

Decision No. R22-0553-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0304E

IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO
ELECTRIC, LLC FOR APPROVAL OF ITS 2023-2025 BENEFICIAL ELECTRIFICATION
PLAN.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ADDRESSING INTERVENTIONS, DENYING
MOTION FOR SUPPLEMENTAL TESTIMONY,
EXTENDING STATUTORY DEADLINE,
AND REQUIRING PARTIES TO CONFER
AND PROPOSE A PROCEDURAL SCHEDULE**

Mailed Date: September 19, 2022

I. STATEMENT, SUMMARY, AND BACKGROUND

A. Summary

1. This Decision addresses interventions; denies the Office of the Utility Consumer Advocate's (UCA) Unopposed Motion Requesting the Filing of Supplemental Direct Testimony filed on August 25, 2022 (Motion); extends the statutory deadline for a final Commission decision to issue; requires the parties to confer on a procedural schedule; provides information relevant to that conferral; and orders Black Hills Colorado Electric, LLC, doing business as Black Hills Energy, (Black Hills) to file a proposed consensus procedural schedule on behalf of the parties by September 27, 2022.

B. Procedural History¹

2. On June 30, 2022, Black Hills filed the above-captioned Application (Application) with attachments seeking the Commission to approve its proposed 2023 to 2024 Beneficial Electrification Plan (Plan). That same day, the Commission provided public notice of the Application, setting a 30-day intervention deadline for all interested persons, except for Colorado Public Utilities Commission Staff's (Staff), whose intervention deadline is 37 after the June 30, 2022 Notice.²

3. On July 15, 2022, the UCA filed a Notice of Intervention of Right, Request for Hearing, and Entry of Appearance (the UCA's Intervention).

4. On August 1, 2022, the following entities made intervention filings: Energy Outreach Colorado (EOC); the Colorado Energy Office (CEO); and Western Resource Advocates (WRA).³

5. On August 4, 2022, Colorado Public Utilities Commission Trial Staff (Staff) filed a Notice of Intervention of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1401, Request for Hearing (Staff's Intervention).

6. On August 25, 2022, the UCA filed its Motion.

7. On August 29, 2022, Black Hills filed a "Response . . . to the Colorado Office of the Utility Consumer Advocate's Motion Requesting the Filing of Supplemental Direct Testimony" (Response).

¹ Only the procedural history necessary to understand this Decision is included.

² Notice of Application Filed (filed on June 30, 2022).

³ This Decision refers to these intervention filings as EOC's Intervention, CEO's Intervention and WRA's Intervention.

8. On August 31, 2022, the Commission referred this Proceeding to an administrative law judge (ALJ) for disposition by minute entry, including all outstanding Interventions which require a decision, and the Motion.

II. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Interventions

9. The ALJ finds that the UCA's, Staff's, and CEO's Interventions establish that they have properly intervened as of right per Rule 1401 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. As such, their Interventions are acknowledged and they are parties to this proceeding.

10. No party filed a response to EOC's and WRA's Interventions, which both seek to permissively intervene. As such, their Interventions are deemed confessed and unopposed.⁴ The ALJ finds that allowing EOC and WRA to participate as parties could provide helpful perspectives given that this Proceeding represents the first beneficial electrification plan that Black Hills has filed since the relevant statutory provisions were enacted and that the Commission has not issued any dispositive decisions on any other utilities' beneficial electrification plan(s). For these reasons, and those stated in their respective Interventions, the ALJ grants EOC's and WRA's Interventions. As such, EOC and WRA are parties to this proceeding.

⁴ Rule 1400(d), 4 CCR 723-1.

B. Statutory Deadline for Final Commission Decision

11. The Commission did not deem Application complete for purposes of § 40-6-109.5, C.R.S. within 15 days of the expiration of the Application's notice period, and has not otherwise determined that the Application is incomplete or that more information is necessary. As such, per Rule 1303(c)(IV), 4 CCR 723-1, the Application was automatically deemed complete on August 16, 2022.⁵

12. Based on the date that the Application was deemed complete (August 16, 2022), and because Black Hills filed testimony and exhibits with the Application, the deadline for a final Commission decision is December 14, 2022, per § 40-6-109.5(1), C.R.S. The ALJ finds that additional time is necessary to: develop the record; hold an evidentiary hearing; issue a recommended decision; allow for exceptions and responses thereto; allow for motions for rehearing, reargument and reconsideration (RRR); and for the Commission to issue a final decision in this proceeding. For all these reasons, the ALJ extends the statutory deadline by an additional 130 days, as permitted by § 40-6-109.5(1), C.R.S. to April 24, 2023.⁶

C. Motion for Supplemental Testimony

13. The UCA contends that the Company's proposed Plan fail to address the effect on income-qualified and disproportionately impacted communities, and that its testimony fails to include information on any outreach or engagement that it performed with such communities, contrary to House Bill (HB) 21-1266.⁷ In support, the UCA cites numerous legislative

⁵ See Notice.

⁶ Because the 130th day falls on a Sunday (April 23, 2023), by operation of § 2-4-108(2), C.R.S., the deadline falls on the next business day, April 24, 2023.

⁷ Motion at 2.

declarations for HB 21-1266, and language in § 24-4-109, C.R.S. concerning engagement with disproportionately impacted communities.⁸ The UCA argues that the legislative declarations upon which it relies require the Commission (as a state agency) to engage with these communities, and not Black Hills, but essentially argues that to meet this obligation, the Commission should require the Company to submit supplemental testimony describing its outreach prior to filing the Application.⁹ The UCA submits that such information will give the Commission the facts necessary to demonstrate its own compliance with the statutory requirements to engage with these communities prior to issuing a decision in this proceeding.¹⁰

14. The UCA also submits that the federal Inflation Reduction Act of 2022, H.R. 5376 (Inflation Reduction Act), may impact the Company's proposed Plan, and that the Company should address the impact (if any), in its supplemental testimony.¹¹

15. The Motion states that Black Hills takes no position, but does not believe supplemental testimony is necessary for it to meet its burden of proof or that its filing is deficient.¹² As to the other parties, the Motion states that EOC, CEO and WRA support the Motion and that Staff takes no position.¹³

16. Black Hills responds that it is willing, if ordered, to file supplemental testimony addressing the items in the Motion, but does not believe this is necessary for it to meet its burden

⁸ *Id.* at 2-3.

⁹ *Id.* at 4.

¹⁰ *See id.* at 4.

¹¹ *Id.* at 8-9.

¹² *Id.* at 9.

¹³ *Id.*

of proof or that its Application and related filings are deficient in any way.¹⁴ Black Hills also states that its Plan includes programs targeting low-income and disproportionately impacted communities, and outreach plans to engage with such communities, but that it is not required to do such outreach as alleged in the Motion.¹⁵ Black Hills also argues that the UCA speculates that the referenced federal law impacts the Plan, which should not serve as a basis for supplemental testimony. Black Hills also argues that the UCA fails to explain why the customary application process, which includes discovery, is insufficient, and that supplemental testimony adds to the cost of litigation and could potentially delay this Proceeding.¹⁶

17. The Commission recently addressed near-identical arguments that the UCA submitted in the proceeding in which Public Service Company of Colorado (Public Service) seeks approval of its beneficial electrification plan (Public Service Proceeding).¹⁷ The Commission rejected the UCA's arguments, finding that the UCA's reasoning for supplemental direct testimony based on HB21-1266 is inconsistent with § 24-4-109(2)(b), C.R.S., which defines "agency" to mean the air quality control commission.¹⁸ The ALJ agrees, and rejects the UCA's similar arguments here.¹⁹

18. In the Public Service Proceeding, the Commission also found that it is necessary for Public Service to augment the record with additional information prior to answer testimony

¹⁴ Response at 1.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 33.

¹⁷ Decision No. C22-0503-I (Mailed September 8, 2022) in Proceeding No. 22A-0315EG (Decision No. C22-0503-I); see Unopposed Motion Requesting the Filing of Supplemental Direct Testimony of the Office of the Utility Consumer Advocate, filed on August 25, 2022 in Proceeding No. 22A-0315EG.

¹⁸ Decision No. C22-0503-I at 11. The Commission also notes that HB 21-1266 establishes the Environmental Justice Action Task Force (Task Force) to discuss whether "agency" should include other entities outside of those listed in § 24-4-109(2)(b), C.R.S. *Id.* at 10. The Commission noted that it is participating in this Task Force process, which is ongoing and renders the UCA's request premature. *Id.* at 10-11.

¹⁹ See Decision No. C22-0503-I at 10-11.

as to the Inflation Reduction Act, and directed Public Service to address the following items through supplemental direct testimony:

- a) The Company should identify potential changes to its cost-benefit analysis for programs that may be impacted by incentives (both upfront as well as tax credits) in place beginning in 2023.
- b) What impacts will the [Inflation Reduction Act's] incentives have on the Company meeting its stated energy and demand savings forecasts and how will the proposed performance incentives be impacted with greater non-utility funding available to customers?
- c) For each of the incentives listed in Hearing Exhibit 201, pg. 21, please identify the corresponding federal incentive available in 2023, along with any income restrictions.
- d) Please identify the potential impacts of the [Inflation Reduction Act] on the Company's proposed DSM/BE Income Qualified and Disproportionately Impacted programs, particularly focused on weatherization, and whole home energy audits.²⁰

19. Similar information in this Proceeding would be helpful to create a more fulsome record, particularly if the Inflation Reduction Act has substantial impacts. But, given that this Proceeding must move forward on a far more compressed schedule than the Public Service Proceeding (discussed below), the ALJ will not require supplemental direct testimony on these items at this time.²¹

20. Rather than requiring supplemental direct testimony on the above items, the parties are directed to confer on how best to provide an assessment of the Inflation Reduction

²⁰ *Id.* at 11-12.

²¹ The Commission is hearing Public Service's Application *en banc*, which eliminates the need to build time into the procedural schedule for a recommended decision or exceptions to the same; and the deadline for a final decision in that Proceeding (May 1, 2023) is later than the deadline in this Proceeding. See Rule 1504(a), 4 CCR 723-1; Decision No. C22-0530-I at 13; and Decision No. CC2-0547-I at 6 (mailed September 15, 2022) in Proceeding No. 22A-0315EG (establishing final decision deadline).

Act's impacts on the Company's Plan (as proposed in its direct case), consistent with the above items, and submit a proposal on how to accomplish this as part of the parties' proposed procedural schedule (discussed in more detail below). The ALJ recognizes that Black Hills does not appear to support the need to include this information in the record; however, given the Commission's approach to this issue, failing to do so risks a poor record that may put the Commission, and therefore, Black Hills, at a disadvantage when the Commission considers a final decision in this Proceeding.

21. The ALJ reminds the parties that there are numerous methods they may use to address the items identified in the UCA's Motions, including the issues relating to the Inflation Reduction Act. For example, the parties may use the discovery process to gather the information that the UCA seeks through its Motion, and such information may be presented through numerous different methods (*e.g.*, nontestimonial exhibits, answer testimony, and rebuttal testimony).

D. Procedural Schedule and Hearing Dates

22. In anticipation of an evidentiary hearing on the Application, the ALJ directs the parties to confer, and requires Black Hills to file a proposed consensus procedural schedule. The below information provides important instruction on the matters the parties must consider as they confer and submit a proposed procedural schedule.

23. First, in proposing a hearing date, the parties should ensure that they allot an appropriate amount of time to conclude the hearing (*e.g.*, one full day versus two or more days). In doing so, the parties should assume that the ALJ will use some time to examine witnesses during the evidentiary hearing.

24. Second, proposed hearing date(s) must accommodate the hearing being complete by **December 16, 2022**. Unless Black Hills waives the statutory deadline for a final Commission decision, the ALJ cannot accommodate a later hearing date.²² That is because this Proceeding is the first beneficial electrification Plan that Black Hills has filed since the relevant legislation (Senate Bill (SB) 21-264) became effective. More importantly, the Commission has not issued any dispositive decisions addressing beneficial electrification plans contemplated under SB 21-264 to date. As such, this matter involves issues that the Commission has not yet addressed, making it even more vital to ensure there is enough time to issue a thoughtful and thorough recommended decision, and to allow for exceptions and RRR on the same. The ALJ recognizes that the hearing timeline will require a compressed procedural schedule, but under the current procedural posture, it is not possible to accommodate a different procedural schedule.²³

25. The parties should consult the Commission's public calendar to find available hearing dates. The ALJ is currently available for a hearing from December 12 to 19, 2022.²⁴ The ALJ's schedule is quickly becoming filled with evidentiary hearings, which may impact the ALJ's availability on these dates. As such, the parties are encouraged to identify hearing dates as soon as possible, and to communicate proposed dates informally to the ALJ via email copied to all parties. Establishing hearing dates first is also necessary because all the other procedural deadlines must accommodate the hearing date(s).

²² It is, of course, Black Hills' choice whether to waive the statutory deadline. The ALJ neither encourages nor discourages Black Hills to do so. Nonetheless, the ALJ notes that any waiver of the statutory deadline must be a complete waiver; partial waivers are not authorized under § 40-6-109.5(1), C.R.S., and will be rejected if proposed.

²³ The ALJ issues this decision within days of being assigned this Proceeding in an effort to avoid unnecessarily losing any more time.

²⁴ If the parties select December 14, 2022, this hearing date may need to be held in a different hearing room than other hearing dates due to the Commission's existing hearing schedule.

26. Third, the parties must confer on the items discussed in paragraph 20 above, and must address such items in their proposed procedural schedule.

27. Fourth, the parties' proposed procedural schedule must include deadlines to file the following items: answer, rebuttal, and cross-answer testimony (testimonial exhibits); witness and exhibit lists; nontestimonial exhibits (exhibits not already filed as testimony or attachments thereto); corrections to exhibits; final exhibits; a joint witness examination matrix listing the order of witnesses and anticipated examination time for all parties; settlement agreements; testimony in support of settlements; stipulations; pre-hearing motions; statements of position, and any other legal briefing the parties wish to submit. If possible, the parties' proposed schedule should order propose deadlines for corrected exhibits, final exhibits, and nontestimonial exhibits before the deadline to file prehearing motions so that parties may challenge corrected exhibits. To avoid confusion, the deadline to file nontestimonial exhibits should be before or at the same time as the deadline to file final exhibits.

28. Fifth, the proposed procedural schedule must also address the parties' preference on the manner in which the hearing will be held. The parties may choose from the following options: fully in-person, with all parties and witnesses appearing in person; hybrid, with parties and witnesses appearing in person and remotely by Zoom and the ALJ appearing in person; and fully remote, with all parties, witnesses, and the ALJ appearing remotely via Zoom. The parties must include a statement in their proposed procedural schedule indicating whether they wish to hold the hearing fully in-person, hybrid, or fully remote.

29. Finally, the parties are also encouraged, but not required, to confer on, and submit any agreements they reach concerning discovery, including shortened discovery response times.

30. As indicated below, Black Hills is responsible for submitting the parties' proposed consensus procedural schedule.

31. The ALJ will issue a decision scheduling the hearing and establishing procedural deadlines and requirements as soon as possible after Black Hills submits a proposed consensus procedural schedule.

32. *The parties are advised and on notice* that any failure to file the required proposed consensus procedural schedule or agree to a procedural schedule will result in the ALJ selecting hearing dates and other deadlines without further input from the parties. In that event, after scheduling the hearing, the ALJ will not consider future requests to reschedule the hearing or move deadlines, unless the requesting party files a motion demonstrating good cause.

III. ORDER

A. It Is Ordered That:

1. The Office of the Utility Consumer Advocate's (the UCA), the Colorado Public Utilities Commission Trial Staff's (Staff), and the Colorado Energy Office's (CEO) Motions or Notices to Intervene as of right are acknowledged. Consistent with the above discussion, Energy Outreach Colorado's (EOC) and Western Resource Advocates' (WRA) Motions seeking to permissively intervene are granted. As such, the parties to this proceeding are: Black Hills Colorado Electric, LLC, doing business as Black Hills Energy, (Black Hills), the UCA, Staff, CEO, EOC, and WRA.

2. Consistent with the above discussion, the statutory deadline for a final Commission decision is extended to April 24, 2023, per § 40-6-109.5(1), C.R.S.

3. The parties must confer on a procedural schedule that addresses all the items discussed in ¶¶ 20, and 23 to 28 above, including the manner in which the evidentiary hearing should be held (fully in-person, hybrid, or fully remote).

4. On or by the close of business on September 27, 2022, Black Hills must file a proposed procedural schedule on behalf of all parties addressing all the items discussed in ¶¶ 20, and 23 to 28 above, including the manner in which the hearing should be held (fully in-person, hybrid, or fully remote).

5. The UCA's "Unopposed Motion Requesting the Filing of Supplemental Direct Testimony . . ." filed on August 25, 2022 is denied consistent with the above discussion.

6. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director