

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
GRANTING-IN-PART AND DENYING-IN-PART
STAFF’S MOTION TO COMPEL AND DENYING STAFF’S
MOTION FOR LEAVE TO FILE REPLY BRIEF**

Mailed Date: August 1, 2019

I. STATEMENT

A. Background

1. On July 18, 2019, Staff of the Public Utilities Commission (Staff) filed a Motion to Compel Black Hills Colorado Gas, Inc. (Black Hills Colorado) to Produce Documents in Response to Staff’s Thirty-Eighth Set of Data Requests and to Shorten Response Time (Motion to Compel). Specifically, Staff requested an order compelling Black Hills Colorado to produce the following documents: (a) documents related to a presentation made to the Board of Directors of Black Hills Corporation (BHC) by Karen Beachy, who is the Vice President of Growth and

Strategy for Black Hills Service Company, LLC, that is “referenced in the BHC Board of Director meeting minutes for January 29-30, 2019” (Data Request CPUC 38-1) (Beachy Presentation);¹ (b) BHC’s 2018-2023 strategic plan that is “referenced in the BHC Board of Director meeting minutes for January 29-30, 2019” (Data Request CPUC 38-3) (2018-2023 Strategic Plan);² (c) BHC’s 2018-2022 strategic plan that is “referenced in the BHC Board of Director meeting minutes for January 23-24, 2019” (Data Request CPUC 38-4) (2018-2022 Strategic Plan);³ and (d) documents related to an analysis undertaken by Deloitte and Touche regarding “income tax positions and strategies associated with the partnership restructuring employed for purposes of accomplishing the Colorado has utility consolidation” “referenced in the BHC Audit Committee meeting minutes for August 6, 2018” (Data Request CPUC 38-5) (Deloitte and Touche Analysis).⁴ Staff also requested that the response time to the Motion to Compel be shortened to seven days.

2. On July 19, 2019, the Office of Consumer Counsel filed its response to the Motion to Compel stating that it supports the Motion to Compel.

3. Later on July 19, 2019, ALJ G. Harris Adams issued Decision No. R19-0613-I in the absence of the undersigned ALG granting Staff’s request to shorten response time to the Motion to Compel to seven days.

4. On July 26, 2019, Black Hills Colorado filed its Response to the Motion to Compel (Response). In its Response, Black Hills Colorado argues that Staff has not established that : (a) the requested documents are relevant to one or more of the disputes in this proceeding,

¹ Response to Motion to Compel at 4-5 (¶ 7).

² *Id.* at 5 (¶ 7).

³ *Id.*

⁴ *Id.*

good cause to justify compelling their production because they are relevant to the subject matter of this proceeding, or are reasonably calculated to lead to the discovery of admissible evidence, all pursuant to C.R.C.P. 26(b)(1); (b) the requested documents are in the custody or control of Black Hills Colorado pursuant to C.R.C.P. 34(a); and (c) that the Deloitte and Touche Analysis is not protected by the attorney-client and work product privileges or should otherwise be produced.

5. On July 31, 2019, Staff filed a Motion for Leave to File Response to Black Hills Colorado's Reply to Staff's Motion to Compel (Motion for Leave).

B. Analysis

1. The Beachy Presentation, 2018-2023 Strategic Plan, and 2018-2022 Strategic Plan

6. Generally, Rule 1405 of the Rules of Practice and Procedure⁵ governs discovery in Commission proceedings.⁶ That rule incorporates by reference specific provisions of the discovery rules found at Rules 26 through 37 of the Colorado Rules of Civil Procedure (C.R.C.P.). Under Rule 26, a party “may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party.”⁷ “Relevance” under Rule 26 has been interpreted “very broad[ly].”⁸ It “is not equivalent to the standard for admissibility of evidence at trial.”⁹

7. Here, Staff has established the relevance of the Beachy Presentation, 2018-2023 Strategic Plan, and 2018-2022 Strategic Plan. Specifically, Staff states that BHC

⁵ 4 *Code of Colorado Regulations* (CCR) 723-1

⁶ The Commission may modify the discovery deadlines and procedures in Rule 1405, 4 CCR 723-1.

⁷ C.R.C.P. 26(b)(1) (2012).

⁸ *Sewell v. Public Service Company of Colorado*, 832 P.2d 994, 999 (Colo. App. 1991).

⁹ *Williams v. District Court*, 866 P.2d 908, 911 (Colo. 1993).

makes important decisions for BH Colorado, including the debt allocated to BH Colorado, the cost of debt for BH Colorado, the proxy companies for determining employee salaries for BH Colorado, the timing of BH Colorado rate cases, mergers and acquisitions that may affect Colorado gas utility customers, and other strategies for its regulated Colorado subsidiaries, including efforts to consolidate utilities and/or rate areas.¹⁰

The issues noted by Staff in its Motion to Compel have been raised and are disputed in this proceeding. Black Hills Colorado does not argue otherwise.

8. Further, Black Hills Colorado does not contend that the Beachy Presentation, 2018-2023 Strategic Plan and 2018-2022 Strategic Plan do not address the issues identified by Staff. Instead, Black Hills Colorado asserts that such information is presented in the documents at such a high level as to be of little to no use to Staff in this proceeding and the documents will not be admissible at the hearing because no witness has personal knowledge of them.¹¹ Black Hills Colorado also asserts that it has produced in this proceeding more specific and thus relevant information on these topics than is contained in the Beachy Presentation, 2018-2023 Strategic Plan, and 2018-2022 Strategic Plan.¹² These arguments do not establish, however, that the information contained in these documents is not relevant.¹³

9. Finally, Black Hills Colorado contends that the Beachy Presentation, 2018-2023 Strategic Plan, and 2018-2022 Strategic Plan are not in its possession, custody, or control, as required by C.R.C.P. 34(a). Instead, according to Black Hills Colorado, these documents are “within BHC’s exclusive possession, custody or control.”¹⁴ Notably, Black Hills Colorado does not state that it has requested the documents sought by Staff from BHC and BHC has refused to

¹⁰ Motion to Compel at 5.

¹¹ See, e.g., Response at 6 (¶ 10), 13 (¶ 21).

¹² See *id.* at 14-16 (¶¶ 23-29).

¹³ See *Sewell*, 832 P.2d at 999; C.R.C.P. 26(b)(1) (“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”) (2012).

¹⁴ Response at 9 (¶ 15).

provide them to Black Hills Colorado, which would be an interesting position for “a holding company that has no employees” but wholly owns the requesting public utility to take in a rate case.¹⁵

10. Accordingly, based on the foregoing, Staff has established that the Motion should be granted with respect to the Beachy Presentation, 2018-2023 Strategic Plan, and 2018-2022 Strategic Plan.

2. Deloitte and Touche Analysis

11. The attorney-client privilege is codified in Colorado by statute and operates to protect communications between attorney and client relating to legal advice.¹⁶ The work product doctrine provides that materials “prepared in anticipation of litigation or for trial” are discoverable “only upon a showing that the party seeking discovery has substantial need of the materials . . . and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”¹⁷ The burden of establishing the applicability of the attorney-client privilege or the work-product doctrine rests with the claimant of the privilege or doctrine.¹⁸ Once that is established, the burden shifts to the party seeking the information to prove that the privilege has been waived or that it has “substantial need of the materials” protected by the doctrine “and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”¹⁹

¹⁵ *Id. Cf.* Response at 9 (¶ 15) (“Black Hills Colorado may certainly request such documents from BHC, [but] BHC’s potential voluntary decision to produce information to Staff requests does not satisfy the legal requirements of C.R.C.P. 34(a)(1).”).

¹⁶ *See Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

¹⁷ C.R.C.P. 26(b)(3) (2012).

¹⁸ *City of Fort Morgan v. E. Colo. Publ’g Co.*, 240 P.3d 481, 486 (Colo. App. 2010).

¹⁹ *Lazar v. Riggs*, 79 P.3d 105, 110 (Colo. 2003); *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462, 467 (Colo. App. 2003).

12. Here, Black Hills Colorado has carried its burden of establishing that the Deloitte and Touche Analysis is protected by at least the work-product doctrine. Specifically, Black Hills states:

This memo was prepared at the request of BHC's Chief Legal Officer in anticipation of BHC pursuing certain tax advantages underlying the transactions involving the former SourceGas companies, including the Colorado gas utility consolidation, and for defending BHC's position in future IRS audits and potential tax court litigation. BHC is routinely audited by the IRS and has successfully defended against IRS examination adjustments and subsequent appeals in its three most recent audits. Due to the complexity and significant dollar amount associated with the tax issues surrounding these restructuring transactions, the Company expects to have to defend its position with the IRS in an upcoming audit.²⁰

Black Hills Colorado's explanation establishes that the Deloitte and Touche Analysis was "prepared in anticipation of litigation or for trial."²¹ Staff's argument that the Deloitte and Touche Analysis is not entitled to protection under the work-product doctrine because "Deloitte and Touche is not a law firm, but a consulting company" is incorrect given Black Hills Colorado's assertion that the analysis was prepared at the direction of BHC's Chief Legal Officer.²² Black Hills Colorado has thus carried its burden of establishing that the Deloitte and Touche Analysis is protected by the work-product doctrine.

13. Staff has not carried its burden, however, of establishing that it "has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."²³ In fact, Staff does not even

²⁰ Response at 17 (¶ 32).

²¹ C.R.C.P. 26(b)(3) (2012).

²² See *Hawkins v. District Court of Fourth Judicial Dist.*, 638 P.2d 1372, 1376-1377 & n.4 (Colo. 1982) ("C.R.C.P. 26(b)(3), like Fed. R. Civ. P. 26(b)(3), draws no distinction between trial preparation materials compiled by an attorney and those prepared by some other agent of a party. . . . The significance of documents, reports and statements being prepared by or under the direction of an attorney, rather than a nonattorney agent of a party, is that the attorney's participation is some indication that the materials were prepared in anticipation of litigation or for trial.").

²³ C.R.C.P. 26(b)(3) (2012).

make the argument. Accordingly, based on the foregoing, the Motion to Compel is denied as to the Deloitte and Touche analysis.

3. Sanctions

14. Staff has not carried its burden of establishing that sanctions are appropriate. For this reason, Staff's request that Black Hills Colorado be sanctioned shall be denied.

4. Staff's Motion for Leave

15. Staff's Motion for Leave does not raise any issues concerning the appropriate interpretation of C.R.C.P. 26(b) of which the ALJ was not already aware. For this reason, the Motion for Leave shall be denied.

II. ORDER

A. It is Ordered That:

1. The Motion to Compel Black Hills Colorado Gas, Inc. to Produce Documents in Response to Staff's Thirty-Eighth Set of Data Requests filed by Staff of the Commission on July 18, 2019 is granted-in-part and denied-in-part consistent with the discussion above.

2. The Motion for Leave to File Response to Black Hills Colorado Gas, Inc.'s Reply to Staff's Motion to Compel filed by Staff on July 31, 2019 is denied.

3. 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