

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0660E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR APPROVAL OF AN AMENDMENT TO ITS 2016 ELECTRIC RESOURCE PLAN CONCERNING A COMPETITIVE SOLICITATION FOR UP TO 200 MW OF RENEWABLE ENERGY AND ENERGY STORAGE.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING REVISED JOINT MOTION TO
ADOPT PROPOSED PROCEDURAL
SCHEDULE AND DISCOVERY PROCEDURES,
AND DENYING MOTION TO DISMISS**

Mailed Date: April 10, 2020

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I. STATEMENT

1. On November 22, 2019, Black Hills Colorado Electric, LLC (Black Hills or the Company) filed an Application for Approval of an Amendment to its 2016 Electric Resource Plan Concerning a Competitive Solicitation for Up to 200 MW of Renewable Energy and Energy Storage (Application). Black Hills filed the Application with an initial procedural motion

(Omnibus Motion) requesting that the Commission: (1) agree to hear this Proceeding *en banc*; (2) adopt the procedural schedule proposed within the Omnibus Motion; (3) grant all necessary waivers and variances from the Commission's Rules as set forth in the Omnibus Motion or as otherwise deemed necessary by the Commission; and (4) grant extraordinary protection for certain information the Company claims to be highly confidential.

2. The procedural history of this proceeding is set out in previous Decisions and is repeated here as necessary to put this Decision in context.

3. On February 12, 2020, by Decision No. R20-0094-I, a prehearing conference was scheduled for February 27, 2020, the requests for permissive intervention were ruled on, and the Company's Request for Highly Confidential Protection was granted. Specifically, the requests for permissive intervention filed by the Colorado Independent Energy Association (CIEA), the City of Pueblo (Pueblo), the Board of County Commissioners of Pueblo County (Pueblo County), LafargeHolcim US Inc. (Lafarge), and the Board of Water Works of Pueblo (Pueblo Water) were granted, and the request for permissive intervention filed by Western Resource Advocates was denied.

4. On February 27, 2020, the prehearing conference took place. Black Hills and Intervenors Staff of the Colorado Public Utilities Commission (Staff), the Colorado Office of Consumer Counsel (OCC), the Colorado Energy Office (CEO), CIEA, Pueblo, Pueblo County, Lafarge, and Pueblo Water (collectively, the Parties) appeared. During the prehearing conference, the ALJ granted additional time for the Parties to confer on an appropriate procedural schedule.

5. On March 6, 2020, Black Hills, the OCC, the CEO, CIEA, Pueblo, Pueblo County, Lafarge, and Pueblo Water (collectively, the Joint Movants) filed a Joint Motion to

Adopt Proposed Procedural Schedule, Discovery Procedures, and for Shortened Response Time (Initial Motion), stating that all parties except for Staff have agreed to the procedural schedule proposed in the Initial Motion.

6. On March 12, 2020, the Joint Movants filed a Revised Joint Motion to Adopt Proposed Procedural Schedule, Discovery Procedures, and for Shortened Response Time (Revised Motion), withdrawing the Initial Motion and proposing an amended procedural schedule. The Revised Motion further states that all parties except Staff have reached a consensus on the proposed procedural schedule and that Staff intends to file a response articulating its concerns.

7. On March 13, 2020, Staff filed its Motion to Dismiss and Response in Opposition to Black Hills' Revised Motion to Adopt Procedural Schedule (Motion to Dismiss).

8. On March 27, 2020, Black Hills, Pueblo, WRA and CIEA filed their Joint Response to Staff's Motion to Dismiss and Lafarge, CEO, Pueblo Water, and the OCC each filed its own Response to Staff's Motion to Dismiss (Responses to the Motion to Dismiss).

9. On April 3, 2020, Staff filed its Motion for Leave to Reply and Reply to Responses to Trial Staff's Motion to Dismiss (Motion to Reply).

10. On April 8, 2020, Black Hills filed its Notice of Waiver of Response Time (Notice). In the Notice, Black Hills states that all other parties waive response time to Staff's Motion to Reply.

II. MOTION FOR LEAVE TO REPLY

11. Rule 1308(b) reads as follows:

No response may be filed to an answer, response, or notice, except upon motion. Any motion for leave to file a response must demonstrate a material misrepresentation of a fact, an incorrect statement or error of law, or accident or surprise which ordinary prudence could not have guarded against. Motions for leave to file a response to applications for RRR are addressed in rule 1506.

12. Staff in its Motion to Reply, argues that Black Hills in its Response states that Staff and other intervenors will have a full opportunity to vet Black Hills' modeling under the proposed procedural framework. Staff claims that this is "materially and demonstrably false, and a serious misrepresentation of the opportunity Staff and other intervenors will have to examine the Company's proposal under the Company's preferred procedural schedule"¹

13. The ALJ construes Staff's argument to be that Black Hills (and every other intervenor) by taking a contrary position to Staff's argument that the proposed procedural schedule is a violation of due process, is making a material misrepresentation of fact.

14. Taking a contrary position is not a material misrepresentation of fact. Whether the proposed procedural schedule is a violation of the parties' due process rights is the question before the ALJ.

15. Failing to "demonstrate a material misrepresentation of a fact, an incorrect statement or error of law, or accident or surprise which ordinary prudence could not have guarded against," the Motion to Reply is denied.

¹ Staff's Motion for Leave to Reply and Reply to Responses to Trial Staff's Motion to Dismiss, pp. 1-2.

III. MOTION TO DISMISS

16. In its Motion to Dismiss, Staff argues that this proceeding should be dismissed because the proceeding is actually an Interim Electric Resource Plan as opposed to an Amendment to the existing Electric Resource Plan (ERP) and they (and all other parties) will be deprived of their due process rights. Staff claims that as filed, the Commission will not be able to make a finding that Black Hills' proposal is in the public interest.

17. Staff continues that Black Hills must address the mandates of § 40-3.2-106, C.R.S., and that Black Hills must update the costs of generic generation units.

18. In each of the Responses to the Motion to Dismiss, the parties refute the claims made by Staff.

19. All other parties state that no due process rights are being deprived to any party. All other parties agree the proper place to determine if the application is in the public interest is through a hearing, not prior to the hearing. They all agree that Black Hills has agreed to update the costs of generic generation costs and address § 40-3.2-106, C.R.S.

20. Most importantly, each party in their Response to the Motion to Dismiss, point out that this application, if approved, will lower costs to Black Hills ratepayers and also lower carbon emissions. Each party argues that to dismiss this application at this point would be contrary to the public interest.

21. Staff never really explains what due process rights they are being deprived of in their Motion to Dismiss. The three times Staff mentions due process are as follows.

- 1) it is increasingly apparent that this matter, filed as an Amended Electric Resource Plan, is in fact an Interim Electric Resource Plan, and **due process** (emphasis added) requires that it be treated as such. *Page 1.*

- 2) An Amended ERP proceeding as Black Hills has proposed will not provide a sufficient Phase I process to address these issues, and threatens to deprive Staff and the other intervenors of their **due process** (emphasis added) rights to a full evaluation of Black Hills' proposed resource acquisition. *Page 3*.
- 3) There are major updates and modifications to underlying costs, assumptions, and modeling. **Due process** (emphasis added) requires a thorough examination of these issues. *Page 8*.

22. According to the U.S. Supreme Court (Court), “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (Internal Citation Omitted) *Mathews v. Eldridge*, 424 U.S. 319, 333. (1976) According to the Court, “[d]ue process is not a fixed menu of procedural rights. How much process is due depends on the circumstances.” *Gilbert v. Homar*, 520 U.S. 924, 930-31, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997). The Court has further found that due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 484; *FDIC v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 1787-88, 100 L.Ed.2d 265 (1972).

23. Staff fails to explain how they will not be heard in a meaningful way or in a meaningful manner. Under the proposed schedule, no party will be deprived of the ability to be heard. Staff appears to confuse due process with the burden of proof. As all other intervenors state, if Black Hills is unable to meet their burden or allow for enough vetting for the Commission to determine if the application is in the public interest, the application will be denied. That is the purpose of the hearing.

24. Black Hills has stated that all other concerns of Staff will be addressed in supplemental testimony. If Black Hills fails to address the costs of generic generation costs and address § 40-3.2-106, C.R.S., this would be a reason for the application to be denied and properly argued during a hearing.

25. [If Black Hills meets its burden in this proceeding, then the benefits to Black Hills ratepayers in reduced rates and reduced usage of fossil fuels will be substantial. Granting the Motion to Dismiss at this stage would deprive ratepayers of potential benefits, and as some parties argue, are contrary to the public interest.

26. The Motion to Dismiss is denied.

IV. PROCEDURAL SCHEDULE

27. In the Revised Motion, the Joint Movants propose the following procedural schedule:

Supplemental Direct Testimony and 120-Day Report	June 19, 2020
Independent Evaluator Report	July 2, 2020
Answer Testimony and Response to 120-Day Report	July 16, 2020
Rebuttal and Cross-Answer Testimonies	August 3, 2020
Evidentiary Hearing	August 18 and 19, 2020
Statements of Position	August 28, 2020

28. The proposed procedural schedule is acceptable and good cause is found for its adoption. The Revised Motion will be granted.

V. ORDER

A. It Is Ordered That:

1. The Revised Joint Motion to Adopt Proposed Procedural Schedule, Discovery Procedures, and for Shortened Response Time filed by Black Hills Colorado Electric, LLC on March 12, 2020 is granted.

2. An evidentiary hearing in this matter is scheduled for the following dates, at the following time, and in the following location:

DATES: August 18 and 19, 2020
TIME: 9:00 a.m.
PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

3. The procedural schedule as stated above in paragraph 27, is adopted.

4. The Motion for Leave to Reply and Reply to Responses to Trial Staff’s Motion to Dismiss filed by Trial Staff of the Public Utilities Commission (Staff) on April 3, 2020 is denied.

5. The Motion to Dismiss and Response in Opposition to Black Hills’ Revised Motion to Adopt Procedural Schedule filed by Staff on March 13, 2020 is denied.

6. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director