

Decision No. C23-0746-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0392EG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2024-2028 CLEAN HEAT PLAN.

INTERIM COMMISSION DECISION: (1) GRANTING MOTION FOR LEAVE TO AMEND; (2) EXTENDING DECISION DEADLINE UNDER § 40-6-109.5(1), C.R.S.; (3) REQUIRING PARTIES TO CONFER ON A PROCEDURAL SCHEDULE; (4) REFERRING CERTAIN ITEMS TO AN ADMINISTRATIVE LAW JUDGE; AND (5) VACATING CERTAIN PROCEDURAL DEADLINES ESTABLISHED BY DECISION NO. C23-0717

Mailed Date: November 3, 2023
Adopted Date: November 1, 2023

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission grants the Motion filed by Public Service Company of Colorado (Public Service or the Company) on October 27, 2023 (Motion for Leave to Amend). The Company shall file its Amended Application and associated supplemental direct testimony supporting its Amended Application no later than November 6, 2023.

2. The Commission also vacates the procedural deadlines set forth in Commission Decision No. C23-0717, issued October 20, 2023, including the hearing set for December 5 and 6, 2023.

3. The Commission directs the parties to confer on a procedural schedule, consistent with the discussion below. On or before November 13, 2023, Public Service shall file a proposed procedural schedule. The proposed procedural schedule should also address discovery processes.

4. To accommodate the remainder of this Proceeding, the Commission finds good cause to extend the decision deadline in this Proceeding an additional 130 days pursuant to § 40-6-109.5(1), C.R.S.

B. Background

5. On August 1, 2023, Public Service filed its Clean Heat Plan Application (Application), which requests that the Commission approve the Company's proposed 2024-2028 Clean Heat Plan (Clean Heat Plan).

6. Public Service's inaugural Clean Heat Plan presents four portfolios: (1) a portfolio that meets the statutory cost cap; (2) a portfolio that meets the 2025 and 2030 Clean Heat targets; (3) a preferred portfolio, which the Company calls "Clean Heat Plus;" and (4) a portfolio relying

solely on electrification and energy efficiency.¹ In its Application, the Company proposed to include certified natural gas (CNG) and emission offsets as additional non-enumerated measures in its “Clean Heat Plus” portfolio; CNG and offsets accounted for approximately 43 percent of the Clean Heat Plus portfolio’s cumulative emission reductions.²

7. On September 6, 2023, the City of Boulder (Boulder), the Natural Resources Defense Council (NRDC) and Sierra Club (collectively, the Conservation Coalition), the Colorado Solar and Storage Association (COSSA) and the Solar Energy Industries Association (SEIA), the Colorado Renewable Energy Society (CRES), Physicians for Social Responsibility (PSR-CO), Southwest Energy Efficiency Project (SWEEP), the Colorado Utility Consumer Advocate (UCA), and Western Resource Advocates (WRA) (Joint Movants) filed a Joint Motion for Partial Summary Judgment (Partial Summary Judgment Motion). The Joint Movants argued that summary judgment on the issue of whether the Commission can, as a matter of law, approve CNG and offsets within this Proceeding was appropriate. In the Partial Summary Judgment Motion, the Joint Movants asserted that: first, no genuine issues of material fact existed; second, that the Commission cannot, as a matter of law, approve CNG and offsets in this Proceeding; third, that Public Service violated the § 40-3.2-108, C.R.S. *et seq.* (Clean Heat Statute) plan filing requirements; and fourth, that the Commission cannot approve CNG and offsets within this Application proceeding. In sum, they argued that, as a matter of law, the Clean Heat Statute does not authorize the Commission to approve a clean heat plan that includes CNG and offsets, or any other “additional measures” beyond recovered methane and measures that reduce the categories of emissions in § 40-3.2.108(3)(c) (I), C.R.S.

¹ Hg Ex. 101 at 29:6–37:9.

² Hg Ex. 101 at 48:1.

8. By Decision No. C23-0626, issued September 19, 2023, the Commission granted requests for permissive intervention filed by the City and County of Denver (Denver), Boulder, the City of Pueblo, the County of Pueblo, Project Canary, PBC (Project Canary), Colorado Energy Consumers (CEC), Holy Cross Electric Association, Inc. (Holy Cross), Black Hills Colorado Gas, Inc. (Black Hills), the Conservation Coalition, CRES and PSR-CO (jointly), WRA, SWEEP, Energy Outreach Colorado (EOC), COSSA and SEIA (jointly), the Chevron Rockies Business Unit, Occidental Petroleum Corporation, and Williams (collectively, the Colorado Decarbonization Coalition), Denver Pipefitters, Local 208 (Pipefitters), and Laborers' International Union of North America, Local 720 (Local 720). The Commission acknowledged the notices of intervention of right filed by Trial Staff of the Commission (Staff), UCA, and the Colorado Energy Office (CEO). Through Decision No. C23-0685-I, issued October 12, 2023, the Commission granted the Air Pollution Control Division's (APCD or Division) motion to participate in this Proceeding as a non-party *amicus curiae*, filed on September 20, 2023.

9. By Decision No. C23-0729, issued October 27, 2023, the Commission denied the Partial Summary Judgment Motion because it found the Joint Movants did not carry their burden to establish that there was an absence of any genuine issue of material fact. The Commission also provided certain threshold legal guidance to the parties to this Proceeding. The Commission stated that the Clean Heat Statute gives the Commission the discretion to approve a clean heat plan that includes non-enumerated resources, as long as the Commission considers whether the clean heat plan maximizes the use of clean heat resources, and the non-enumerated resources achieve a reduction of carbon dioxide and methane emissions from the distribution and end-use combustion of gas. The Commission did not conclude whether the CNG or offsets proposed by Public Service would meet that standard.

10. By Decision No. C23-0717, issued October 20, 2023, the Commission established an accelerated procedural schedule to address the inclusion of CNG and emission offsets as proposed in Public Service's "Clean Heat Plus" portfolio for its Clean Heat Plan. That decision scheduled a pre-hearing conference for October 26, 2023, as well as an evidentiary hearing on December 5 and 6, 2023. Also by Decision No. C23-0717, the Commission established numerous testimony deadlines in November related to the December evidentiary hearing.

11. On October 26, 2023, the Commission held a pre-hearing conference to discuss procedural matters related to the December evidentiary hearing. At the pre-hearing conference, Public Service made an oral motion for leave to amend its Application to which the Commission provided an opportunity for response from other parties. The Commission also heard proposals from other parties on other matters in this Proceeding. At the pre-hearing conference, the Commission vacated the October 27, 2023 deadline for direct testimony established by Decision No. C23-0717. The Commission also set a deadline of October 27, 2023 at 12:00 p.m. for Public Service to provide its request for leave to amend in written form and a deadline of close of business on October 30, 2023 for responses to the Company's request.

12. On October 27, 2023, the Company filed its Motion for Leave to Amend, seeking leave to file a restrictive amendment to its Application, consistent with Rule 1309(a) of the Commission's Rules of Practice and Procedure, 4 *Colorado Code of Regulations* (CCR) 723-1. The Company also requested the Commission vacate the expedited procedural schedule adopted in Decision No. C23-0717 to accommodate a December 2023 hearing.

13. On October 30, 2023, the Commission received responses to the Motion for Leave to Amend from (1) CEO; (2) Black Hills; (3) Staff; (4) UCA; (5) Colorado Decarbonization Coalition, City of Pueblo, Pueblo County, Colorado, Project Canary, and Pipefitters Local 208,

jointly; and (6) the Conservation Coalition, Boulder, CRES, PRC-CO, SWEEP, and COSSA/SEIA, jointly.

C. Public Service Motion for Leave to Amend

1. Motion for Leave to Amend

14. In its Motion, the Company requests leave to amend its Application through restrictive amendments in several ways (Amended Application). The Company proposes removing its request to purchase offsets from the Proceeding entirely, but retain its request to approve CNG purchases under the Commission's general authority to regulate the Company's gas purchases for Commission consideration. However, CNG would be removed from counting toward the clean heat targets, and the Company would shift its recovery proposal to receiving cost recovery for CNG purchases through the gas cost adjustment only. The Company would retain the proposed Market Transformation Portfolio but would propose an "amended preferred portfolio" for Commission consideration. All other portfolios would remain the same. To support its Amended Application, the Company proposes providing limited supplemental direct testimony, including updated testimony from Mr. Ihle, and updates of certain key tables and workbooks.

15. The Company proposes that it would file its Amended Application and supporting supplemental direct testimony by November 6, 2023, and also file a proposed conferral procedural schedule no later than November 13, 2023.

16. The Company states that good cause exists to grant the Company's Motion for Leave to Amend because the proposed amended Application is a practical, constructive path responsive to and consistent with the Commission's decisions from the October 18, 2023 Commissioners' Weekly Meeting, and no party will be prejudiced by the restrictive amendment. The Company argues that granting the Motion for Leave to Amend would avoid the December

hearing and would require no additional Commission notice period, both of which would benefit the public by allowing a final decision at the earliest possible date.

17. The Company also proposes, in the alternative, if the Commission does not grant its leave to amend its application, an updated procedural schedule and discovery provisions cumulating in the December 5 and 6, 2023 hearing previously established by Decision No. C23-0717. The Company states it filed this alternative schedule solely in response to the bench order made at the October 26, 2023 pre-hearing conference.

2. Responses to Motion for Leave to Amend

18. Black Hills filed a response in support of the Company's Motion for Leave to Amend. Black Hills states that it also supports vacating the December hearing because it does not believe additional testimony and a separate hearing would be helpful to the Commission in light of Public Service's proposed restrictive amendments to its Application. Black Hills also informs the Commission that it is not currently planning to include either CNG or offsets in its clean heat plan to be filed on January 1, 2023.

19. Colorado Decarbonization Coalition, City of Pueblo, Pueblo County, Project Canary, and Pipefitters Local 208 also filed a response in support of the Company's Motion for Leave to Amend. They state that granting the Company leave to amend its Application would moot the need to maintain the current schedule and the December hearing because the matter would be nonjusticiable.

20. CEO also filed a response in support of the Company's Motion for Leave to Amend. CEO supports the motion on grounds that it resolves all of the concerns CEO raised in its response to the Partial Summary Judgment Motion, including that the Commission should not allow Public Service to count CNG or offsets towards its clean heat target. CEO states the proposed

amendments satisfy CEO's concerns about using resources that do not reduce emissions from the combustion of gas in customer end uses or meet an approved recovered methane protocol towards compliance with the Company's clean heat targets. CEO agrees with Public Service that the Commission can consider CNG in this Proceeding outside of the clean heat plan requirements under the Commission's general authority over the expenditures of gas utilities and that the December hearing should be vacated. CEO expects to address whether it is in the public interest for Public Service to purchase CNG in this Proceeding through the normal course of the adjudication.

21. Staff filed a response supporting the Company's proposed amendments. Staff states that the Company's proposed amendments are restrictive because they significantly reduce the scope of the Application, so under Rule 1309(a), 4 CCR 723-1, the Commission may grant Public Service's Motion For Leave to Amend without re-noticing the Proceeding. Staff also states that the Commission should not force the Company to advocate for proposals that it no longer wishes to pursue, especially in light of the skepticism expressed by the Commission on the use of CNG and offsets to meet the clean heat targets. Staff also argues that vacating the December hearing supports the Commission's goals for a December hearing, because allowing the 250-day process to proceed provides the other utilities, namely, Atmos Energy Corporation and Black Hills, with necessary guidance, continues litigation on the concerns presented, and is in line with the Joint Movants' and the Company's requests regarding the Partial Summary Judgment Motion.

22. Staff also agrees that the December hearing should be vacated. Staff states that Public Service's proposal to voluntarily remove CNG and offsets from the emission accounting governed by § 40-3.2-108(3)(c)(I)(a)-(c), C.R.S., renders the December hearing unnecessary. It also states that the Commission's guidance in Decision No. C23-0279 is sufficient to guide other

utility's January clean heat plan filings without the need for the additional hearing. Staff argues that the Commission should resist any temptation to reserve the December 5 and 6, 2023 hearing process for an examination of a standalone CNG proposal included by Public Service in its Amended Application that does not count toward the clean heat target emissions reduction because the issue is too narrow to merit a separate hearing process, especially since the traditional 250-day process already enables parties to thoroughly examine the standalone CNG proposal.

23. Finally, Staff supports the deadlines proposed by the Company for filings of its Amended Application and a conferral procedural schedule because it states this path forward will return the Proceeding to a traditional 250-day track and allow the Commission to expeditiously adjudicate the proceeding.

24. The Conservation Coalition, Boulder, CRES, PRC-CO, SWEEP, and COSSA/SEIA (Boulder *et al.*) jointly filed a response to the Company's Motion for Leave to Amend. They request that the Commission grant the Company's request to file an Amended Application while also retaining the December hearing, unless the parties reach a unanimous stipulation by November 2, 2023, as to the relevant facts concerning CNG and offsets. They argue that the Company's proposed amendments do not resolve critical legal issues that should be addressed at the outset of the Proceeding, and the proposed amendments improperly ask the Commission "to do indirectly what it cannot do directly."³ They assert that the Commission cannot approve CNG as part of a clean heat plan, and the Company cannot ask the Commission to sidestep that legal prohibition through the "ruse of approving the identical amount of CNG in this same proceeding."⁴ Boulder *et al.* also argue that the Company's assertion that it would entirely remove offsets from

³ Boulder *et al.* Response to Motion for Leave to Amend, p. 2.

⁴ *Id.* at 3.

this Proceeding is incorrect because offsets are still within the Company's Renewable*Connect Natural Gas proposal.

25. Boulder *et al.* remain concerned that, without convening the December hearing, other parties could still advocate for portfolios with CNG or offsets and that the Company's amendment proposal would not do anything to preclude this without further Commission guidance. They argue that the Commission should not vacate the December hearing because threshold questions such as whether it is appropriate for CNG to be included in the case at all, and whether other intervenors can advocate for portfolios that include offsets and CNG, still need to be answered.

26. Boulder *et al.* suggest that the Commission order the Company, by November 2, 2023, at 5:00 p.m., to inform the Commission as to whether there is consensus among the parties on the narrow factual issue of whether CNG and offsets are capable of reducing emissions from the end-use combustion and distribution of gas. They recommend that, if the parties reach consensus and commit to filing a stipulation on this factual issue, the Commission should vacate the December hearing but instruct the parties to submit legal briefs addressing two issues that apply the law to the facts in the stipulation: (1) does the Clean Heat Statute authorize the Commission to approve CNG and/or offsets in a Clean Heat Plan; and (2) if not, is it appropriate for CNG and offsets to be considered in this Proceeding. They argue that if the parties cannot agree to a stipulation, then the Commission should still hold the hearing in December on offsets and CNG with a limited scope of the factual issue of whether CNG and offsets are capable of reducing emissions from the distribution and end-use combustion of gas. Boulder *et al.* put forward proposed discovery and scheduling parameters to support the December hearing.

27. In its response, UCA states that the Company's proposed amendments do not negate the need for the December hearing. UCA urges the Commission to hold a hearing in December on the narrow issues of whether CNG and offsets are capable of reducing emission of the end-use combustion and distribution of gas, and therefore whether these technologies can be properly part of a clean heat plan. UCA argues that it does not serve the public interest to defer determination on issues regarding whether CNG and offsets can be included in a clean heat plan, because there is a distinct possibility that other utilities will include CNG and offsets in their filings. Further, UCA argues that the legal determination is necessary to ensure that no party offers CNG and offsets as part of an approvable clean heat plan within this Proceeding. Finally, UCA argues that keeping CNG in Public Service's Application raises questions about whether ratepayer funds should be used to acquire resources that do not contribute to the required emissions reductions set forth in the Clean Heat Statute.

3. Findings and Conclusions

28. Pursuant to Rule 1309 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, a party that commenced an action may amend or supplement its pleading if the Commission grants leave to amend or supplement the Application. Unless done through restrictive amendment, the Commission shall provide new notice of the proceeding consistent with Commission notice rules. A restrictive amendment shall not change applicable timelines.

29. We find good cause to grant the Company's Motion for Leave to Amend. While Public Service's proposal does not address all the questions we sought to address through the December hearing, it resolves the major issues regarding CNG and offsets at this juncture by removing CNG and offsets from the Company's proposed emission accounting. We struggle to see value in requiring Public Service to continue to litigate issues unrelated to its Amended

Application. If future issues related to CNG and offsets arise during this Proceeding, including whether intervenors propose CNG or offsets as non-enumerated resources to count towards the clean heat target, those issues can be addressed most efficiently and appropriately through the normal course of the Proceeding.

30. We also find that the amendments, as proposed in the Motion for Leave to Amend, are restrictive⁵ and thus no additional notice is required to move forward with the Amended Application. As Staff points out, the Company's proposed amendments restrict the scope of the Application and do not add any new or different issues to the filing.⁶ We therefore affirm, as proposed by the Company, that it may file its proposed amendments without re-noticing the Application pursuant to Rules 1206 or 1207 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

31. Finally, the Commission finds that the Amended Application, at least as described and proposed by the Company in its Motion for Leave to Amend, is properly before the Commission. We agree with CEO's statement in its response that the Commission can consider CNG outside of the clean heat plan requirements under the Commission's general authority over the expenditures of gas utilities within this Proceeding.⁷ While the primary purpose of this Proceeding is to approve an inaugural clean heat plan for Public Service pursuant to Senate Bill 21-264, the Commission can, and routinely does, consider ancillary issues that are properly noticed within application proceedings.

⁵ See e.g., In Decision No. R22-0240-I, in Proceeding No. 22A-0042T, the ALJ determined that an amendment to an application was restrictive because it limits the scope of the original application. In Decision No. R22-0253-I, in Proceeding No. 21AL-0650E, the ALJ found that a proposed amendment was restrictive because it imposed fewer burdens and removed certain costs.

⁶ Staff Response, p. 2.

⁷ CEO Response, p. 6, citing §§ 40-3-101, 40-3-102, 40-5-101, C.R.S.

D. Findings and Conclusions regarding the Procedural Deadlines established by Decision No. C23-0717

32. By Decision No. C23-0717, the Commission established an accelerated procedural schedule to address the inclusion of CNG and offsets as proposed in Public Service’s “Clean Heat Plus” portfolio for its Clean Heat Plan. The Commission indicated that the purpose of the hearing was to address testimony related to the disputed issues of fact regarding the inclusion of CNG and offsets, as well as the significance of certain undisputed facts and issues including: (a) whether CNG and offsets proposed by the Company do in fact reduce emissions from gas distribution utilities; and (b) whether Public Service’s emission accounting approach comports with § 40-3.2-108(c)(I)(a)-(c), C.R.S.; and (c) other related topics that the parties believe limited testimony on will aid the Commission.

33. Through this Decision, the Commission grants the Company leave to amend its Application in order to remove CNG and offsets from its Clean Heat Plus portfolio and to make further amendments that ensure the accounting of emissions reductions from those two measures are removed from counting toward the clean heat targets.⁸

34. In light of the Company’s proposed amendments to its Application, we find that there is no need to hold the evidentiary hearing scheduled by Decision No. C23-0717. The hearing was intended to address threshold issues related to proposals no longer found in the Company’s Application. Any issues related to the inclusion of CNG and offsets in the Company’s Amended Application can be addressed through the normal course of the Proceeding.

⁸ Motion for Leave to Amend, p. 3.

E. Procedural Schedule

35. In Decision No. C23-0626, issued on September 19, 2023, the Commission set this matter for hearing *en banc* and deemed the Application complete. At that time, we did not set a procedural schedule for the remainder of the Proceeding.

36. We now direct Public Service to confer with the parties to develop a proposed procedural schedule, including provisions for discovery. Public Service shall file the proposed procedural schedule no later than 5:00 p.m. on November 13, 2023.

37. In order to accommodate the procedural schedule for the remainder of the Proceeding, we find the additional time permitted in § 40-6-109.5(1), C.R.S., is required in this Proceeding. We therefore extend the decision deadline by the 130 days allowed by statute.

F. Referrals to an Administrative Law Judge

38. For procedural efficiency, we refer discovery disputes and motions, if any, for extraordinary protection of information claimed to be highly confidential, to an Administrative Law Judge for resolution.

II. ORDER**A. It Is Ordered That:**

1. The Motion filed by Public Service Company of Colorado (Public Service) on October 27, 2023 for leave to amend its Application is granted, consistent with the discussion above. Public Service shall file its Amended Application and associated supplemental direct testimony supporting its Amended Application no later than November 6, 2023.

2. The deadline for a Commission decision is extended an additional 130 days, as permitted in § 40-6-109.5(1), C.R.S.

3. Discovery disputes and any motions for extraordinary protection are referred to an Administrative Law Judge.

4. The procedural deadlines set forth in Commission Decision No. C23-0717, issued October 20, 2023, including the evidentiary hearing set for December 5 and 6, 2023, are vacated.

5. Public Service shall confer with the parties to develop a proposed procedural schedule, consistent with the discussion above. Public Service shall file the proposed procedural schedule no later than November 13, 2023.

6. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 1, 2023**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners