

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

PROCEEDING NO. 24A-0327E

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER APPROVING EXPENSES INCURRED FOR THE PERIOD JANUARY 2023 THROUGH DECEMBER 2023 THAT ARE RECOVERED THROUGH THE ELECTRIC COMMODITY ADJUSTMENT AND PURCHASED CAPACITY COSTS RECOVERED THROUGH THE PURCHASED CAPACITY COST ADJUSTMENT FOR THE SAME PERIOD AND APPROVING THE CALCULATION OF 2023 SHORT TERM SALES MARGINS.

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**INTERIM DECISION  
MEMORIALIZING RULINGS**

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Issued Date: January 24, 2025

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**I. STATEMENT, SUMMARY, AND PROCEDURAL HISTORY****A. Statement and Summary**

1. This Decision memorializes and explains prior rulings on all motions that were pending as of January 9, 2025, and the verbal ruling during the January 10, 2025 hearing to modify the deadline to file Statements of Position (“SOPs”).

**B. Procedural History<sup>1</sup>**

2. On August 1, 2024, Public Service Company of Colorado (“Public Service” or the “Company”) filed the above-captioned Application with supporting testimony and other exhibits.

3. On September 11, 2024, among other matters, the Commission referred this matter by minute entry to an administrative law judge (“ALJ”) for disposition.

4. In addition to Public Service, the Office of the Utility Consumer Advocate (“UCA”) and Colorado Public Utilities Commission Trial Staff (“Staff”) are parties to this Proceeding.<sup>2</sup>

5. With input from the parties, on September 23, 2024, the ALJ scheduled a fully remote evidentiary hearing for January 9 and 10, 2025, and established deadlines to facilitate that hearing, including a January 21, 2025 deadline to file SOPs.<sup>3</sup>

6. On October 25, 2024, UCA and Staff filed Answer Testimony.

7. On November 22, 2024, Public Service filed Rebuttal Testimony.

8. On December 6, 2024, the Company filed a Non-Unanimous Comprehensive Settlement Agreement filed (“Agreement” or “Settlement Agreement”), executed by Public Service and Staff.<sup>4</sup> UCA opposes the Agreement.<sup>5</sup>

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<sup>1</sup> Only the procedural history necessary to understand this Decision is included.

<sup>2</sup> Decision No. R24-0683-I at 13 (issued September 23, 2024).

<sup>3</sup> *Id.*

<sup>4</sup> Settlement Agreement at 2.

<sup>5</sup> *Id.*

9. On December 18, 2024, UCA filed “[. . .] Unlabeled Public Exhibits Cited in Its Witness Exhibit List” (“Motion to File Unlabeled Exhibits”) with the referenced unlabeled exhibits, and a “Motion Authorizing the Filing of Surrebuttal Testimony [. . .]” (“Motion to File Surrebuttal”) and public and highly confidential versions of the referenced Surrebuttal Testimony and attachments thereto (Hearing Exhibit 301 and 301HC).

10. On December 19, 2024, Public Service filed an “Unopposed Motion [. . .] for Leave to File Amended Hearing Exhibit 102, Revision 2, Direct Testimony of Mark G. Schultz and Request for Waiver of Response Time” (“Unopposed Motion” or “Unopposed Motion to File Amended Exhibit”) and the referenced amended exhibit.

11. On December 20, 2024, UCA filed a “Motion to Compel Disclosures [. . .]” (“First Motion to Compel” or “First Motion”) with attachments.

12. On January 2, 2025, Public Service filed a public and highly confidential “Response in Opposition [. . .] to the Office of the Utility Consumer Advocate’s Motion to Compel and Motion for Leave to File Surrebuttal Testimony” (“Combined Response”) with attachments.<sup>6</sup>

13. On January 6, 2025, the ALJ informed the parties and counsel of her rulings on the above outstanding Motions via email.<sup>7</sup> This was done as a courtesy to provide the parties as much time as possible to adjust their hearing preparations based on the outcome of the pending Motions.<sup>8</sup> Specifically, the parties were put on notice that: UCA’s Motion to File Unlabeled Exhibits is denied as moot; UCA’s Motion to File Surrebuttal is granted; Public Service’s Unopposed Motion

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<sup>6</sup> With its Combined Response, the Company filed the following attachments: Affidavit of Samuel D. Eisenberg in Support of Response in Opposition (“Eisenberg Affidavit”); Attachment 1 and 1 HC to Eisenberg Affidavit (responses to UCA 3-1 and 3-3); Attachment 2 to Eisenberg Affidavit (December 18, 2024 communication with UCA); and Affidavit of Mark G. Schultz in Support of Response in Opposition (“Schultz Affidavit”).

<sup>7</sup> Email to Parties Regarding Pending Motions filed January 6, 2025 (“January 6, 2025 Email to Parties”)

<sup>8</sup> *Id.*

to File Amended Exhibit is granted; and UCA's First Motion to Compel is denied.<sup>9</sup> The ALJ explained that a written decision will outline these rulings, and that during the hearing (set to start on January 9, 2025), Public Service and Staff will be given the opportunity to present evidence responding to UCA's Surrebuttal Testimony.<sup>10</sup>

14. On January 6, 2025, after the ALJ informed the parties of her rulings on the referenced Motions, UCA filed a "Motion to Compel Disclosures to the Fifth Set of Discovery Requests [. . .]" ("Second Motion to Compel" or "Second Motion") with an attachment.

15. On January 7, 2025, Public Service filed a "Response in Opposition [. . .]" to the Second Motion to Compel of the Office of the Utility Consumer Advocate" ("Response to Second Motion to Compel" or "Response to Second Motion").

16. The ALJ held the evidentiary hearing on January 9 and 10, 2025 as noticed. All parties appeared. Prior to starting the evidentiary portion of the hearing, the ALJ reiterated her rulings on the above-referenced Motions and denied UCA's Second Motion to Compel. Public Service and Staff were given the opportunity to present evidence responding to UCA's Surrebuttal Testimony during the hearing. Public Service took advantage of that opportunity. At the end of the hearing on January 10, 2025, based on UCA's concerns, the ALJ modified the deadline to file SOPs to January 24, 2025.<sup>11</sup>

## **II. DISCUSSION AND FINDINGS**

### **A. Motions Relating to Exhibit Filings**

17. UCA submitted the Motion to File Unlabeled Exhibits and the referenced unlabeled exhibits because it was unsure whether it would be able to properly label, redact, and refile the

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> No party objected to this modification.

exhibits before the close of business on the deadline to file such exhibits.<sup>12</sup> UCA's concerns did not come to fruition, as it was able to mark and file the unlabeled exhibits on the same day that it filed the referenced Motion. As such, the Motion to File Unlabeled Exhibits is moot and is denied as such.

18. As to the Unopposed Motion to File Amended Exhibit, the Company explains that the amended version of the relevant exhibit removes a single question and answer that incorrectly describes one column of data in an attachment to the exhibit, and that the change does not impact any parties' substantive analysis of the relevant data.<sup>13</sup> The Company states that Interveners do not oppose or object to the Unopposed Motion, and that no party will be prejudiced by granting the requested relief.<sup>14</sup> For the reasons discussed in the Unopposed Motion, and because the requested relief is unopposed, the ALJ grants the Unopposed Motion.

**B. Motion to File Surrebuttal Testimony**

19. Some additional background is helpful to understand the parties' positions on UCA's Motion to File Surrebuttal (and its two Motions to Compel). In Answer Testimony (filed October 25, 2024), UCA argues that the Company should not be permitted to recover \$3,654,955 of costs associated with 90 instances wherein the Company made decisions to run combustion turbine generating units ("CTs") while curtailing renewable generation, or while also pumping at its Cabin Creek hydroelectric plant ("Cabin Creek") because these decisions were imprudent.<sup>15</sup> In Rebuttal Testimony, (filed November 22, 2024), the Company disagreed that the relevant decisions were imprudent; objected to UCA's proposed disallowances; and explained why CTs may be

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<sup>12</sup> Motion to File Unlabeled Exhibits at 1.

<sup>13</sup> Unopposed Motion at 1.

<sup>14</sup> *Id.* at 1-2.

<sup>15</sup> Hearing Exhibit 300, Rev. 1 ("Hearing Exhibit 300"), 8: 7-12—9 (Revised Table CN-1); 11: 1-7—12 (Table CN-2); 17: 19-22—18: 1-3.

prudently run while renewable generation is curtailed or while pumping Cabin Creek.<sup>16</sup> On November 27, 2024, UCA issued its Fourth Set of Discovery Requests (“Fourth Discovery Set”), asking the Company to explain and/or identify the instances where the circumstances described<sup>17</sup> in Rebuttal Testimony applied to the 90 instances at issue.<sup>18</sup> The Company largely objected to these requests, but subject to its objections, provided discovery analyzing the top 8 (by proposed disallowance amount) of the 90 instances that UCA identified.<sup>19</sup>

20. UCA’s Surrebuttal Testimony discusses the Company’s analyses of those eight instances; responds at a high level to the Company’s explanations as to why CTs may be prudently run while also curtailing renewable generation or pumping Cabin Creek; and modifies its initial disallowance recommendation from \$3,654,955 to approximately \$2.9 million based, in part, on the Company’s analyses of the referenced eight instances and actual average curtailment costs.<sup>20</sup>

21. In support of its Motion to File Surrebuttal, UCA asserts that the Company’s Rebuttal Testimony introduces new information, that is, the criteria the Company relies on when making the type of generation decisions at issue in this Proceeding, and that it has not otherwise had an opportunity to respond to this aspect of the Company’s Rebuttal Testimony.<sup>21</sup> UCA also argues that Surrebuttal Testimony is necessary based on the Company’s discovery responses

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<sup>16</sup> See e.g., Hearing Exhibit 108, 5: 13-20—6: 1-5; 9: 1-15; 19: 3-21—20: 1-6.

<sup>17</sup> This refers to Rebuttal Testimony explaining circumstances where it is prudent to run CTs while also curtailing renewable generation or pumping Cabin Creek. See Hearing Exhibit 301, 5: 9-18. See e.g., Hearing Exhibit 108, 5: 13-20—6: 1-5; 9: 1-15; 19: 3-21—20: 1-6.

<sup>18</sup> UCA’s First Motion to Compel at 2. The relevant portions of UCA’s Fourth Discovery Set and responses thereto are in the record as Hearing Exhibits 303 to 319. See also Combined Response at 7; Hearing Exhibit 301, 5: 9-18.

<sup>19</sup> See Hearing Exhibit 301, 5: 19-21—6: 1-8; Hearing Exhibit 301, Attachment CN-6, Rev. 1 and CN-6HC, Rev. 1 (“Hearing Exhibit 301, Attachment CN-6” and “Hearing Exhibit 301, Attachment CN-6HC”).

<sup>20</sup> See Hearing Exhibit 301, 4: 2-8; 6: 9-23—15: 1-22. When it filed Answer Testimony, the UCA did not have information as to the actual average curtailment costs, so it based its disallowance requests on estimates; the Company provided the actual average curtailment costs in response to discovery request UCA 3-8. *Id.* at 7: 9-22—8: 1-9.

<sup>21</sup> Motion to File Surrebuttal at 1-2.

(discussed above) applying the referenced criteria to eight instances at issue.<sup>22</sup> UCA states that Surrebuttal Testimony is intended to respond to the criteria for generation decision-making described in Rebuttal Testimony and the Company's application of this criteria to the relevant eight instances; and to update UCA's analyses and disallowance recommendations based on the same.<sup>23</sup>

22. UCA argues that the updated analyses in its Surrebuttal Testimony are a vital component of its case and overall recommendations in this Proceeding, including its recommended disallowances.<sup>24</sup> It argues that its written Surrebuttal Testimony will save time at hearing; is consistent with the Commission's preference for written testimony; will provide a clearer record overall; and will give a meaningful opportunity for the other parties and the Commission to review UCA's updated calculations and recommendations before the hearing.<sup>25</sup>

23. Staff takes no position on the Motion to File Surrebuttal.<sup>26</sup> Public Service objects to the Motion.<sup>27</sup> The Company submits that surrebuttal is rare in Commission proceedings and that UCA has not established cause to deviate from the standard process.<sup>28</sup> Public Service argues that surrebuttal has been allowed in unique circumstances where there is a significant controversy or

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<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 2-3.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 4-5. UCA cites as support, Decision No. C09-1154, ¶¶ 4-6, Proceeding No. 09AL-299E; Decision No. C13-1493-I, ¶ 4, Proceeding No. 13A-0686E; Decision No. C07-0286, ¶¶ 2-4, Proceeding No. 06-0478E; Decision No. C17-0602-I, ¶¶ 5-7, Proceeding No. 15A-0589E. *Id.* at 3-4. Almost all of UCA's citations to these decisions and cases include errors, which the ALJ construes as unintentional typographical errors. Examples include: ¶ 7 of the Motion for Surrebuttal references Decision No. C09-299 but the footnote citation for this refers to Decision No. C09-1154; ¶ 8 of the Motion refers to Proceeding No. 13A-0686EG, but the footnote citation for this refers to Proceeding No. 13A-0696EG; ¶ 9 of the Motion refers to Proceeding No. 15A-0589R, but the footnote citation to this refers to 15A-0589E. The ALJ researched each of UCA's cited Decisions to determine the correct decision or proceeding number and has cited to the correct decisions and proceedings in this footnote (without repeating UCA's errors). UCA is encouraged to take extra care in the future to ensure that its citations are correct.

<sup>26</sup> See Motion to File Surrebuttal at 6.

<sup>27</sup> Combined Response at 26.

<sup>28</sup> *Id.*

where the request is unopposed, which is not the case here.<sup>29</sup> The Company argues that UCA was aware of the types of points that the Company might make in rebuttal (*i.e.*, the referenced criteria) given that UCA raised the same disallowance theories in the Company's last ECA case, Proceeding No. 23A-0394E, ("Last ECA Proceeding") to which the Company responded, and thus could have addressed these issues in its Answer Testimony.<sup>30</sup> Public Service adds that UCA's grounds to submit surrebuttal—to explain new recommendations and respond to information in Rebuttal Testimony and discovery responses—is simply not enough.<sup>31</sup> The Company argues that rebuttal testimony will almost always contain new information of some nature in response to answer testimony, and permitting interveners to file surrebuttal based on a mere desire to re-work their theory of the case would upend the ordinary procedural structure of Commission proceedings.<sup>32</sup>

24. The Company asserts that allowing surrebuttal testimony implicates its due process rights, because as the Applicant, it carries the ultimate burden of proof in this Proceeding, and thus, is entitled to have the last opportunity to present affirmative testimony.<sup>33</sup> The Company asserts that there is not time for additional rounds of written testimony given the timing of UCA's Motion.<sup>34</sup>

### **1. Findings, Analysis, and Conclusions**

25. There is little Commission guidance as to the circumstances under which surrebuttal testimony should be allowed. Generally, the Commission may allow a party to submit

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<sup>29</sup> *Id.* at 27.

<sup>30</sup> *Id.* at 26 and 29, citing Hearing Exhibit 109, 38: 1-23—39: 1-4 in Proceeding No. 23A-0394E.

<sup>31</sup> *Id.* at 28.

<sup>32</sup> *Id.* at 28-29.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.* at 28.

surrebuttal testimony when it finds good cause for the same.<sup>35</sup> The decision to allow surrebuttal testimony is within the discretion of the trier of fact.<sup>36</sup> Surrebuttal testimony is not usually permitted in Commission proceedings, but it has been permitted in appropriate situations.<sup>37</sup>

26. For the reasons discussed, the ALJ grants the Motion to File Surrebuttal. That said, Public Service's arguments are not without merit. For example, Public Service correctly points out that in the Last ECA Proceeding, UCA made similar disallowance arguments, to which the Company responded, and as a result, the UCA had notice of the type of information in the Company's Rebuttal Testimony concerning its generation decision-making that UCA's Surrebuttal Testimony seeks to address.<sup>38</sup> The Company also correctly notes that it is not unusual for rebuttal testimony or discovery responses to include new information of some nature. In granting UCA's Motion to File Surrebuttal, the ALJ does not discount these points.<sup>39</sup>

27. From the ALJ's perspective, UCA's Surrebuttal Testimony provides helpful insight into UCA's position on a significant aspect of the relief that Staff and the Company seek through the Settlement Agreement. Indeed, the Agreement requests that the Application, including the Company's proposed cost recovery, be approved (with the Agreement's modifications).<sup>40</sup> UCA's Surrebuttal Testimony (filed after the Agreement) argues that certain costs should be disallowed, and in doing so, identifies the primary basis for UCA's objection to the Agreement, (*i.e.*, the

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<sup>35</sup> See *e.g.*, Decision No. C17-0602-I (issued July 24, 2017), Proceeding No. 15A-0589E; Decision No. C13-1493-I (issued December 3, 2013), Proceeding No. 13A-0686EG; Decision No. C07-0286 (issued April 16, 2007), Proceeding No. 6A-478E. See also, Decision No. C12-01001-I (issued August 24, 2012), Consolidated Proceeding Nos. 11A-869E, 12A-782E, 12A-785E.

<sup>36</sup> See *e.g.*, Decision No. R15-0512-I, ¶ 93 (issued June 1, 2015), Proceeding No. 15AL-0135G ("Decision No. R15-0512-I").

<sup>37</sup> See *e.g.*, *id.* at ¶ 94.

<sup>38</sup> See Hearing Exhibit 109, 38: 1-23—39: 1-4 in Proceeding No. 23A-0394E. UCA did not have notice of all the information that it addressed in Surrebuttal Testimony from this last ECA Proceeding, as some information relates to specific generation or operational decisions that occurred in the timeframe relevant to the Application here.

<sup>39</sup> Whether to allow Surrebuttal Testimony was a close call. In the future, circumstances may warrant the ALJ weighing these types of factors more heavily in deciding whether to allow surrebuttal testimony.

<sup>40</sup> Settlement Agreement at 2.

Agreement does not encompass the requested disallowances). Given that UCA is not a party to the Agreement, having written testimony in the record that identifies the primary basis for UCA's objection to the Agreement is helpful to the ALJ as the fact finder.<sup>41</sup> What is more, much of the information in UCA's Surrebuttal Testimony could have been presented as argument in UCA's SOP. Indeed, SOPs serve as written closing argument in which parties summarize key evidence admitted during a hearing, explain how that evidence fits into the relevant legal framework, and based on all of this, make arguments in support of their respective positions. Given this, it can come as no surprise that parties' SOPs may identify changes to their initial positions based upon the admitted evidence, all of which they may not have had when filing written testimony.<sup>42</sup> While an SOP is treated as argument (and not evidence), learning of changes to a party's position in an SOP can be less helpful for the fact finder, and can result in a lacking record because opposing parties cannot present responsive evidence or argument before a recommended decision issues. As a result, in the circumstances here, allowing UCA's Surrebuttal Testimony provided the opportunity for opposing parties to respond to UCA's updated position both through evidentiary presentations during the hearing, and through argument in SOPs.

28. The ALJ carefully considered the Company's due process concerns. First, the ALJ considered the nature of Surrebuttal Testimony, including whether it is feasible for the Company to prepare to respond to Surrebuttal Testimony in the short time available prior to the evidentiary hearing. UCA's Surrebuttal Testimony is not particularly complex or lengthy. It involves discrete

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<sup>41</sup> UCA's Surrebuttal Testimony also enabled the ALJ to better prepare for the evidentiary hearing and understand UCA's position on the Agreement. The ALJ acknowledges that settlement testimony was an available and appropriate route for UCA to present its position on the Agreement.

<sup>42</sup> The ALJ has little doubt that UCA would have updated its position on proposed disallowances based on the record evidence in its SOP even if the ALJ did not allow its Surrebuttal Testimony. Indeed, it makes little sense that UCA or any party would argue for a position that they no longer support, and neither the law nor Commission procedures force parties to do so. Rightly so, as the hearing process serves a vital truth-seeking mission.

issues that are critical to UCA's positions in Answer Testimony and on the Settlement Agreement. UCA raised these issues as early as October 25, 2024 when it filed its Answer Testimony, thereby giving the Company ample opportunity to consider and evaluate these issues. UCA's conclusion in Surrebuttal Testimony—that the Commission should disallow costs associated with disputed generation decisions—is reasonably foreseeable given its Answer Testimony. Notably, UCA's updated position seeks approximately \$600,000 less in disallowances than its Answer Testimony (from \$3,495,046 to \$2,904,118) and narrows the scope of disputes concerning certain generation decisions.<sup>43</sup> For all these reasons, the ALJ determined that it is both feasible and practicable for the Company to prepare to respond to UCA's Surrebuttal Testimony in the time available prior to the hearing, and that the Company could appropriately respond to Surrebuttal Testimony by providing live testimony during the hearing.<sup>44</sup>

29. Second, to ensure the Company and Staff had as much time as possible to prepare to respond to UCA's Surrebuttal Testimony, the ALJ informally told the parties via email that she is granting the Motion to File Surrebuttal as soon as this decision was made (on January 6, 2025).<sup>45</sup> At the same time, the ALJ informed the parties that the Company and Staff would be given an opportunity to respond to UCA's Surrebuttal Testimony by presenting evidence during the hearing.<sup>46</sup>

30. Third, the Company and Staff were given the opportunity to present evidence responding to the UCA's Surrebuttal Testimony during the hearing, and the Company did present such evidence.

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<sup>43</sup> See e.g., Hearing Exhibit 301HC, 9: 4-8; 10: 21-23; 13: 5-12; 14 (Table CN-6); 14: 5-8—15: 1-2; 15: 15-18.

<sup>44</sup> In addition, fewer disputed issues tend to promote administrative economy.

<sup>45</sup> January 6, 2025 Email to Parties.

<sup>46</sup> *Id.*

31. For all these reasons, the ALJ finds that the Company and Staff were afforded appropriate due process to respond to UCA's Surrebuttal Testimony, and that allowing UCA's Surrebuttal Testimony does not and did not prejudice the Company or Staff. For the reasons discussed, the ALJ finds that allowing UCA's Surrebuttal Testimony aids the fact finder in reaching a recommended decision, which, in the circumstances here, establishes good cause for the same. In reaching these conclusions, the ALJ explicitly does not intend to establish any precedent, model, standard, or guide for circumstances under which surrebuttal testimony should be permitted in the future.<sup>47</sup>

### **C. Motions to Compel**

#### **1. Relevant Law**

32. Rule 1405 generally governs discovery in Commission proceedings.<sup>48</sup> Under Rule 1405(g), the Commission discourages discovery disputes and "will entertain motions to compel or for protective orders only after the movant has made a good faith effort to resolve the discovery dispute."<sup>49</sup>

33. Through Rules 1004(h) and 1405(a), the Commission incorporates Rules 26 to 37 of the 2012 edition of the Colorado Rules of Civil Procedure ("C.R.C.P."), with some exceptions.<sup>50</sup> Thus, unless the Commission orders otherwise, the incorporated C.R.C.P. provisions apply.<sup>51</sup> Under C.R.C.P. 26(b)(1), parties may obtain discovery as to any non-privileged matter relevant to the claim or defense of any party. The relevant information sought need not be admissible, so long

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<sup>47</sup> Another decision-maker could reasonably reach a different result.

<sup>48</sup> Rule 1405 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* ("CCR") 723-1.

<sup>49</sup> Rule 1405(g), 4 CCR 723-1.

<sup>50</sup> Rule 1405(a), 4 CCR 723-1. Rule 1405(a)(II) identifies numerous C.R.C.P. provisions that are explicitly not incorporated: 4 CCR 723-1. No later amendments to or editions of the C.R.C.P. are incorporated into the Rules of Practice and Procedure. Rule 1004(h), 4 CCR 723-1. Unless otherwise stated, this Decision's citations to the C.R.C.P. are to the 2012 edition.

<sup>51</sup> Rule 1405(a), 4 CCR 723-1.

as the discovery is reasonably calculated to lead to the discovery of admissible evidence.<sup>52</sup> Indeed, information may be relevant for the purpose of discovery, but not admissible at trial.<sup>53</sup>

34. Generally, discovery rules are to be liberally construed to effectuate the rules' truth-seeking purpose.<sup>54</sup> "In close cases, the balance must be struck in favor of allowing discovery."<sup>55</sup> However, discovery is not limitless.<sup>56</sup> C.R.C.P. 26(g)(2)(C) speaks to some of these limits, providing that the signature of counsel posing discovery requests certifies that to the best of the signer's information and belief, formed after reasonable inquiry, that the requests are not "unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The current version of C.R.C.P. 26(b)(1) addresses similar limits by requiring discovery to be proportional to the needs of the case, considering the importance of the issues at stake, the amount in controversy, the parties' relative access to the information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Although the current version of C.R.C.P. 26(b)(1) is not incorporated in the Commission's Rules, the ALJ finds it persuasive, particularly given that the applicable version of C.R.C.P. 26(g)(2)(C) addresses similar factors.<sup>57</sup>

35. Objections to discovery requests must identify the reasons for the objection and otherwise answer the question to the extent it is not objectionable.<sup>58</sup>

36. Motions to compel discovery are "committed to the discretion of the trial court."<sup>59</sup>

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<sup>52</sup> C.R.C.P. 26(b)(1).

<sup>53</sup> *Sewell v. Public Service Co. of Colorado*, 832 P.2d 994, 999 (Colo. App. 1991).

<sup>54</sup> *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Ct.*, 718 P.2d 1044, 1046, (Colo. 1986).

<sup>55</sup> *Williams v. Dist. Ct.*, 866 P.2d 908, 911 (Colo. 1993).

<sup>56</sup> *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002).

<sup>57</sup> See e.g., Decision No. R22-0481-I at fn. 131 (issued August 12, 2022) in Proceeding No. 22AL-0046G.

<sup>58</sup> C.R.C.P. 33(b)(1), 34(b), 36(a).

<sup>59</sup> *Corbetta v. Albertson's, Inc.*, 975 P.2d 718, 720 (Colo. 1999).

37. The proponents of an order bear the burden of proof by a preponderance of the evidence that their requested relief should be granted.<sup>60</sup>

## 2. First Motion to Compel

38. UCA's First Motion to Compel requests that the Commission compel the Company to provide discovery in response to UCA's discovery requests UCA 4-4(c), 4-5, 4-6, and 4-9 to 4-17.<sup>61</sup> Alternatively, UCA requests the Commission compel the Company to provide responses to UCA's Fifth Set of Discovery Requests ("Fifth Discovery Set").<sup>62</sup>

39. In support, the UCA asserts that based on Public Service's Rebuttal Testimony, on November 27, 2024, it issued its Fourth Discovery Set seeking discovery as to the Company's justifications or criteria applied to the 90 instances where the Company ran CTs while also curtailing renewable resources or pumping Cabin Creek, as identified in Mr. Neil's Answer Testimony, (Tables CN-1 and CN-2).<sup>63</sup> On December 10, and 11, 2024, Public Service responded. UCA asserts that in large part, the Company's responses were nonresponsive, and that the Company objected on the grounds that responding requires special studies.<sup>64</sup> At the same time, in response to UCA 4-3, subject to its objections, the Company provided discovery analyzing the top 8 (by proposed disallowance amount) of the 90 instances that UCA identified.<sup>65</sup> UCA argues this proves the Company can undertake the requested analyses. It further asserts that the requested

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<sup>60</sup> § 24-4-105(7), C.R.S.; Rule 1500, 4 CCR 723-1.

<sup>61</sup> UCA's First Motion to Compel at 1. UCA did not file copies of these discovery requests and responses thereto as attachments to its First Motion to Compel, but filed them as Hearing Exhibits 306-308, and 311 to 318-A on December 18, 2024, and relies on these filings in its First Motion. *See id.* at 1, fn. 1.

<sup>62</sup> *Id.* at 6. Although UCA also did not file a copy of its Fifth Discovery Set and responses thereto as an attachment to its First Motion to Compel, UCA filed it as Hearing Exhibit 320 on December 18, 2024 and relies on this filing in its First Motion. *See id.* at 3, fn. 9.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.* at 2, citing Hearing Exhibits 303 to 319.

<sup>65</sup> Hearing Exhibit 301, Attachment CN-6, and CN-6HC. *See* Hearing Exhibit 301, 5: 19-21—6: 1-8. *See also*, First Motion to Compel at 2-3.

information will give the Commission and parties a greater understanding of the Company's generation decision-making and better enable them to evaluate the prudence of such decisions before they impact ratepayers.<sup>66</sup>

40. Since Public Service asks the Commission "and parties" to approve its decision-making for the relevant 2023 period, and the disputed discovery seeks information on the circumstances surrounding specific decisions in that period, UCA asserts that the information sought in its Fourth and Fifth Discovery Sets are relevant to the claims at issue here.<sup>67</sup> UCA argues that its requests are reasonable and proportional to the needs of the case since the requests are limited to instances where UCA identified potentially imprudent decisions, and because it does not seek explanations for each hour of every day for the relevant 2023 period.<sup>68</sup> UCA asserts that the requested information is uniquely held by the Company and that it cannot otherwise access the information.<sup>69</sup> UCA argues that the request is not unduly burdensome and does not require a special study, as evidenced by the partial response the Company provided, and that the benefit of requiring disclosure outweighs any burden on the Company.<sup>70</sup>

41. Staff takes no position on the First Motion to Compel,<sup>71</sup> but the Company objects to it. As background, Public Service explains that UCA's first two sets of discovery requests, served on September 6 and 24, 2024, request information related to the timing of the Company's use of CTs during 2023 or to UCA's disallowance request from the last ECA Proceeding.<sup>72</sup> On October 17, 2024, UCA served its Third Set of Discovery Requests ("Third Discovery Set"),

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<sup>66</sup> First Motion to Compel at 3.

<sup>67</sup> *See id.* at 4.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 4-5.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *See id.* at 6.

<sup>72</sup> Combined Response at 6.

seeking information about 20 instances in which UCA stated the Company was running CTs while pumping Cabin Creek (UCA 3-1), and about 47 instances in which UCA stated the Company was running CTs and/or Plains End while curtailing renewable generation (UCA 3-3).<sup>73</sup>

42. Public Service responded to the Third Discovery Set on October 31, 2024. In its response, Public Service objected to UCA 3-1 on several grounds, including undue burden and that answering requires a special study.<sup>74</sup> At the same time, the Company also provided a narrative answer describing “multiple reasons why it is appropriate to pump at Cabin Creek during the same time period when CTs are running,” and six non-exhaustive scenarios in which this may occur.<sup>75</sup> The Company also objected to UCA 3-3 on numerous grounds, including undue burden and that answering requires a special study, but also provided a narrative answer describing several reasons why it may be necessary to curtail some amount of renewable generation while CTs or Plains End are running.<sup>76</sup> UCA did not follow up with the Company on its responses to the Third Discovery Set, did not seek additional responses relating to these requests, and did not seek to meet and confer about the same.<sup>77</sup>

43. The Company’s Rebuttal Testimony (filed November 22, 2024) addresses UCA’s disallowance recommendations in Answer Testimony.<sup>78</sup>

44. On November 27, 2024, UCA issued its Fourth Discovery Set seeking additional explanations for events listed in its Third Discovery Set and other events discussed in Answer Testimony.<sup>79</sup> On December 10, 2024, the Company responded to the Fourth Discovery Set,

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<sup>73</sup> *Id.* at 6; Attachment 1 and IHC to Eisenberg Affidavit.

<sup>74</sup> Combined Response at 6; Attachment 1 and IHC to Eisenberg Affidavit.

<sup>75</sup> Combined Response at 6-7; Attachment 1 and IHC to Eisenberg Affidavit at 1-2.

<sup>76</sup> Combined Response at 7; Attachment 1 and IHC to Eisenberg Affidavit at 3-5.

<sup>77</sup> *See* Combined Response at 7; Eisenberg Affidavit at 2.

<sup>78</sup> Hearing Exhibit 108 at 5-24. *See* Combined Response at 7.

<sup>79</sup> Combined Response at 7.

objecting to several requests as unduly burdensome and requiring special studies. Subject to its objections, Public Service provided its analyses of the top 8 (by proposed disallowance amount) of the 90 instances that UCA identified.<sup>80</sup> Over a 13-day period, Company witness and employee Mr. Schultz spent approximately 15 to 20 hours to prepare those analyses; this total does not include time the Company's regulatory and legal personnel devoted to this effort.<sup>81</sup> The analyses required a manual review of information available to the Company at the time each decision was made, such as the state of electric system in prior hours and days, and load and renewable generation output forecasts.<sup>82</sup> There is no database from which the information provided in those analyses or the information sought in UCA's other discovery requests relating to these events can be pulled.<sup>83</sup>

45. On December 18, 2024, counsel for UCA informed the Company's counsel by telephone that it planned to file a motion to compel later that day, but did not seek to confer on the motion, provide details as to the discovery responses at issue (or why the responses are deficient), and did not ultimately file the First Motion to Compel that day.<sup>84</sup> UCA's counsel followed up shortly after this call with an email to the Company's counsel.<sup>85</sup> The UCA's December 18, 2024 email's only reference to the First Motion states that the "UCA will file today . . . Motion to Compel certain responses, or lack thereof to UCA DR Set 4," and that it will send its motion to compel to the Company later that day.<sup>86</sup> It did not.

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<sup>80</sup> Hearing Exhibit 301, Attachment CN-6 and CN-6HC. *See* Combined Response at 8.

<sup>81</sup> Combined Response at 8; Schultz Affidavit at 2-3.

<sup>82</sup> Shultz Affidavit at 2.

<sup>83</sup> *Id.*

<sup>84</sup> Combined Response at 8; Eisenberg Affidavit at 3.

<sup>85</sup> Attachment 2 to Eisenberg Affidavit.

<sup>86</sup> Attachment 2 to Eisenberg Affidavit at 2. *See* Eisenberg Affidavit at 3.

46. On Friday, December 20, 2024, UCA’s counsel contacted the Company’s counsel by telephone.<sup>87</sup> During that call, the Company’s attorney told UCA’s counsel that there had not been conferral as to the contents of the anticipated motion to compel.<sup>88</sup> After this call, at 3:10 p.m. that same day, UCA’s counsel emailed the Company asking to confer “this afternoon” about its anticipated motion to compel, and provided a draft of its motion (“First Motion Draft” or “Draft”).<sup>89</sup> Public Service responded that conferral on the discovery dispute was not possible in the 90 minutes remaining in the business day, particularly on the Friday before the Christmas holiday, and that UCA’s request is improper.<sup>90</sup> The Company’s counsel explained that he is not available to take a call in the 90 minutes left in the day, “much less confer with my client and get you even an initial response,” and that conferral requires a back and forth communication.<sup>91</sup> The Company’s counsel added that “[s]hould you wish to confer, please send written correspondences spelling out the subparts on which UCA is seeking a further response and the reasons you believe a response is required. I will commit to getting a response from the Company, but it may take time given the Christmas holiday and Company personnel travel schedules.”<sup>92</sup> Rather than do this, UCA filed the First Motion at approximately 4:55 p.m. on December 20, 2024.

47. The Company argues that the First Motion to Compel should be denied for two reasons: UCA failed to properly confer on the First Motion; and the burden of responding to the disputed discovery requests far outweighs their evidentiary value.<sup>93</sup> Public Service adds that the

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<sup>87</sup> See Attachment A to First Motion to Compel at 2.

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*; Combined Response at 8-9.

<sup>90</sup> *Id.* Eisenberg Affidavit at 4.

<sup>91</sup> Attachment A to First Motion to Compel at 1.

<sup>92</sup> *Id.*

<sup>93</sup> Combined Response at 9-10.

ALJ need not address the merits of First Motion because UCA's failure to confer as required by Rule 1405(g) is not a close question.<sup>94</sup>

48. In support, Public Service argues that UCA made no attempt to meet and confer to either resolve or narrow the discovery dispute before filing the First Motion, in violation of conferral requirements in Rule 1405(g), 4 CCR 723-1, and that UCA's own filings concede its lack of compliance.<sup>95</sup> Specifically, Public Service points to the conferral statement in the First Motion Draft, which refers to conferral under Rule 1400, 4 CCR 723-1, and states that UCA contacted Staff and the Company about the anticipated motion and that Public Service opposes the motion while Staff takes no position.<sup>96</sup> Public Service asserts that while this may be sufficient for conferral under Rule 1400 for other motions, it is not sufficient conferral on a discovery motion, which is governed by Rule 1405(g). The Company argues that UCA's late email on December 20, 2024 does not meet the conferral standards in Rule 1405(g) because its counsel would not have had time to confer with it on the discovery dispute in the short amount of time left in the business day (the Friday before the Christmas holiday).<sup>97</sup> Public Service highlights that UCA's First Motion to Compel modifies the conferral statement as compared to the Draft, but still fails to mention or apply the conferral standard in Rule 1405(g), and makes no attempt to explain how UCA's actions constitute a "good faith effort to resolve the discovery dispute" as required by Rule 1405(g).<sup>98</sup> The Company argues that because Rule 1405(g) states that the Commission will entertain motions to compel "only after" the movant has made a good faith effort to confer, and UCA failed to do so, the Commission should deny the First Motion.

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<sup>94</sup> *Id.* at 14-15.

<sup>95</sup> *Id.* at 12.

<sup>96</sup> *Id.* referencing Attachment B to First Motion to Compel at 2.

<sup>97</sup> *See* Combined Response at 8-9, 13.

<sup>98</sup> *Id.* at 13, quoting Rule 1405(g), 4 CCR 723-1 and citing First Motion to Compel at 6.

49. The Company also argues that the First Motion should be rejected because the burden of responding to the disputed discovery requests far outweighs their evidentiary value.<sup>99</sup> At the heart of the dispute is whether the Company should be required to reconstruct the details of its operations during 82 separate events in 2023, across almost 600 separate hours, to answer UCA's questions about specific generation decisions made during each of those hours.<sup>100</sup> The Company explains that there are numerous operational considerations that go into the Company's decision-making process each day, and the conditions and circumstances of each day are unique.<sup>101</sup> To answer the discovery requests at issue, the Company would have to conduct a close examination through a manual review of the remaining 82 events that UCA identified; each event would require its own separate and independent research project.<sup>102</sup> The information needed for this research cannot be generated or gathered by querying a database, and instead requires manual research to gather the needed information for each event.<sup>103</sup> Because each event is unique and requires independent research, the Company submits that fully answering the discovery requests requires it to perform numerous special studies.<sup>104</sup> The Company estimates that it would take approximately 164 hours to do this, but notes that it could take significantly longer depending on the relative complexity of system operations on a particular day.<sup>105</sup> This estimate does not include the time that other Company personnel would have to devote to prepare and review the analyses and response.<sup>106</sup>

50. Public Service argues that requiring Mr. Schultz to spend approximately a month of his time to respond to these requests is a significant burden on him and the Company,

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<sup>99</sup> Combined Response at 9-10.

<sup>100</sup> *Id.* at 15.

<sup>101</sup> Shultz Affidavit at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Combined Response at 16.

<sup>105</sup> Shultz Affidavit at 3-4.

<sup>106</sup> *Id.*

particularly given that his full-time responsibility is the safe and reliable operation of the electric system, on which the Company's customers and the Colorado economy depend.<sup>107</sup>

51. In response to UCA's argument that the requests are not unduly burdensome because the Company analyzed 8 of the 90 events at issue, the Company argues that it provided those analyses without waiving its objections as a courtesy to UCA; did not admit that further special studies for the remaining 82 events would be reasonable; and that just because an analysis is possible does not mean that it is not unduly burdensome.<sup>108</sup> The Company highlights that UCA fails to address the fact that it took the Company 13 days to complete studies of less than one-tenth of the events in question, and that a similar pace, it would take another 133 days for Mr. Schultz and the Company to complete special studies of the remaining 82 instances.<sup>109</sup> In short, Public Service argues that UCA does not provide any fact-based analysis of the burden that its requested relief would have on the Company.

52. Public Service argues that the evidentiary value of responses to the discovery requests is minimal. In support, the Company asserts that UCA has only speculation to support its claim that there may be anything imprudent about the Company's actions during the relevant events.<sup>110</sup> The Company adds that it has already provided considerable evidence as to its use of CTs, system operation, and why the circumstances UCA points to do not indicate an unusual system operation, much less lack of prudence.<sup>111</sup> For all these reasons, Public Service argues that

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<sup>107</sup> Combined Response at 16.

<sup>108</sup> *Id.* at 16-17.

<sup>109</sup> *Id.* at 17; Schultz Affidavit at 2-4. The Company also states that it explained the burden of responding to the discovery requests in its October 31, 2024 response to UCA 4-3(b). *Id.* at 17-18, quoting Response to UCA 4-3(b).

<sup>110</sup> *Id.* at 19.

<sup>111</sup> *Id.* at 15 and 19. Schultz; Affidavit at 3-4.

the excessive burden to reconstruct the relevant 82 events far outweighs any incremental evidentiary value that might be gleaned from the resulting discovery response.<sup>112</sup>

**a. Findings, Analysis, and Conclusions**

53. For the reasons discussed, the ALJ denies the First Motion based on UCA's failure to make a good faith effort to resolve the First Motion's discovery dispute before filing it, in violation of Rule 1405(g), 4 CCR 723-1.

54. The UCA erroneously relies on Rule 1400 as the governing conferral standard.<sup>113</sup> Rule 1405(g) sets a higher conferral standard than Rule 1400.<sup>114</sup> Whereas Rule 1400 requires a party to make "a reasonable good faith effort to confer with all parties on a motion and report when the requested relief is unopposed," Rule 1405(g) requires the movant to make "a good faith effort to resolve the dispute" before the discovery motion will be entertained.<sup>115</sup> This elevated conferral standard effectuates language in Rule 1405(g) that "the Commission discourages discovery disputes."<sup>116</sup> As such, where a movant fails to make a good faith effort to resolve a discovery dispute before filing a discovery motion, the movant violates the plain language of Rule 1405(g) and undermines the Commission's efforts to discourage discovery disputes. Indeed, given that the Rule's plain language states that the Commission will "only entertain" a discovery motion "after" the movant made a good effort to resolve the discovery dispute, Rule 1405(g) puts movants on notice that the Commission may deny a discovery motion when the movant fails to make a good faith effort to resolve the dispute before filing the motion.<sup>117</sup>

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<sup>112</sup> See Combined Response at 15 and 19.

<sup>113</sup> First Motion at 6.

<sup>114</sup> See Rules 1400 and 1405(g), 4 CCR 723-1.

<sup>115</sup> Rules 1400 and 1405(g), 4 CCR 723-1.

<sup>116</sup> Rule 1405(g), 4 CCR 723-1.

<sup>117</sup> *Id.*

55. Such is the case here. This is not a close question. UCA’s December 18, 2024 communications with the Company provided no substantive information as to the grounds for the anticipated motion to compel, including the specific discovery requests and responses in dispute.<sup>118</sup> Without this type of substantive information on the discovery dispute, the party from whom discovery is sought cannot determine what is in dispute and why, let alone attempt to identify a resolution and work with the movant to resolve the dispute. UCA acknowledges the shortfalls in its conferral. Specifically, the UCA states that it “*believed* it discussed the contents of the forthcoming motion,” and that “[i]n accordance with this *erroneous* belief,” the UCA contacted the Company the afternoon of December 20, 2024 to inform the Company that the First Motion would be filed that afternoon.<sup>119</sup> Believing that proper conferral occurred is not the same as actually doing so, nor does such a belief excuse UCA from failing to make a good faith effort to resolve the discovery dispute before filing the First Motion as required. For these reasons, the ALJ concludes that the UCA’s efforts to confer on December 18, 2024 do not meet Rule 1405(g)’s requirement to make a good faith effort to resolve the First Motion’s discovery disputes.

56. Similarly, UCA’s communications on December 20, 2024 also do not amount to a good faith effort to resolve the First Motion’s discovery disputes as required by Rule 1405(g), 4 CCR 723-1. On December 20, 2024, UCA’s counsel initially spoke with one of the Company’s attorneys, then followed up that same day with an email.<sup>120</sup> UCA admits that counsel’s call to Public Service on December 20, 2024 “was not intended to be a last-minute effort to confer.”<sup>121</sup> During that call, counsel for Public Service stated that UCA had not conferred on the contents of

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<sup>118</sup> See First Motion to Compel at 6; Combined Response at 8 and 12; Eisenberg Affidavit at 3; Attachment 2 to Eisenberg Affidavit at 1-2.

<sup>119</sup> First Motion to Compel at 6 (emphasis added). See also Attachment A to First Motion to Compel at 2.

<sup>120</sup> Attachment A to First Motion to Compel at 2.

<sup>121</sup> *Id.*

the anticipated motion; this prompted the UCA's email to Public Service with the Draft First Motion.<sup>122</sup> Thus, the Company's first notice of the substantive nature of the discovery disputes in the First Motion was at 3:10 p.m. on Friday, December 20, 2024 when it received the Draft First Motion. Even if it were not the Friday afternoon before a federal and state holiday, this timing left almost no room for the parties to attempt to resolve the discovery dispute before the First Motion was filed less than two hours later.<sup>123</sup> In short, UCA's conferral efforts on the First Motion fall far short of meeting Rule 1405(g)'s requirement that the movant make a "good faith effort to resolve the discovery dispute." In the circumstances here, this failure is fatal. For all the reasons discussed, the First Motion is denied because UCA failed to make a good faith effort to resolve the discovery dispute as required by Rule 1405(g), 4 CCR 723-1.<sup>124</sup>

57. Because the ALJ decides the First Motion based on the UCA's failure to comply with Rule 1405(g), 4 CCR 723-1, there is no need to address the Company's remaining arguments as to the First Motion.<sup>125</sup>

### 3. Second Motion to Compel

58. UCA's Second Motion to Compel seeks the Commission to compel Public Service to respond to its Fifth Discovery Set, specifically, UCA 5-1, served on December 17, 2024.<sup>126</sup> UCA 5-1 states:

Public Service provided an analysis of eight events based on the factors discussed in the Rebuttal Testimony of Company witness Mark G. Schultz,

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<sup>122</sup> *Id.*

<sup>123</sup> What is more, given the holiday, it was reasonably foreseeable that conferral at that time presented its own challenges aside from only having two hours left in the business day.

<sup>124</sup> In reaching this conclusion, the ALJ makes no finding that the UCA conferred in bad faith. Indeed, based on the First Motion, the attachments thereto, the Combined Response and attachments thereto, it appears that UCA may have mistakenly believed that it conferred with the Company about the contents of the First Motion before December 20, 2024.

<sup>125</sup> Because the Company incorporates these arguments in its Response to the Second Motion, the ALJ addresses them in that context. *See* Response to Second Motion at 2-4.

<sup>126</sup> Second Motion to Compel at 1.

Hearing Exhibit 108 as its justification for eight of UCA's proposed disallowances in Tables CN-1 or CN-2 in its Attachment UCA-4-3.A1 based on the circumstances that Mr. Schultz identified in his Rebuttal Testimony where it would be valid to be both running combustion turbines and also curtailing renewable generation or pumping Cabin Creek. Please provide a similar analysis and justification for the remaining instances in Tables CN-1 and CN-2.<sup>127</sup>

59. On January 2, 2025, the Company responded to UCA 5-1 ("response" or "discovery response"), objecting on the grounds that UCA 5-1 is untimely, duplicates some requests in UCA's Third and Fourth Discovery Sets, is vague, ambiguous, overly broad, would be unduly burdensome to answer, seeks information in a form that does not currently exist, and requires special studies.<sup>128</sup> Public Service's discovery response also explains that the 90 events discussed in UCA's Answer Testimony cover approximately 597 hours during which the Company's system operators considered numerous factors to ensure system reliability; that such operators make thousands of decisions per day based on a large volume of data and their professional judgment, expertise, and experience; a detailed recounting of all factors considered by the Company during each of the 597 hours at issue is not practicable; and that the burden of expending an entire month or more of Company personnel time to analyze these events is disproportionate to the needs of the case.<sup>129</sup>

60. In support of its Second Motion, UCA raises the same arguments as in its First Motion.<sup>130</sup> Indeed, the Second Motion seeks at least some of the discovery at issue in the First Motion.<sup>131</sup> Those arguments are not repeated here.

61. As to conferral, the Second Motion states that UCA conferred with the Company and Staff at approximately 2:00 p.m. on the day it filed the Second Motion, January 6, 2025, and

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<sup>127</sup> Attachment A to Second Motion to Compel at 1.

<sup>128</sup> *Id.* at 1-2.

<sup>129</sup> *Id.* at 1.

<sup>130</sup> Compare Second Motion at 2-3 with First Motion at 4-5.

<sup>131</sup> See First Motion at 3 (stating that UCA's Fifth Discovery Set asked the Company to provide the information largely requested in its Fourth Discovery Set).

that UCA and the Company were not able to agree to a satisfactory response to the relevant discovery request.<sup>132</sup>

62. Staff takes no position on the Second Motion to Compel,<sup>133</sup> but Public Service objects to it.<sup>134</sup> The Company's Response to the Second Motion incorporates by reference its Combined Response and attachments thereto.<sup>135</sup> Public Service argues that the Second Motion duplicates its First Motion and should therefore be denied.<sup>136</sup> The Company explains that the Second Motion seeks the identical information as the First Motion, that is, an explanation similar to the one the Company provided in discovery Attachment UCA 4-3.A1HC for the remaining 82 events for which UCA speculates that the Company may have acted imprudently.<sup>137</sup> Public Service makes the same arguments in its Combined Response that the discovery request is unduly burdensome.<sup>138</sup> Those are not repeated here. The Company asserts that UCA has not tailored its requested relief to strike an appropriate balance, instead continuing to demand that the Company study all remaining 82 events, even those for which the UCA seeks only minimal disallowances.<sup>139</sup> The Company argues that UCA cannot cure the defects in its First Motion by serving an additional set of discovery seeking the same information and filing another, identical motion to compel.<sup>140</sup> Public Service views the UCA's Second Motion as an attempt to grant UCA the opportunity to file

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<sup>132</sup> Second Motion at 2-3.

<sup>133</sup> See Second Motion to Compel at 3.

<sup>134</sup> Public Service does not directly object to the Second Motion to Compel for failure to confer in good faith as required by Rule 1405(g) but asserts that whether UCA properly conferred is an open question. Response to Second Motion to Compel at 3, fn. 3.

<sup>135</sup> Response to Second Motion to Compel at 1.

<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.* The referenced discovery Attachment is in the record as Hearing Exhibit 301, Attachment CN-6 and CN-6HC.

<sup>138</sup> Response to Second Motion to Compel at 2, citing Combined Response at 11-12, 15-26, and Schultz Affidavit at 3-4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2-3.

a reply brief addressing the Company's Combined Response, even though UCA has nothing new to say.<sup>141</sup>

63. Public Service reiterates that the relevant discovery requests would require it to embark on a fishing expedition to reconstruct hundreds of hours of system operation decisions based on UCA's speculation about events that its witness admits could be reasonable and prudent.<sup>142</sup> The Company highlights that UCA made no effort to counter any of the points the Company made in its Combined Response; does not challenge the Company's description of the burden entailed with complying with the relevant discovery request; provides no additional information explaining why the value of the information sought outweighs the burden of producing it; and made no effort to narrow the discovery dispute to reduce the burden entailed with fully responding to the discovery request.<sup>143</sup>

**a. Findings, Analysis, and Conclusions**

64. For the reasons discussed, the ALJ denies UCA's Second Motion to Compel. The Company provided credible evidence establishing that answering UCA 5-1 would be unduly burdensome in the circumstances, and that doing so requires the Company to conduct special studies.<sup>144</sup> UCA's response to this is unpersuasive. Specifically, UCA speculates that its discovery request is not unduly burdensome because the Company provided analyses for 8 of the 90 instances at issue in the normal course of business, and that it does not appear that the Company "commissioned" an outside study or used outside resources to provide those analyses.<sup>145</sup> Notably, UCA ignores the Company's credible evidence that it would require a minimum of 164 hours of

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<sup>141</sup> *Id.* at 3.

<sup>142</sup> *Id.* at 4, citing Hearing Exhibit 301, 4: 2-5.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *See* Schultz Affidavit at 1-3.

<sup>145</sup> Second Motion to Compel at 3.

employee time over a period of one month to research the events at issue and respond to the discovery request.<sup>146</sup> Under this undisputed estimate, if the Company's relevant employee worked full-time on a discovery response from the day the request was served on the Company on December 17, 2024, and took no time off for the December and January holidays, the Company's response would have been produced on or around January 16, 2025, after the evidentiary hearing.<sup>147</sup>

65. As to UCA's assertion that the Company analyzed 8 events in the normal course of business, the UCA ignores the Company's estimate that if it were to analyze the remaining 82 events at the same pace as its prior analyses, it would take the Company 133 days to complete the analyses.<sup>148</sup> At that pace, if the Company started working on its discovery response on the day the request was served on December 17, 2024, the Company's response would be provided on or around April 29, 2025, a mere 20 days before the statutory deadline for a final Commission decision expires.<sup>149</sup>

66. Under either timeline, a Company employee would have to dedicate a significant amount of time to study and analyze the events and could not have produced a response before the evidentiary hearing. And this does not consider the potential risk to the public interest if the relevant Company employee were forced to a full month away from his primary responsibility to maintain the safety and reliability of the Company's electric system.<sup>150</sup>

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<sup>146</sup> See Schultz Affidavit at 1-3. This low-end estimate is based on the Company's actual experience analyzing 8 of the 90 events at issue. See *id.*

<sup>147</sup> It could take longer than this to respond, depending on the complexity of system operations around the time of each of the 82 events, and the amount of time regulatory and legal personnel require to review the response. Schultz Affidavit at 3-4.

<sup>148</sup> See Combined Response at 17.

<sup>149</sup> See Decision No. R24-0683-I at 13 (identifying May 19, 2025 as the statutory deadline for a file decision per § 40-6-109.5(1), C.R.S.)

<sup>150</sup> See Combined Response at 16.

67. The timing of UCA's discovery request compounds the difficulties associated with responding to it. UCA could have issued discovery requests for the information at issue as it developed its Answer Testimony and became aware that it would challenge the Company's decisions relating to the identified 90 events. At latest, UCA could have sought the information about the 90 identified instances around the time it filed its Answer Testimony on October 25, 2024. UCA waited until November 27, 2024 to seek this information, and then asked for the same information again on December 17, 2024 through UCA 5-1. Given the compressed procedural schedule that the Commission typically employs (and did employ here) to meet the statutory deadline for a final decision under § 40-6-109.5, C.R.S., parties in Commission proceedings must be nimble with discovery, and particularly mindful to issue discovery requests as soon as they are aware of the need for discovery. Indeed, Commission proceedings usually move forward on a much faster schedule than most federal and state court litigation which lack the same kind of statutory deadlines and therefore can accommodate significantly more time for discovery. Thus, what may be a reasonable discovery request in state or federal court litigation, may be unduly burdensome in a Commission proceeding. Here, UCA's choice to delay issuing its discovery request meant that the Company would have to respond to it during a time in which there were numerous holidays, and while preparing for the closely approaching evidentiary hearing and meeting other procedural deadlines, even though its best efforts could not have resulted in a complete discovery response before the evidentiary hearing.

68. In deciding the Second Motion, the ALJ considered the parties' competing interests.<sup>151</sup> UCA asserts that its discovery request is reasonable and proportional to the needs of

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<sup>151</sup> As noted, the current version of C.R.C.P. 26(b)(1) provides persuasive authority upon which the ALJ relies in evaluating the competing interests at issue.

the case because: (a) it only seeks information about 82 events that it identified as “potentially imprudent;” (b) it cannot otherwise obtain the information since it is uniquely held by the Company; and (c) neither the Commission nor UCA can meaningfully assess whether disallowances are warranted without the requested information.<sup>152</sup> While the ALJ generally agrees that the discovery request seeks relevant information that may be helpful to the Commission, the burden of answering the request in the circumstances here outweighs the benefit of providing the information. To start, as explained, given the request’s timing and the time required to respond, the Company could not have provided a response until after the evidentiary hearing, making its evidentiary value nil. And, while the request focuses on 82 events, the Company provided credible evidence that researching and analyzing those events is a complex matter that would take a significant amount of time. What is more, the Company has provided information, both through testimony and discovery responses, explaining criteria it considers when making generation decisions to operate CTs while curtailing or pumping Cabin Creek; how applying those criteria results in prudent generation decisions to operate CTs while curtailing or pumping Cabin Creek; and spent 15-20 hours to study, analyze and apply those criteria to specific events at issue.<sup>153</sup> Considering all of this alongside UCA’s interest in seeking information that could not have been provided before the evidentiary hearing about “potentially imprudent” decisions, the scale tips in favor of the Company.

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<sup>152</sup> Second Motion to Compel at 2-3.

<sup>153</sup> See Hearing Exhibit 108, 5: 13-20—6: 1-5; 9: 1-15; 19: 3-21—20: 1-6; Hearing Exhibit 301, Attachment CN-6 and CN-6HC; Schultz Affidavit at 2-3. See also First and Second Motions to Compel; Combined Response and Response to Second Motion to Compel.

69. For all the reasons discussed, the Company's objections to UCA 5-1 as unduly burdensome and requiring special studies are sustained, and the Second Motion to Compel is denied.

### III. ORDER

#### A. It Is Ordered That:

1. Consistent with the above discussion, the Office of the Utility Consumer Advocate's ("UCA") motion regarding "[. . .] Unlabeled Public Exhibits Cited in Its Witness Exhibit List" filed December 18, 2024 and UCA's "Motion to Compel Disclosures [. . .]" filed December 20, 2024 are denied, *nunc pro tunc*, January 6, 2025.

2. For the reasons discussed, UCA's "Motion to Compel Disclosures to the Fifth Set of Discovery Requests [. . .]" filed January 6, 2025 is denied *nunc pro tunc*, January 9, 2025.

3. Consistent with the above discussion, UCA's "Motion Authorizing the Filing of Surrebuttal Testimony [. . .]" filed December 18, 2024 and Public Service Company of Colorado's "Unopposed Motion [. . .] for Leave to File Amended Hearing Exhibit 102, Revision 2, Direct Testimony of Mark G. Schultz and Request for Waiver of Response Time" filed December 19, 2024, are granted, *nunc pro tunc*, January 6, 2025.

4. The deadline to file Statements of Position is modified to January 24, 2025.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MELODY MIRBABA

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Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,  
Director