

Decision No. C24-0487

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0676E

IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO ELECTRIC, INC. DOING BUSINESS AS BLACK HILLS ENERGY FOR APPROVAL OF ITS RESIDENTIAL TIME-OF-DAY RATE PILOT PROGRAM.

**COMMISSION DECISION
GRANTING MOTION FOR LEAVE TO REPLY AND
GRANTING MOTION FOR PERMANENT WAIVER**

Issued Date: July 9, 2024

Adopted Date: July 3, 2024

I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission grants the Motion for Permanent Waiver of the Six-Month Noticing Requirement Required in Decision No. C19-0590 (“Motion for Permanent Waiver”), filed by Black Hills Colorado Electric, Inc. doing business as Black Hills Energy (“BHCOE” or “Company”) on June 14, 2024. The Commission also grants BHCOE’s Motion for Leave to Reply, filed on June 24, 2024.

B. Background and Discussion

2. By Decision No. C19-0590, issued on July 15, 2019, the Commission set aside Recommended Decision No. R19-0341 and denied the Application filed by BHCOE seeking approval of a residential time-of-day pilot program (“RTOD Pilot”).

3. In Decision No. C19-0590, the Commission found that the RTOD Pilot was not developed with sufficiently clear objectives and expectations and that more clarity was necessary.¹ The Commission directed BHCOE to file a notice six months prior to the filing of its next electric rate case in order to provide an opportunity for further consideration of the issues related to time-of-day rates.²

4. On June 14, 2024, BHCOE filed Advice Letter No. 871 (“AL 871”), commencing a combined Phase I and Phase II electric rate case.³ In addition to requesting an annual rate revenue increase, through AL 871 the Company proposes to implement an optional time of use (“TOU”) rate schedule available to all rate classes.

5. Also on June 14, 2024, BHCOE filed in this Proceeding the Motion for Permanent Waiver. In its Motion, BHCOE acknowledges that it did not make the required filing prior to filing AL 871, but states that its failure to do so was inadvertent and therefore it seeks a permanent waiver of this Commission directive pursuant to 4 *Code of Colorado Regulations* (“CCR”) 723-1-1003 (“Rule 1003”).

6. In its Motion for Permanent Waiver, BHCOE contends that the review of TOU rates already occurred in its two Transportation Electrification Plans (“TEPs”), Proceeding Nos. 20A-0195E and 23A-0244E. Black Hills argues that these TOU filings sufficiently meet the Commission’s requirement for TOU issues to be reviewed and also that most of the parties to Proceeding No. 18A-0676E have had opportunities to discuss TOU rate components. The Company also states that it expects many of the same parties to Proceeding No. 18A-0676E to intervene in the Company’s newly-filed rate case, so there will be sufficient time to fully

¹ Decision No. C19-0590 at ¶ 35.

² Decision No. C19-0590 at ¶ 40.

³ See Proceeding No. 24AL-0275E, initiated on June 14, 2024.

consider the TOU proposal in the course of this Proceeding. As basis for good cause under Rule 1003, BHCOE argues that because any parties to Proceeding No. 18A-0676E may seek to participate in the forthcoming rate case proceeding and address the Company's TOU proposal, and most of the parties to Proceeding No. 18A-0676E already did have the opportunity to address TOU issues in the First and Second TEP cases, the purpose of the notice is fulfilled, and stakeholders are not harmed by the lack of the six-month notice.

7. On June 20, 2024, the Board of County Commissioners of Pueblo County ("Pueblo") filed an Opposition to BHCOE's Motion for Permanent Waiver. Pueblo contends that AL 871 cannot be certified complete because the Company did not meet the requirement of the previous rate case and that Mr. Harrington's certification in Proceeding No. 24AL-0275E is inaccurate because the filing is incomplete. Pueblo rejects BHCOE's reasoning that other parties have reviewed the TOU rates in the TEP proceedings, arguing that TOU rates for electric vehicle (EV) customers are different from full stakeholder engagement with direction from the Commission.

8. Pueblo objects to requiring intervenors in Proceeding No. 24AL-0275E to use resources for discovery and experts to review the proposed TOU rates. Pueblo also argues that TOU rates for EV customers is a different issue than what is proposed here which would make substantial changes to the service classes that could opt in.

9. Pueblo offers four options for the Commission: (1) reject Proceeding No. 24A-0275E entirely; (2) strike portions of Proceeding No. 24A-0275E that deal with new TOU tariffs; (3) determine that Proceeding No. 24A-0275E is not complete and order BHCOE to comply with its obligation; or (4) require BHCOE to comply with its order in this case.

10. On June 24, 2024, BHCOE filed a Motion for Leave to Reply to Pueblo's Opposition. In its Motion for Leave to Reply, BHCOE argues that a reply is warranted because pursuant to Rule 1400(e) a reply is appropriate when a material misrepresentation of fact or incorrect statement of law is present. The Company argues that Pueblo misleads the Commission by arguing that Mr. Harrington's attestation is inaccurate because it relates to the new completeness rule based on SB 23-291 and not the notice issue at hand. BHCOE also argues that the Commission did not make the six-month notice requirement a "condition precedent" to filing a new rate case. BHCOE argues that Pueblo's suggested remedies of (1) striking the rate case; (2) ordering the rate case incomplete; or (3) denying the Motion and requiring it to comply with the notice requirement, are each unlawful. BHCOE contends that those remedies suggested by Pueblo would violate its due process rights and are wholly disproportionate to any alleged harm. BHCOE emphasizes that what is proposed in Proceeding No. 24AL-0275E is an "opt in" approach to TOU rates, which was different than the proposal in Proceeding No. 18A-0676E. Finally, BHCOE argues that it is misleading to suggest the Company's proposal in Proceeding No. 24AL-0275E is wholly different from the TOU rates considered in prior TEP proceedings.

C. Conclusions and Findings

11. We find that statements made by Pueblo meet the requirements of the Rule 1400 standard for leave to reply and we therefore we grant BHCOE's Motion for Leave to Reply and consider its

12. We find BHCOE's arguments for granting the Motion for a Permanent Waiver persuasive and agree that delaying or dismissing the AL 871 filing would be a disproportionate remedy to the failure to provide six months' notice here. Granting the Motion is appropriate in this

instance because BHCOE has demonstrated that the rationale behind the Commission's original decision has been satisfied by the TOU issues in the TEP proceedings (an occurrence that could not be foreseen by earlier Commission). Importantly, BHCOE's proposal is for voluntary opt-in TOU rates, and there is no harm on participants in either proceeding by having the issue fully litigated now. While waiving or modifying prior Commission decisions should not be done lightly, it seems in the public interest here to allow the issue to move forward through adjudication, particularly because parties still have ample opportunity to intervene and participate in the development of the rates. However, we caution BHCOE that it must comply with Commission directives in the future to the fullest extent.

II. ORDER

A. The Commission Orders That:

1. The Request for Leave to Reply to Pueblo County's Opposition to Motion for Permanent Waiver of Notice Requirement filed by Black Hills Colorado Electric, Inc. [Now LLC] d/b/a Black Hills Energy ("BHCOE") on June 24, 2024, is granted.
2. The Motion for Permanent Waiver of the Six-Month Noticing Requirement Required in Decision No. C19-0590 filed by BHCOE on June 14, 2024, is granted.
3. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

4. This Decision is effective on its Issued Date.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads 'Rebecca E. White'.

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners