

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19AL-0075G

IN THE MATTER OF ADVICE LETTER NO. 1 FILED BY BLACK HILLS COLORADO GAS, INC. TO PLACE IN EFFECT ITS NEW P.U.C. VOLUME NO. 1 TARIFF ESTABLISHING NEW RATE SCHEDULES AND BASE RATES FOR ALL NATURAL GAS SALES AND TRANSPORTATION SERVICES, INCREASING JURISDICTIONAL BASE RATE REVENUES, COMBINING EXISTING GAS COST ADJUSTMENT (“GCA”) AREAS INTO NEW GCA REGIONS, IMPLEMENTING A DISTRIBUTION SYSTEM INTEGRITY RIDER, REVISING THE CONSTRUCTION ALLOWANCE CALCULATION METHOD, AND OTHER PROPOSED TARIFF CHANGES TO REPLACE AND SUPERSEDE ITS P.U.C. VOLUME NO. 3 TARIFF (FORMERLY BLACK HILLS/COLORADO GAS UTILITY COMPANY, INC.) AND P.U.C. VOLUME NO. 7 TARIFF (FORMERLY BLACK HILLS GAS DISTRIBUTION, LLC) IN THEIR ENTIRETY, TO BECOME EFFECTIVE ON MARCH 4, 2019.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
VACATING PROCEDURAL SCHEDULE,
APPROVING NEW PROCEDURAL SCHEDULE,
VACATING AND RESETTING HEARING,
DENYING STAFF’S MOTION TO STRIKE,
AND DENYING-AS-MOOT BLACK
HILLS’ MOTION TO STRIKE**

Mailed Date: June 4, 2019

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I. STATEMENT

A. Summary

1. This interim decision addresses the impact of the Notice of Filing of Updated and Corrected Revenue Requirement Study (Notice), Second Amended Advice Letter No. 1, and Second Amended Tariff Sheets filed by Black Hills Colorado Gas, Inc. (Black Hills or Company) on April 24, 2019. For the reasons stated below, the Administrative Law Judge (ALJ) concludes that the foregoing filings do not trigger a requirement to provide additional public notice. The ALJ further vacates the current procedural schedule, approves a new procedural schedule, vacates and resets the hearing, denies the Motion to Strike Black Hills’ Revised, Corrected, and Supplemental Direct Testimony filed by Staff of the Public Utilities Commission’s (Staff) on May 22, 2019, and denies-as-moot the Motion to Strike the request by the Office of Consumer

Counsel (OCC) for a 2018 calendar-year historic test year (HTY) filed by Black Hills on May 15, 2019.

B. Background

2. A more comprehensive summary of the background of this proceeding is included in Decision Nos. R19-0351-I and R19-0374-I that were issued in this proceeding on April 19, 2019 and April 26, 2019, respectively. The facts relevant to this Decision are stated below.

3. On February 1, 2019, Black Hills filed Advice Letter No. 1 with supporting attachments (including a Customer Notice) and pre-filed testimony. The proposed effective date of the tariffs filed with Advice Letter No. 1 was March 4, 2019. In Advice Letter No. 1 and in the Customer Notice, Black Hills proposes to increase annual base rate revenues by \$2,463,363 based on an overall annual revenue requirement of \$73,181,063. The annual base rate revenues are based upon a Revenue Requirement Study evaluating the Company's investments, revenues, and expenses for the 12-month period ending June 30, 2018, as adjusted for known and measurable and other *pro forma* changes through December 31, 2018.

4. By Decision No. C19-0194 issued on February 22, 2019, the Commission: (a) set March 25, 2019 as the deadline for intervening in this proceeding; (b) set the tariff pages for hearing, which suspended the effective date of the tariff pages filed by Black Hills (and thus the proposed increases in rates) until July 2, 2019 pursuant to § 40-6-111(1), C.R.S.; and (c) referred this proceeding to an ALJ for disposition. The proceeding was subsequently assigned to the undersigned ALJ.

5. Staff, the OCC, Bachelor Gulch Village Association (BGVA), The Vail Corporation (Vail), and Energy Outreach Colorado (EOC) intervened in the proceeding.

6. On March 21, 2019, the ALJ issued Decision No. R19-0265-I that, among other things, extended the statutory deadline.

7. Following a prehearing conference on April 5, 2019, the ALJ issued Decision No. R19-0351-I on April 19, 2019 establishing a prehearing schedule that included a deadline of May 8, 2019 for answer testimony, scheduled public comment hearings for April 30, 2019 and May 1, 2019, and scheduled the evidentiary hearing in this proceeding for June 10 through 13, and 17, 2019.

8. On April 24, 2019, Black Hills filed the Notice referenced above, and an Amended Advice Letter No. 1, and Amended Tariff Sheets. In the Notice, Black Hills stated that it had made “updates” and “corrections” to the Revenue Requirement Study filed at the outset of the proceeding. The updates and corrections cause Black Hills’ alleged revenue requirement to increase by \$996,324 to \$74,177,387. However, Black Hills stated that it “is not proposing to revise its February 1, 2019 advice letter filing in order to reflect these changes”¹ and it “is not seeking to increase its requested revenue increase from the [amount] originally proposed in the February 1, 2019 advice letter filing.”² Instead, Black Hills stated that it would cap its revenue requirement at the amount identified in the original Advice Letter and Notice (\$73,281,063).³

9. The Amended Advice Letter No. 1 and Amended Tariff Sheets changed the proposed effective date of the new rates from March 4, 2019 to April 5, 2019. This resulted in “an additional 32 days in the current procedural schedule and allow[ed] the maximum 210-day suspension period to expire on October 31, 2019.”⁴ In the Notice, Black Hills requested that a

¹ Notice at 2.

² *Id.*

³ *Id.* at 2, 3-4.

⁴ *Id.* at 3

prehearing conference be convened “as quickly as possible in order to amend the existing procedural schedule in order to extend the dates for Answer Testimony, Rebuttal/Cross Answer Testimony and to reset the hearing dates. [Black Hills] believes it is not necessary to reschedule the public hearing dates that are currently scheduled for April 30 and May 1, 2019.”⁵

10. On April 26, 2019, the ALJ issued Decision No. R19-0374-I that established a deadline of April 30, 2019 to respond to the Notice and scheduled a status conference for May 3, 2019 at 10:00 a.m.

11. Later on April 26, 2019, Staff filed an Unopposed Motion to Vacate the Procedural Schedule and for Waiver of Response Time (Unopposed Motion). In the Unopposed Motion, Staff requested that the procedural schedule be vacated in its entirety and for a waiver of response time to the Unopposed Motion. As support, Staff states that: (a) there is insufficient time within which “to fully analyze Black Hills’ Revised Attachment MCC-1 and determine how the changes made impact Black Hills’ complex rate and tariff proposals” before answer testimony is due on May 8, 2019;⁶ and (b) “[v]acating the existing procedural schedule will allow the intervenors to focus on any to-be-filed responses to Black Hills’ notice and prepare for the status conference without worries about the current May 8, 2019 Answer Testimony due date.”⁷ Finally, Staff stated that it had conferred with the other parties to this proceeding and was authorized to represent that the Unopposed Motion is unopposed.

⁵ *Id.*

⁶ Unopposed Motion at 2.

⁷ *Id.* at 3.

12. On April 29, 2019, the ALJ issued Decision No. R19-0375-I that granted-in-part and denied-in-part the Unopposed Motion. The May 8 deadline for answer testimony was vacated, but the request to vacate the remainder of the procedural schedule was denied.

13. On May 3, 2019, the ALJ convened the status conference scheduled in Decision No. R19-0374-I. The parties presented oral argument concerning the issues raised by Black Hills' filing of the Updated and Corrected Revenue Requirement Study, the Amended Advice Letter No. 1, and Amended Tariff Sheets. At the conclusion of the status conference, the ALJ took the issues discussed under advisement and established the deadline of May 13, 2019 for the parties to file briefs addressing: (a) whether the Updated and Corrected Revenue Requirement Study and its impact on the rates in this proceeding required the proceeding to be re-noticed; and (b) the procedural schedule that should be adopted assuming that the proceeding would be re-noticed.

14. On May 13, 2019, Black Hills, Staff, the OCC, BGVA, Vail, and EOC filed briefs addressing the issues noted above.

15. Also on May 13, 2019, Black Hills filed a Second Amended Advice Letter and Second Amended Tariff Sheets with a new effective date of May 5, 2019. Applying the 210-day suspension period to the new effective date means that the end of the suspension period would be November 30, 2019. This is an extension of 62 and 30 days of the effective dates of the original advice letter and the revised advice letter, respectively.

16. On May 15, 2019, Black Hills filed a Motion to Strike a Portion of the OCC's Brief or, in the Alternative, a Motion for Leave to Respond and Request for Waiver of Response Time (Black Hills' Motion to Strike). In the Motion to Strike, Black Hills argues that the OCC impermissibly requested in its brief filed on May 13, 2019, that the ALJ order Black Hills to file

an informational 2018 calendar-year HTY. Black Hills requests that the portion of the OCC's brief addressing the 2018 calendar-year HTY be struck or, alternatively, permission to file a response brief addressing that issue.

17. On May 20, 2019, Black Hills filed Revised, Corrected, and Supplemental Direct Testimony to address “[c]oncerns [] raised by Staff and the other intervenors regarding the impact of the two revenue requirement studies and the single class cost of service study filed with the Commission.”⁸ Specifically, Black Hills filed the following testimony:

- Revised Direct Testimony of Fredric C. Stoffel;
- Revised Direct Testimony of Michael C. Clevinger and Attachment MCC-6;
- Revised Direct Testimony of Eric J. Gillen and Attachment EJG-7;
- Corrected Direct Testimony of Douglas N. Hyatt and Corrected Attachment DNH-13;
- Supplemental Direct Testimony of Douglas N. Hyatt and Attachments DNH-14 through DNH-19; and
- Supplemental Direct Testimony of Thomas J. Sullivan and Attachment TJS-6.

The revised, corrected, and supplemental testimony reiterates Black Hills' commitment to cap the revenue it is seeking in this proceeding at the amount included in the original advice letter and notice (\$73,181,063). It also reveals the impact of the \$996,324 in additional revenue requirement identified in the Notice for “illustrative purposes.” Specifically, notwithstanding an overall alleged increase of \$996,324 in Black Hills' proposed total revenue requirement, only the rates for the residential class of customers would increase if the “illustrative” case were put into effect. Specifically, under the “illustrative” scenario, while the volumetric rates of the residential class of customers would increase from \$0.18363 to \$0.19144 per therm in the proposed R-1 rate area, and from \$0.14462 to \$0.14880 in the proposed R-2 rate area, the rates for the other classes

⁸ Black Hills Notice of Filing Revised, Corrected, and Supplemental Direct Testimony and Attachments at 2.

(small commercial, large commercial, and seasonal/irrigation) would remain the same, as initially proposed by Black Hills in its original Advice Letter. And, all other components of Black Hills' proposed rates would remain the same due to the mitigation strategy employed by Black Hills.⁹

18. On May 22, 2019, Staff filed a Motion to Strike, or in the Alternative, Stay Black Hills' Revised, Corrected, and Supplemental Direct Testimony and Attachments (Staff's Motion to Strike). In its Motion to Strike, Staff notes that the new testimony "expand[s] the scope of this case beyond what was originally filed and noticed" and "make Black Hills' direct case a moving target."¹⁰ Staff requests that the "new testimony and attachments [] be stricken, or at the very least stayed, to give the parties some clarity while waiting for the ALJ's decision on the substantial issues already before him for resolution."¹¹

C. Parties' Arguments

1. Black Hills

a. **The Commission's Authority to Permanently Suspend the Proposed Rates and Tariff Sheets, and the Advice Letter, and Dismiss the Proceeding**

19. Even though the ALJ specifically instructed the parties not to address the issue in their briefs, Black Hills argues at length that the Commission does not have the authority to permanently suspend the Advice Letter and dismiss the processing. As support, Black Hills cites §§ 40-6-111(1)(a) and (b) and 40-6-111(2), C.R.S., and states that "[o]nce the Commission acts to suspend the utility's filed rates, the *only* way the Commission can prevent

⁹ Compare Direct Testimony of Thomas J. Sullivan, Attach. TJS-5 with Supplemental Direct Testimony of Thomas J. Sullivan, Attach. TJS-6.

¹⁰ Staff's Motion to Strike at 4.

¹¹ *Id.*

the filed rates from going into effect automatically upon the expiration of the suspension period is to hold a hearing and determine just and reasonable rates.”¹² Black Hills concludes that “[b]y exercising its authority under C.R.S. § 40-6-111(1) in this proceeding to suspend and set for hearing the Company’s February 1, 2019 rate filing, the Commission is now *required* to hold a hearing and either determine whether the Company’s proposed rates and tariffs are just and reasonable or, to the extent they are not, to determine the just and reasonable rates and tariffs in lieu thereof.”¹³

b. Additional Notice

20. Black Hills asserts that additional notice is not required. As support, Black Hills first states that the purpose of § 40-3-104(1)(c), C.R.S., “is to allow for customers and other members of the public to inform the Commission in the exercise of its powers under C.R.S. § 40-6-111(1) to suspend the effectiveness of proposed rate and tariff changes and to hold a hearing on the propriety thereof ‘if it believes that such rate [etc.] ... may be improper.’”¹⁴ Because the Commission has already suspended the original advice letter and scheduled it for hearing, there is no statutory right to notice of the revised advice letter, even though it changes the revenue requirement.¹⁵

21. Black Hills also argues that the Constitutional right to due process does not require notice of the revised advice letter. According to Black Hills, the due process requirements of notice and an opportunity to be heard arise only if individuals have a protected

¹² Black Hills’ Brief at 9 (emphasis added).

¹³ *Id.* (emphasis added). *See also id.* at 18-23 (citing Decision No. C18-0280 issued in Proceeding No. 17AL-0649E on April 26, 2018, several federal cases interpreting the authority of the Federal Energy Regulatory Commission, and *Public Service Co. of Colorado v. PUC*, 653 P.2d 1117, 1121-22 (1982)).

¹⁴ *Id.* at 11 (citing Decision No. C09-1446 issued on December 24, 2009 in Proceeding No. 09AL-299E at 9 (¶ 23)).

¹⁵ *Id.* at 12.

interest in an issue implicated by governmental action.¹⁶ Because ratepayers do not “have any right to utility service at current rates,” Black Hills ratepayers do not have a due process right to notice and an opportunity to be heard concerning the revised advice letter.¹⁷ Black Hills concludes that “while it may be customary and appropriate to provide customers with notice of and an opportunity to participate in rate review proceedings, either through the public notice hearings or the evidentiary hearings, customers do not have any special entitlement to such notice under due process of law.”¹⁸

22. Finally, Black Hills asserts that its agreement to accept “a revenue requirement that is no greater than the revenue requirement originally filed with its February 1, 2019 advice letter filing. . . . has resolved any potential notice issue.”¹⁹ As support, Black Hills states that

the notice provided to the Company’s customers as to how the February 1, 2019 advice letter filing would affect their rates and services is still accurate in all respects. The Company’s agreement to cap the originally stated revenue requirement and to accept rates no greater than the rates as filed eliminates any increase to filed rates to customers from the Company’s Revised Revenue Requirement Study. Any additional customer notice that the Company could provide regarding rate or bill impacts would only operate to foster customer confusion. The notice originally issued to customers stated that final rates may be greater or less than those filed. Any subsequent notice would provide the same guidance.²⁰

23. In addition, Black Hills asserts that the Commission has the legal authority to accept Black Hills’ agreement to cap the revenue requirement at the level of the original Advice Letter “even if the Commission were to determine that a greater revenue requirement is just and

¹⁶ *Id.* at 14 (citing *Denver Welfare Rights Organization v. PUC*, 547 P.2d 239, 190 Colo. 329 (1976) (citations omitted)).

¹⁷ *Id.* (citing *Public Service Co. of Colorado v. PUC*, 653 P.2d 1117, 1121 (1982)).

¹⁸ *Id.*

¹⁹ *Id.* at 16.

²⁰ *Id.* at 16.

reasonable.”²¹ The Commission’s requirement to approve “just and reasonable rates” affords the Commission wide latitude. According to Black Hills, the only limit on that latitude is that rates cannot extend “into the forbidden reaches of confiscation.”²² Because the cap agreed to by Black Hills will not result in confiscatory rates (and even if it did Black Hills has agreed to waive any right to avoid such prejudice), and the Commission does not otherwise have the legal authority to dismiss a rate filing after it has been suspended, the Commission has no choice but to accept the Second Amended Advice Letter and proceed on in this proceeding.²³

c. Schedule

24. Based on its Second Amended Advice Letter with an effective date (after suspensions) of December 1, 2019, Black Hills proposes the following schedule:

<u>Event</u>	<u>Date</u>
Revised, Supplemental, and Corrected Direct testimony	May 17, 2019
Answer Testimony	June 14, 2019
Rebuttal and Cross-Answer Testimony	July 12, 2019
Hearing	August 5-9, 12, 2019
Statements of Position	August 29, 2019
End of Suspension Period	November 30, 2019

25. Black Hills is proposing a sixth day of the hearing for August 12 “based on the Company’s expectation that one or more intervenor witnesses will be unavailable the week of August 5.”²⁴

²¹ *Id.* at 17.

²² *Id.* at 18 (citing *PUC v. Northwest Water Corporation*, 451 P.2d 266, 276 (1969)).

²³ *Id.* at 18-19.

²⁴ *Id.* at 5-6.

26. While Black Hills stated that it would file its revised, supplemental, corrected direct testimony by May 17, 2019, it did not do so until May 20, 2019.

2. Intervenor Who Filed Briefs

a. The Commission's Authority to Permanently Suspend the Proposed Rates and Tariff Sheets and Dismiss the Proceeding

27. In their briefs, Staff, BGVA, Vail, and EOC followed the ALJ's instructions and did not explicitly address whether the Commission has the authority to permanently suspend the operative Advice Letter and dismiss the proceeding. However, Staff, BGVA, and Vail argue for the dismissal of the proceeding, at least in part, which necessarily implies that the Commission has the authority to do so.²⁵ EOC did not address the issue of permanent suspension and dismissal, instead arguing that: (a) re-noticing of the Second Amended Advice Letter No. 1 and Second Amended Tariff Sheets is required; (b) allowing the proceeding to go forward as proposed by Black Hills will lead to the filing of a new Phase I rate case by Black Hills to recover the \$996,324 in costs foregone by Black Hills in this proceeding; and (c) it is uncertain how the cap proposed by Black Hills will impact the Phase II portion of this proceeding.²⁶

28. Like Black Hills, the OCC explicitly addresses the Commission's authority to permanently suspend the proposed rates and tariff sheets and to dismiss the proceeding. Specifically, the OCC cites Decision No. C18-0820 issued in Proceeding No. 17AL-0649E. In that decision, the Commission permanently suspended the rates and tariff sheets proposed by Public Service Company of Colorado (PSCo) after PSCo made significant changes to its revenue requirement and rates contained in the original advice letter and tariff sheets suspended by the

²⁵ Staff's Brief at 6, 26; Vail's Brief at 4; BGVA's Brief at 2-3.

²⁶ EOC's Brief at 2-3.

Commission.²⁷ The OCC concludes that the Commission has the authority to permanently suspend the rates and tariff sheets proposed by Black Hills without holding a hearing.

b. Additional Notice

29. All of the intervening parties that filed briefs agree that additional notice of the Second Amended Advice Letter and Second Amended Tariff Sheets is required. Staff agrees with Black Hills that there is no Constitutional due process requirement for notice and a hearing (albeit for different reasons), but disagrees that additional notice is not required under § 40-3-104, C.R.S.²⁸ The OCC does not address the due process question, but agrees with Staff that notice of the Second Amended Advice Letter and Second Amended Tariff Sheets is required under § 40-3-104, C.R.S.²⁹ The OCC also disagrees with Black Hills' argument that the purpose of § 40-3-104(1)(c), C.R.S., is to allow members of the public to provide information to the Commission concerning whether the proposed rates and tariff sheets should be suspended pursuant to § 40-3-111, C.R.S.³⁰ The EOC believes that due process does require additional notice, but does not address the statutory-based notice argument.³¹ Finally, BGVA and Vail agree that additional notice is required, but do not address the underlying basis for their argument in any detail.³²

c. Schedule

30. EOC, BGVA, and Vail did not propose schedules in their briefs. Instead, Vail states that if re-noticing is not ordered by the ALJ, "the dates [Black Hills] suggested are likely to

²⁷ Decision No. C18-0280 issued in Proceeding No. 17AL-0649E on April 26, 2018.

²⁸ Staff's Brief at 6-11.

²⁹ OCC's Brief at 5-7.

³⁰ *Id.* at 7-9.

³¹ EOC's Brief at 2.

³² *See* BGVA's Brief at 2-3; Vail's Brief at 2-3.

be acceptable to [Vail].”³³ And, BGVA states that it will “cooperate with counsel regarding scheduling following the establishment of an appropriate extension.”³⁴

31. On the other hand, Staff and the OCC proposed schedules in their briefs. Those proposed schedules, are juxtaposed with Black Hills’ proposed schedule below:

<u>Event</u>	<u>Black Hills’ Proposed Dates</u>	<u>Staff’s Proposed Dates</u>	<u>OCC’s Proposed Dates</u>
Effective Date of Amended Advice Letter	May 5, 2019	May 30, 2019	May 5, 2019
Supplemental Direct Testimony	May 17, 2019	May 24, 2019 (with Re-Notice)	May 17, 2019
End of Notice Period	N/A	June 24, 2019	10 days after Notice
Answer Testimony	June 14, 2019	July 22, 2019	June 21, 2019
Rebuttal Testimony	July 12, 2019	August 12, 2019	July 19, 2019
Hearing	August 5-9, 12, 2019	September 9-13, 2019	August 5-9, 12, 2019
Statements of Position	August 29, 2019	September 27, 2019	August 28, 2019
End of Suspension Period	November 30, 2019	December 26, 2019	November 30, 2019

32. Because they agree on the effective date of the Second Amended Advice Letter and Second Amended Tariff Sheets, there is significant consistency between Black Hills’ and the OCC’s schedules. In contrast, the differences between the schedules proposed by Black Hills and Staff are driven by the fact that Staff proposes an effective date of a new proposed amended advice letter and tariff sheets that is 25 days later than the effective date proposed by Black Hills.

³³ Vail’s Brief at 4.

³⁴ BGVA’s Brief at 3.

D. Analysis

1. Additional Notice

33. The parties offer fundamentally different views of the notice requirements in this proceeding. As noted above, Black Hills asserts that neither due process nor § 40-3-104, C.R.S., requires additional notice. With the exception of Staff and the OCC, the intervenors disagree, arguing that Constitutional procedural due process and § 40-3-104, C.R.S., require additional notice. Staff and the OCC agree with the other intervenors that additional notice is required by § 40-3-104, C.R.S., but not pursuant to procedural due process.

34. The ALJ concludes that additional notice of the Revised Revenue Requirement Study and its impact on rates presented by Black Hills for “illustrative purposes” is unnecessary. As an initial matter, the Colorado Supreme Court has held that “[w]here an administrative or municipal agency is acting in a quasi-legislative rather than a quasi-judicial capacity, there is no constitutional requirement for notice and a hearing.”³⁵ Because the Commission acts in a quasi-legislative capacity in rate cases,³⁶ there is no Constitutionally-derived due process right to notice and a hearing in a rate-setting proceeding. Accordingly, there is no Constitutional procedural due process right to additional notice of the Revised Revenue Requirement Study or its impact on rates in this proceeding.³⁷

³⁵ *Cottrell v. Denver*, 636 P.2d 703, 710 (Colo. 1981).

³⁶ *See id.* (“Rate-making is essentially a legislative function.”). *See also CF&I Steel, L.P. v. PUC*, 949 P.2d 577, 584 (rate setting is a legislative function which involves many questions of judgment and discretion”); *Colorado Ute Electric Association, Inc. v. P.U.C.*, 602 P.2d 861 (Colo. 1979) (“As this Court has repeatedly emphasized, rate-making is not an exact science, but a legislative function involving many questions of judgment and discretion.”).

³⁷ *See Cottrell*, 636 P.2d at 710.

35. Instead, the right to notice and a hearing is governed by § 40-3-104, C.R.S.

Section 40-3-104(c)(II) states that a notice:

shall be sufficient if it states the total dollar amount sought to be raised by such increased rates or other changes and, if determinable at the time of filing, the average monthly increase, by dollar amount or percentage, to customers served under residential and small business tariffs; states the effective date or dates thereof; contains a general description of the types of services to be affected thereby; informs affected customers, other than residential and small business customers, where they may call to obtain information during the thirty-day period prior to the effective date of the proposed increases or changes concerning how such increases or changes will affect them; and includes the telephone number and address of the commission with instructions regarding the registration of a protest to the proposed increases or changes. Proof of additional notice shall be filed by the public utility with the commission.

Here, the notice that issued at the outset of this proceeding identified the total dollar amount sought to be raised by the proposed increased rates and other changes (\$2,463,363) and included, among other things, the bill impacts resulting from the identified increase in the revenue requirement on the average residential and small commercial classes of customers. No party contends that the original customer notice was deficient in any way. Given Black Hills' commitment to cap its increase in the revenue requirement at the increase identified in the original notice (\$2,463,363), and not to seek in this proceeding the additional \$996,324 identified in the revised revenue requirement, it is not clear what Intervenors believe must be included in a new notice.

36. In addition, intervenors seemingly agree that the purpose of any additional notice would be to give ratepayers the opportunity to intervene in this proceeding based on the change in the revised revenue requirement study.³⁸ However, while the \$996,324 "illustrative" increase in the revenue requirement is not insignificant, the revised, supplemental, and corrected

³⁸ See Staff's Brief at 9-10; OCC's Brief at 11-12; BGVA's Brief at 2; Vail's Brief at 2.

testimony filed by Black Hills on May 20, 2019 reveals that *only* the “illustrative” volumetric rates (following Black Hills’ proposed mitigation) for the residential class of customers would increase as a result of the \$996,324 increase from the levels initially proposed in the revenue requirement. Due to Black Hills’ mitigation strategy, neither the volumetric rates nor the other charges for the other proposed rate classes (small commercial, large commercial, and seasonal/irrigation) would increase from the levels initially proposed at the outset of this proceeding if the “illustrative” rates were put into effect.³⁹ Specifically, pursuant to its mitigation strategy, Black Hills almost eliminated a revenue decrease for the small commercial, large commercial, and seasonal/irrigation classes to offset a reduction of the revenue increase for the residential class, both of which resulted from the allocation of functionally classified costs to the customer classes. Notably, the OCC is a party in this proceeding, is representing, among others, the residential class of ratepayers⁴⁰ and has not disclaimed representation of any interest or otherwise limited its representation of the interests it is statutorily mandated to represent.⁴¹ Accordingly, even if the rates identified by Black Hills for “illustrative” purposes were put into effect, additional notice would be unnecessary in this proceeding for the purpose of giving ratepayers who are not already parties to, or represented in, this proceeding the opportunity to intervene.⁴²

³⁹ Compare Direct Testimony of Thomas J. Sullivan, Attach. TJS-5 with Supplemental Direct Testimony of Thomas J. Sullivan, Attach. TJS-6.

⁴⁰ See § 40-6.5-104(1), C.R.S. (the OCC must “represent the public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers.”).

⁴¹ See § 40-6.5-104(2), C.R.S. (“[i]f the consumer counsel determines that there may be inconsistent interests among the various classes of the consumers he represents in a particular matter, he may choose to represent one of the interests or to represent no interest.”).

⁴² See *Greene v. Lindsey*, 456 U.S. 444, 451 (1982) (“In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, ‘its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.’”) (quoting *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)).

37. Finally, it is not unusual for changes to occur in the revenue requirement sought by a utility during the course of a proceeding. While the Intervenors seemingly agree that a change in a revenue requirement must be material before the obligation to re-notice is triggered,⁴³ no party has identified the threshold level of material change that triggers the re-noticing obligation.⁴⁴ Similarly, no party has adequately explained why under the circumstances of this proceeding in which Black Hills has committed to capping its increase in the revenue requirement at the increase identified in the original notice (\$2,463,363), new notice of the Revised Revenue Requirement Study and its impact on rates is necessary. Accordingly, Intervenors have not provided a compelling reason that re-noticing is required in this case based on the revised revenue requirement and the “illustrative” resulting rates.

38. Commission Decision No. C18-0280 does not mandate a different result, as suggested by the Intervenors. In that proceeding, PSCo filed an advice letter seeking a general rate schedule adjustment (GRSA) pursuant to a multi-year plan (MYP) using future test years (FTYs) covering the four calendar years 2018 through 2021. However, the advice letter that was noticed included only the GRSA for 2018. Soon after the Commission established a schedule for the proceeding, President Trump signed the Tax Cut and Jobs Act of 2017, which, among other things, reduced the corporate tax rate from 35 percent to 21 percent. Because the reduction in the corporate tax rate eliminated the 2018 revenue requirement, PSCo proposed to remove the 2018 FTY, 2018 revenue requirement, and 2018 GRSA from the proceeding and not seek any additional revenue for 2018. Thus, PSCo removed from the proceeding the only rate increase

⁴³ See Staff’s Brief at 11-12; OCC’s Brief at 3,4,6; BGVA’s Brief at 2-3; Vail’s Brief at 2.

⁴⁴ See, e.g., Staff’s Brief at 12 (“There is no bright line rule as to materiality when it comes to re-noticing.”).

identified in the notice (the 2018 GRSA). Moreover, PSCo requested to add over \$1 billion in costs of the Rush Creek Wind Project to the proceeding, even though PSCo had stated in its initial filing that it would not seek those costs in the proceeding. Under these circumstances, the Commission held that PSCo's proposals created insoluble notice problems and permanently suspended the advice letter and tariff sheets and dismissed the proceeding.

39. Here, in contrast, Black Hills has not requested to withdraw from the proceeding the revenue increases resulting in the bill impacts included in the customer notice. In addition, like PSCo, Black Hills is seeking to add costs to the revenue requirement study. However, Black Hills' additional costs are only a fraction of the costs PSCo sought to add. Finally, while PSCo sought to recover additional revenue requirement with the \$1 billion in costs it sought to add to its proceeding, Black Hills has stated that it will not seek to recover the \$1 million in extra revenue requirement it has added to the Revised Revenue Requirement Study. Accordingly, Decision No. C18-0280 is distinguishable on its facts and does not require permanent suspension of Black Hills' Second Amended Advice Letter and Second Amended Tariff Sheets and dismissal of this proceeding.

40. For the foregoing reasons, the ALJ concludes that, under the particular circumstances present here, additional notice of the Third Amended Advice Letter and Third Amended Tariff Sheets, and/or the changes in the Revised Revenue Requirement Study and its "illustrative" impact on rates, is unnecessary under § 40-3-104(c)(II), C.R.S., or Constitutional due process.

2. Schedule

41. Based on the input from the parties, the ALJ adopts the following schedule:

<u>Event</u>	<u>Date</u>
Revised, Supplemental, and Corrected Direct testimony	May 20, 2019
Answer Testimony	June 28, 2019
Rebuttal and Cross-Answer Testimony	July 19, 2019
Corrected Testimony and Exhibits	July 24, 2019
Prehearing Motions	July 24, 2019
Responses to Prehearing Motions	July 29, 2019
Stipulation(s) or Settlement Agreement(s)	July 31, 2019
Witness Order and Cross-Examination Matrix	July 31, 2019
Hearing	August 5-9, 12, 2019
Statements of Position (SOPs)	August 29, 2019
End of Suspension Period	November 30, 2019

42. The schedule is somewhat compressed due to the delay caused by Black Hills revisions to the revenue requirement study. The schedule leaves the ALJ less than 30 days to issue the Recommended Decision following receipt of SOPs. That is an ambitious schedule under a “regular” rate Phase 1 or Phase 2 rate case, much less a combined Phase 1 and 2 rate case like this one. In addition, it is likely that there will need to be one or two technical conferences between the receipt of the SOPs and the issuance of the recommended decision to run the models employed in this proceeding based on different assumptions. This fact makes the above schedule even more challenging.

43. If Black Hills files a third amended advice letter and tariff sheets that results in an effective date (after suspensions) of December 21, 2019, the following schedule would apply:

<u>Event</u>	<u>Date</u>
Revised, Supplemental, and Corrected Direct testimony	May 20, 2019
Answer Testimony	June 28, 2019
Rebuttal and Cross-Answer Testimony	July 19, 2019
Corrected Testimony and Exhibits	July 24, 2019
Prehearing Motions	July 24, 2019
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Witness Order and Cross-Examination Matrix	July 31, 2019
Hearing	August 5-9, 12, 2019
Statements of Position (SOPs)	August 29, 2019
End of Suspension Period	December 20, 2019

44. Black Hills shall have until June 14, 2019 to file the third amended advice and letter noted above that results in an effective date (after suspensions) of December 21, 2019. Black Hills is not required to do so, but if it does, the schedule in paragraph 43 shall control this proceeding. If Black Hills chooses not to file a third amended advice letter and tariff sheets, the schedule in paragraph 41 shall apply.

3. Original Revenue Requirement Versus Revised Revenue Requirement

45. The revenue requirement study serves as the foundation for any rate case. As such, the intervenors in a rate case frame their counterarguments and counterproposals around

the utility's revenue requirement study, and the Commission then bases its decision on the study. While a utility rarely, if ever, receives all of the revenue it initially sought in the advice letter, the revenue requirement study serves as the foundation for the Commission's determination of the rates that are just and reasonable.

46. Here, the original revenue requirement study is incorrect insofar as it does not include almost \$1 million in revenue required by Black Hills. The revised revenue requirement allegedly corrects the errors in the original revenue requirement study. The ALJ is concerned about the Commission's ability to determine just and reasonable rates at the end of this proceeding if the parties focus their analysis on the admittedly incorrect original revenue requirement study. As a result, the ALJ advises the parties to this proceeding not to ignore the revised revenue requirement study in their analyses.

4. The OCC's Request for a 2018 Calendar-Year HTY

47. As noted above, Black Hills Revenue Requirement Study is based on an HTY ending on June 30, 2018 with *pro forma* adjustments through December 31, 2018. The OCC requests that the ALJ order Black Hills to produce a 2018 calendar-year HTY for use in this proceeding.⁴⁵ The OCC has not, however, made a compelling argument that the HTY ending on June 30, 2018 with *pro forma* adjustments through the end of 2018 is "stale" or otherwise inappropriate to use as the basis for setting rates in this proceeding.

48. Moreover, the proceedings identified by the OCC in which the Commission ordered a utility to produce an informational HTY involved revenue requirements based on MYP's using FTYs.⁴⁶ At least one of the reasons the Commission ordered the utility to file

⁴⁵ OCC's Brief at 13-16.

⁴⁶ *Id.* at 13.

informational HTYs in those proceedings was so they could be employed in the event the Commission rejected the use of the proposed MYPs based on FTYs. Here, in contrast, Black Hills has based its proposed revenue requirement on an HTY, not an MYP using FTYs. As a result, the Commission decisions cited by the OCC do not provide justification for ordering Black Hills to produce an informational 2018 calendar-year HTY. To the extent Black Hills does not adequately answer discovery seeking information that would allow the OCC to create its own 2018 calendar-year HTY or to investigate the *pro forma* adjustments made by Black Hills to its HTY ending on June 30, 2018, the OCC can file a motion to compel.⁴⁷

5. Motions to Strike

49. The ALJ has accepted Black Hills' Revised, Corrected, and Supplemental Direct Testimony and Attachments and has not ordered Black Hills to provide an informational 2018 calendar-year HTY. Accordingly, Staff's Motion to Strike is denied and Black Hills' Motion to Strike is denied-as-moot.

II. ORDER

A. It Is Ordered That:

1. For the reasons stated above, the pre- and post-hearing schedule established in Decision No. R19-0351-I that issued on April 19, 2019 is vacated and the pre- and post-hearing schedule stated in paragraph 41 is adopted.

2. If Black Hills Colorado Gas, Inc. (Black Hills) files by June 14, 2019 a third amended advice letter and third amended tariff sheets that results in an effective date (after suspensions) of December 21, 2019, the pre- and post-hearing schedule in paragraph 43 shall be adopted, and the pre- and post-hearing schedule in paragraph 40 shall be vacated.

⁴⁷ *Id.* at 15.

3. The evidentiary hearing in this proceeding currently scheduled for June 10 through 13 and 17, 2019 is vacated and reset as follows:

DATES: August 5 through 9 and 12, 2019
TIMES: August 5, 6, 8, 9, and 12, 2019 – 9:00 a.m.;
August 7, 2019 – to be determined⁴⁸
PLACES: August 5 through 9, 2019

Commission Hearing Room A
1560 Broadway, 2nd Floor
Denver, Colorado

August 12, 2019
Commission Hearing Room B
1560 Broadway, 2nd Floor
Denver, Colorado

4. The request by the Office of Consumer Counsel (OCC) for a decision ordering Black Hills to file an informational 2018 calendar-year historic test year is denied.

5. The Motion to Strike a Portion of the OCC's Brief or, in the Alternative, a Motion for Leave to Respond and Request for Waiver of Response Time filed by Black Hills on May 15, 2019 is denied-as-moot.

6. The Motion to Strike, or in the Alternative, Stay Black Hills' Revised, Corrected, and Supplemental Direct Testimony and Attachments filed by Staff of the Public Utilities Commission on May 22, 2019 is denied.

⁴⁸ The hearing on August 7, 2019 shall commence after the completion of the Commissioners' Weekly Meeting.

7. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director