.

45. Applicant and Intervenors Staff, the OCC, the CEO, CIEA, Pueblo, Pueblo County, Lafarge, and Pueblo Water, collectively, are the Parties in this proceeding.

### **III. UNOPPOSED MOTION FOR LEAVE TO REPLY**

46. Black Hills filed its Unopposed Motion for Leave to Reply on January 10, 2020, seeking leave to reply to the Responses to the Omnibus Motion filed by Staff, the OCC, and WRA on January 3, 2020.

47. Specifically, the Company asserts that its reply is necessary because it can assist in resolving issues raised in these Responses concerning the procedural schedule and request for extraordinary protection, which Black Hills could not, with reasonable diligence, have discovered when the Omnibus Motion was filed.

---

<sup>20</sup> The undersigned ALJ does not make a finding as to whether “protecting the environment” is a tangible interest. It is a moot point since “protecting the environment” as defined by WRA, increasing the use of renewable energy generation, is not at issue in the above captioned proceeding.

48. Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1, requires that a motion for leave to file a reply to a response must demonstrate:

- (I) a material misrepresentation of a fact;
- (II) accident or surprise, which ordinary prudence could not have guarded against;
- (III) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or
- (IV) an incorrect statement or error of law.

49. The ALJ finds that Black Hills has satisfied its burden of proof to demonstrate sufficient grounds under Rule 1400(e) to file the Reply set forth in its Unopposed Motion for Leave to Reply.

#### **IV. MOTION FOR EXTRAORDINARY PROTECTION**

50. In its Request for Highly Confidential Protection set forth in the Omnibus Motion (Motion for Extraordinary Protection), Black Hills seeks highly confidential designation and extraordinary protection for the following categories of information:

- Unit Level Delivered Fuel Costs
- Hourly Market Price Data
- Unit Level Heat Rate Curves
- Unit Detailed Maintenance Schedules
- Bid Information of any sort (from the Company and from other entities)



- Pricing and any other commercially sensitive information regarding a Power Purchase Agreement (“PPA”), until the competitive solicitation has concluded in accordance with Rule 3613(k)
- ABB Group Modeling Files<sup>21</sup>

51. Black Hills asserts that if released, this information could negatively affect the Company’s ability to effectively buy and sell energy and in turn, financially impact its customers.

52. For the first five above-listed categories of highly confidential information (unit level delivered fuel costs; hourly market price data; unit level heat rate curves; unit detailed maintenance schedules; and bid information of any sort, from the Company and other entities), Black Hills seeks an order limiting party access to a “reasonable number of attorneys” and a “reasonable number of subject matter experts” representing a party to this proceeding, consistent with Commission Rule 3614(b).<sup>22</sup> For the sixth category (any information protected by a PPA), the Company requests access be limited to the Commission, Staff, and the OCC. For the seventh category (ABB Group Modeling Files), Black Hills seeks confirmation that it need not – and indeed, cannot – provide this information to anyone who does not hold an ABB Group license.

53. In its Reply, Black Hills maintains its request as to the seventh category (ABB Group Modeling Files) and agrees to modify the remainder of its Motion for Extraordinary Protection as follows:

- With respect to the first five categories (unit level delivered fuel costs; hourly market price data; unit level heat rate curves; unit detailed maintenance schedules; and bid information of any sort, from the Company and other entities), the Company agrees: (a) not to limit the number of Staff attorneys or Staff subject matter experts with access to the highly confidential information shared by the Black Hills in this matter; and (b) Staff need not return or destroy the highly confidential information received during this proceeding.

---

<sup>21</sup> Black Hills Omnibus Motion p. 10.

<sup>22</sup> *Id.*, pp. 10-11.

- With respect to the sixth category (any information protected by a PPA), the Company agrees to withdraw its request for extraordinary protection.

54. Under Rule 1100(n) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, the information referenced above is presumed to be a public record. Rule 1101 provides the procedure and requirements for filing and seeking a document to be designated as highly confidential. Rule 1101(c) governs records that are presumed to be public under Rule 1100(n) 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.

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

- (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.

56. Here, as summarized above, Black Hills provides a detailed description of the information for which it seeks protection and a showing that it deserves and needs highly confidential protection. The Motion for Extraordinary Protection also includes a proposed form of nondisclosure agreement, as well as an affidavit identifying the individuals that have access to the information and stating that extraordinary protection sought for the information must remain in place “indefinitely.” With respect to subparagraph (VII) of Rule 1101(b), 4 CCR 723-1, the Motion for Extraordinary Protection states, “[g]iven that the Highly Confidential Information here is highly competitive and highly sensitive as described herein, Black Hills has not attached these documents as an exhibit with this Motion.”<sup>23</sup> Finally, any objections to the Motion for Extraordinary Protection appear to be resolved by the agreements put forth in the Company’s Reply.

57. The ALJ finds that Black Hills has satisfied each of the requirements of Rule 1101(b) and has shown good cause for highly confidential protection of the identified information. Accordingly, the Company’s Motion for Extraordinary Protection will be granted. Black Hills will be ordered to file, in accordance with the procedures established in Rule 1101(a), 4 CCR 723-1, the information for which highly confidential protection has been granted.

---

<sup>23</sup> Black Hills Omnibus Motion, pp. 12-13.

**V. PREHEARING CONFERENCE**

58. It is necessary to schedule a hearing, to establish a procedural schedule, and to discuss discovery and other matters. A prehearing conference will be held on February 27, 2020.

59. The undersigned ALJ expects the Parties to come to the prehearing conference with proposed dates for disclosures, including hearing dates, for the procedural schedule. The Parties must consult prior to the prehearing conference with respect to the listed matters and are encouraged to present, if possible, a procedural schedule and hearing dates that are acceptable to all Parties.

60. If the Parties reach agreement on a procedural schedule, they may file the proposed procedural schedule and a motion to vacate the prehearing conference.

**VI. ORDER**

**A. It Is Ordered That:**

1. A prehearing conference in this matter is scheduled for the following date, at the following time, and in the following location:

DATE: February 27, 2020  
TIME: 9:00 a.m.  
PLACE: Commission Hearing Room  
1560 Broadway, Suite 250  
Denver, Colorado

2. The Colorado Office of Consumer Counsel (OCC), Staff of the Colorado Public Utilities Commission (Staff), and the Colorado Energy Office (CEO) are intervenors by right and parties to this proceeding.

3. The requests for permissive intervention filed by the Colorado Independent Energy Association (CIEA), the City of Pueblo (Pueblo), the Board of County Commissioners of

Pueblo County (Pueblo County), LafargeHolcim US Inc. (Lafarge), the Board of Water Works of Pueblo (Pueblo Water), are granted. CIEA, Pueblo, Pueblo County, Lafarge, and Pueblo Water are parties to this proceeding.

4. The Petition for Leave to Intervene filed by Western Resource Advocates on January 3, 2020 is denied.

5. The Request for Highly Confidential Protection set forth in the Omnibus Motion filed by Black Hills Colorado Electric, LLC (Black Hills) on November 22, 2019 is granted.

6. Black Hills shall file, in accordance with the procedures established in Rule 1101(a), 4 *Code of Colorado Regulations* 723-1, the information for which highly confidential protection has been granted.

7. Access to the highly confidential information shall be limited as described above in paragraphs 52 and 53.

8. In order to have access to the highly confidential information, representatives of, and attorneys for, the OCC, the CEO, CIEA, Pueblo, Pueblo County, Lafarge, and Pueblo Water, must have signed, served, and filed the non-disclosure agreement (NDA) provided by Black Hills prior to gaining access to the highly confidential information in the report at issue.

9. Members of the Commission, the Commission's Trial and Advisory Staff assigned to this proceeding, and the Attorneys General representing the Trial Staff and Advisory Staff assigned to this proceeding, must have signed and have on file with the Commission a current annual NDA in accordance with Commission Rule 4 *Code of Colorado Regulations* 723-1-1100(h) prior to gaining access to the highly confidential information.

10. All provisions enumerated above are now in effect regarding the highly confidential information and are granted consistent with the discussion above.

11. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,  
Director