

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22AL-0347E

IN THE MATTER OF ADVICE LETTER NO. 831 FILED BY BLACK HILLS COLORADO ELECTRIC, LLC DOING BUSINESS AS BLACK HILLS ENERGY FOR APPROVAL TO RECOVER COSTS ASSOCIATED WITH JOINING THE WESTERN ENERGY IMBALANCE SERVICES MARKET OPERATED BY THE SOUTHWEST POWER POOL AND TO CREDIT SPP WEIS MARKET SALE REVENUES TO CUSTOMERS THROUGH THE ELECTRIC COST ADJUSTMENT TARIFF, TO BECOME EFFECTIVE SEPTEMBER 2, 2022.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ADDRESSING INTERVENTIONS, FURTHER
SUSPENDING EFFECTIVE DATE OF TARIFF SHEETS,
AND REQUIRING PARTIES TO CONFER AND
PROPOSE A PROCEDURAL SCHEDULE**

Mailed Date: September 21, 2022

I. STATEMENT, SUMMARY, AND BACKGROUND

A. Summary

1. This Decision addresses interventions by acknowledging Colorado Public Utilities Trial Staff's (Staff) Intervention and setting a deadline for Black Hills Colorado Electric, LLC (Black Hills or the Company) to file a motion to strike the remaining two interventions; further suspends the effective date of the relevant Tariff Sheets; requires the parties to confer on a procedural schedule; provides information relevant to that conferral; and orders Black Hills to file a proposed consensus procedural schedule on behalf of the parties by September 29, 2022.

B. Procedural History¹

2. On August 2, 2022, Black Hills filed Advice Letter No. 831-Electric (Advice letter), seeking to amend its Energy Cost Adjustment (ECA) rate, within its Colo. P.U.C. No. 11-Electric Tariff (Tariff Sheets) to allow cost recovery associated with participating in the Southwest Power Pool (SPP) Western Energy Imbalance Service (WEIS) market (SPP-WEIS), with a September 2, 2022 effective date.

3. At the same time, Black Hills filed a Motion for Approval of Alternative Forms of Notice (Motion for Alternative Notice), seeking authority under § 40-3-104(1)(c)(I)(E), C.R.S., to provide alternative forms of notice of the Advice Letter and Tariff Sheets to its customers.

4. On August 10, 2022, the Commission granted the Motion for Alternative Notice.²

5. On August 22, 2022, the Commission suspended the effective date of the Tariff Sheets submitted with the Advice Letter by 120 days through December 31, 2022; referred this matter to an Administrative Law Judge (ALJ) for disposition; and established September 16, 2022 as the deadline for interested persons and entities to file a motion to intervene in this proceeding.³

6. On September 6, 2022, the Office of the Utility Consumer Advocate (the UCA) filed a Notice of Intervention of Right, Request for Hearing, and Entry of Appearances (the UCA's Intervention).

7. On September 7, 2022, Black Hills filed affidavits concerning its publication of notice of the Advice Letter and Tariff Sheets to customers.

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

² Decision No. C22-0473-I at 3 (mailed August 10, 2022).

³ Decision No. C22-0492-I at 3 (mailed August 22, 2022) and Decision No. C22-0492-E (mailed August 23, 2022).

8. Also on September 7, 2022, Colorado Public Utilities Commission Trial (Staff) filed a Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1401, and Request for Hearing (Staff's Intervention).

9. On September 15, 2022, the Colorado Energy Office (CEO) filed a Notice of Intervention of Right (CEO's Intervention).

10. No other interested person or entity filed a motion to intervene and the time to file one has expired.

II. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Interventions

11. The UCA, Staff, and CEO all intervene as of right.

12. Generally, interventions of right are governed by Rule 1401(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Under that Rule, a party may object to an intervention of right by filing a motion to strike, but the rule does not set a deadline for such a filing. To move this matter forward without delay while ensuring that Black Hills has a fair opportunity to object to interventions of right, the ALJ will establish a deadline for Black Hills to file a motion to strike the UCA's and CEO's Interventions should it wish to do so.

13. However, Staff's Intervention warrants different treatment. That is because Staff may intervene of right in any proceeding per Rule 1401(e), 4 CCR 723-1. And, Staff is not required to state its legally protected right in its Intervention, which is the primary basis under Rule 1401(b)

for a motion to strike an intervention of right.⁴ For all these reasons, the ALJ does not establish a deadline for such a motion, and instead acknowledges Staff's Intervention and party-status.⁵

14. Failing to file motions to strike the UCA's and CEO's Interventions by the established deadline will amount to a waiver of Black Hills' right to file such motions. In addition, if Black Hills does not file motions to strike by the established deadline, the ALJ will deem this failure to mean that Black Hills does not oppose the UCA's and CEO's Interventions. In such a circumstance, the UCA and CEO's Interventions will automatically be acknowledged and they will be parties in this Proceeding.

B. Further Suspension of the Tariff Sheets' Effective Date

15. As noted, the Commission suspended the effective date of the tariff sheet by 120 days through December 31, 2022. The ALJ finds that additional time is needed 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 allow for the Commission to issue a final decision in this proceeding.

16. For all these reasons, the ALJ finds that further suspension of the Tariff Sheets' effective date is warranted, and suspends the Tariff Sheets' period of suspension for an additional 130 days to May 10, 2023, as permitted by § 40-6-111(1)(b), C.R.S.

C. Procedural Schedule and Hearing Dates

17. In anticipation of an evidentiary hearing on the Advice Letter and Tariff Sheets, the ALJ directs the parties to confer⁶ and submit a proposed consensus procedural schedule. The below

⁴ See Rule 1401(b), 4 CCR 723-1. The other basis for a motion to strike is to "challenge . . . the party's request for hearing." *Id.*

⁵ Rule 1401(e), 4 CCR 723-1.

⁶ For purposes of conferral, the parties also include the UCA and CEO, (whose interventions have not yet been acknowledged), in addition to Staff and Black Hills.

information provides important instruction on the matters the parties must consider as they confer and submit a proposed procedural schedule.

18. 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.

19. Second, proposed hearing date(s) must accommodate the hearing being complete by **January 20, 2023**.⁷ Unless Black Hills submits an amended Advice Letter and Tariff Sheets with an effective date later than May 10, 2023, there is no room to push out a hearing beyond this date.⁸ Indeed, 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.

20. The parties should consult the Commission's public calendar to find available hearing dates. The ALJ is currently available for a hearing on the following dates: January 12, 13, 18 and 19, 2023. The ALJ's schedule is quickly becoming filled, 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).

21. Third, the parties' proposed procedural schedule must include deadlines to file the following items: answer, rebuttal, and cross-answer testimony (testimonial exhibits);

⁷ Based on the current May 10, 2023 effective date, there is no room to push out a hearing beyond this date.

⁸ See § 40-6-111, C.R.S.

nontestimonial exhibits⁹ (exhibits not already filed as testimony or attachments thereto); corrections to exhibits; final exhibits; witness and exhibit lists; 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 ensure that the deadlines for corrected exhibits, nontestimonial exhibits, and final exhibits are before the deadline to file prehearing motions so that parties may challenge exhibits via prehearing motion, should they wish to do so. To avoid confusion, the deadline to file nontestimonial exhibits should be before or at the same time as the deadline to file final exhibits.

22. Fourth, 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 the ALJ and 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.

23. Finally, the parties are also encouraged, but not required, to confer on, and submit any agreements they reach concerning discovery, particularly if those agreements diverge from the Commission's discovery rules.

⁹ The ALJ does not require parties to pre-file exhibits that will be used solely for impeachment, to refresh recollection, or that may be raised in rebuttal. But, the parties are expected to prefile any exhibit they intend to offer into evidence during the evidentiary hearing.

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

25. The ALJ will issue a decision scheduling the hearing and establishing procedural deadlines and requirements as soon as possible after Public Service submits a proposed consensus procedural schedule.

26. *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 Colorado Public Utilities Commission Staff's (Staff) Intervention of Right is acknowledge and Staff is a party.

2. Consistent with the above discussion, should Black Hills Colorado Electric, LLC (Black Hills) wish to object to the Colorado Energy Office's (CEO) or the Office of the Utility Consumer Advocate's (the UCA) Notice of Intervention of Right, it must file a motion to strike such Interventions on or by September 29, 2022. If Black Hills does not file such motions by that deadline, the UCA's and CEO's Interventions will be acknowledged and they will be parties to this Proceeding without further order.

3. Consistent with the above discussion, the proposed effective date of Black Hills' Tariff Sheets with Advice Letter No. 831-Electric filed on August 2, 2022 is suspended for an additional 130 days to May 10, 2023, per § 40-6-111(1)(b), C.R.S.

4. The parties must confer on a procedural schedule that addresses all the items discussed in ¶¶ 18 through 22 above, including the manner in which the evidentiary hearing should be held (fully in-person, hybrid, or fully remote).

5. On or by the close of business on September 29, 2022, Black Hills must file a proposed procedural schedule on behalf of all parties addressing all the items discussed in ¶¶ 18 through 22 above, including the manner in which the hearing should be held (fully in-person, hybrid, or fully remote).

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