

Decision No. R20-0780-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20C-0408E

IN THE MATTER OF COMMISSION TRIAL STAFF'S REQUEST FOR ISSUANCE OF A SHOW CAUSE ORDER REQUIRING BLACK HILLS COLORADO ELECTRIC LLC TO EXPLAIN WHY FILINGS HAVE NOT BEEN MADE TO COMPLY WITH DECISION NOS. C18-0326-I AND C20-0194-I IN PROCEEDING NO. 18M-0074EG, PURSUANT TO 4 C.C.R. 723-1-1302(G).

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
DISMISSING REQUEST FOR ORDER TO SHOW CAUSE**

Mailed Date: November 6, 2020

I. STATEMENT

1. On September 24, 2020, Trial Staff of the Public Utilities Commission (Staff or Trial Staff) filed its Request for Show Cause Order Against Black Hills Colorado Electric, LLC (Request). In support of the Request, Trial Staff filed an affidavit and a proposed order to show cause in accordance with Rule 1302(g) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

2. Trial Staff alleges that Black Hills Colorado Electric, LLC (Black Hills):
- a) Black Hills intentionally violated Decision No. C18-0326-I, issued in Proceeding No. 18M-0074EG, by failing to implement an April 2019 bill credit to refund protected and non-protected excess deferred federal income taxes (EDFIT) as required by the Company's approved "Plan to Implement in Rates the Cost Savings Benefits of the Tax Cuts and Jobs Act;" and

- b) Black Hills intentionally violated Decision No. C20-0194-I, issued in Proceeding No. 18M-0074EG, by failing to provide additional information as ordered.

Trial Staff requests that the proposed order to show cause it filed be issued and that injunctive remedies and civil penalties be imposed. Additional specificity to the requested relief is addressed in the affidavit of Gabe Dusenbury, Section Head - Rate Financial Analysts with the Staff of the Colorado Public Utilities Commission, filed in support of Trial Staff's request. Hearing Exhibit 101 at 10. *See* Hearing Exhibits 100 through 108.

3. This is a case of first impression applying a new streamlined show cause process of Rule 1302(g) as adopted in Proceeding No. 19R-0483ALL. Trial Staff serves the named respondent upon filing of the request, providing an opportunity for objection to the request for issuance of the proposed order. The matter is scheduled for an expedited hearing before an Administrative Law Judge (ALJ). The sole issue referred to the ALJ is a preliminary determination based on the information then available to issue the order to show cause requiring a response or dismissal of the request. Critically, this is only a preliminary determination that does not decide the merits or on any factual allegation.

4. On October 1, 2020, Director Doug Dean served Black Hills with the Commission's Order Setting Hearing and Notice of Hearing scheduling a hearing for October 26, 2020.

5. On October 8, 2020, Black Hills filed its Response to Trial Staff's Request for Show Cause Order.

6. At the scheduled time and place, the hearing was convened. Both parties appeared and participated through counsel. Trial Staff offered Hearing Exhibits 100 through 110 in support of its request.

II. DISCUSSION AND CONCLUSIONS

7. All disputed matters relate to the Commission decisions intended to ensure “that Colorado utility customers benefit from the reduction in the federal corporate incomes taxes through lower rates.” Decision No. C18-0075 in Proceeding No. 18M-0074EG issued February 1, 2018, ¶ 2.

8. The Commission expressly joined Trial Staff as a party recognizing it “will play an essential role in educating the Commission on the highly technical aspects of federal income taxes in cost of service ratemaking and in working with the utilities to develop approaches that benefit their ratepayers with relief as soon as practical. Decision No. C18-0075 at ¶ 14.

9. By Decision No. C18-0326-I, issued May 11, 2018, the Commission approved Black Hill’s Tax Cuts and Jobs Act (TCJA) Plan and ordered status reports addressing the implementation of rates. At a point after status reports without apparent progress, Staff took action. When Staff filed its request, it is uncontested that Black Hills had not implemented a bill credit to refund protected and nonprotected EDFIT as provided in the approved TCJA Plan.

10. On February 13, 2020, Black Hills filed a motion in Proceeding No. 18M-0074EG that would allow the return of non-protected EDFIT in the April 2020 billing cycle, as opposed to a four-year, amortization period. The Commission did not rule on the motion. Rather, the Commission ordered Black Hills to provide additional information regarding proposed bill credits to its customers before deciding the motion. Decision No. C20-0194-I, issued March 23, 2020. It is uncontested that as of September 22, 2020, Black Hills filed no response to Commission Decision No. C20-0194-I and that no response was filed in Proceeding No. 18M-0074EG prior to the hearing on Trial Staff’s request.

11. On September 24, 2020 (*i.e.*, shortly before the request filed by Trial Staff in this proceeding) Advice Letter No. 789 was filed in Proceeding No. 20AL-0394E providing the \$7,283,320 bill credit to be returned in December 2020 for the non-protected EDFIT. Counsel for Black Hills characterized that proceeding to provide Black Hills' response to the non-protected EDFIT issues raised in Decision No. C20-0194-I. No protest was filed in the proceeding.

12. By Decision No. C20-0747, issued October 23, 2020, the Commission acknowledged the issues raised here are closely related to matters at issue in Proceeding No. 20AL-0394E. The proposed effective date of Advice Letter No. 789 was suspended pending the outcome of this proceeding.

13. On September 24, 2020, Advice Letter No. 790 was filed in Proceeding No. 20AL-0395E providing approximately \$2 million of bill credits for years 2018 and 2019 to customers to be returned in December 2020 for the protected EDFIT. Both the Office of Consumer Counsel (OCC) and Trial Staff filed protests to Advice Letter No. 790.

14. By Decision No. C20-0748, issued October 23, 2020, the Commission acknowledged that the issues raised by Staff and the OCC with regard to Advice Letter No. 790 are closely related to Advice Letter No. 789, and as such, the resolution of this proceeding. The proposed effective date of Advice Letter No. 790 was suspended pending the outcome of this proceeding.

15. Trial Staff emphasizes that the purpose of this action is to enforce Commission decisions ensuring customers benefit from the reduction in the federal corporate incomes taxes.

16. In part, Black Hills argues that the request should be dismissed without prejudice because Staff can fully resolve the substantive matters concerning the bill credits and TCJA Plan in

pending Advice Letter proceedings. Dismissal will most efficiently result in customers receiving intended benefits.

17. Whether this action should proceed hinges on the nature of relief sought by Trial Staff and the timing of the advice letter proceedings. Before Trial Staff's pending request and prior to issuance of any civil penalty assessment notice (CPAN), Black Hills initiated two rate proceedings putting non-protected and protected EDFIT at issue.

18. The Commission found issues in Proceeding Nos. 20AL-0394E and 20AL-0395E so closely related to Staff's request that it suspended the proposed effective date of the advice letters to preserve the opportunity for relief in this proceeding. Black Hills' counsel characterizes those proceedings to encompass the substantive concerns raised by Staff.

19. Trial Staff has not, either in its filings or at hearing, addressed *when* it alleges Black Hills first violated Commission decisions. In light of the present circumstances, it is unclear why, aside from frustration with Black Hills' alleged noncompliance, Trial Staff filed its request roughly two years and four months following plan approval as opposed to any other point in time earlier or later.

20. The protected EDFIT bill credit is at issue and pending and Staff may pursue the concerns raised in its protest. Although filing an advice letter alone is not determinative of the outcome, Staff Counsel acknowledged that it is too early to know whether Staff's concerns in its protest to Advice Letter No. 790 may yet be resolved. Staff did not protest Advice Letter No. 789.

21. Trial Staff's intent to enforce the Commission's decisions regarding Black Hills' TCJA Plan can be achieved through pending proceedings. Staff's affidavit makes clear an advice letter proceeding was sought to credit TCJA-related EDFIT. The undersigned agrees with arguments of Black Hills that those advice letter proceedings are the most efficient means of

getting credits to customers. Issuing the show cause order will more likely than not delay those benefits.

22. Deciding intentionality of whether any alleged violation of Decision Nos C18-0326-I and C20-0194-I occurred is clearly outside the scope of other pending proceedings. However, the issue is not necessary, relevant, or administratively efficient to determine as proposed. **To determine whether an intentional violation has occurred in this proceeding would effectively amount to a declaratory ruling, but that is not how proposed the matter.

23. As Staff argues, a fixed utility also remains potentially subject to a civil penalty assessment for an intentional violation of a Commission decision even if that violation is subsequently cured. Staff can continue to monitor Black Hills' activity in light of actions taken in Proceeding Nos. 20AL-0394E and 20AL-0395E.¹ Dismissal preserves Staff's position while allowing for resolution and does not prohibit imposition of civil penalties now or later. § 40-7-116.5, C.R.S., and Rule 3010(a), 4 CCR 723-3 of the Commission's Rules Regulating Electric Utilities.

24. Staff retains full prosecutorial discretion to pursue civil penalties for intentional violation of a Commission decision by refileing an appropriate request or issuing a CPAN. The Director of the Commission or his or her designee has independent statutory authority to issue a

¹ Rule 1302(b) also requires the Commission to first consider any evidence concerning aggregating or mitigating circumstances prior to determining the amount of civil penalty to assess. Rule 1302(b) of the Rules of Practice and Procedure, 4 CCR 723-1. At this point, the ongoing advice letter proceedings could potentially prove either.

CPAN to a public utility apart from the show cause process. *Id.* If, in the exercise of prosecutorial discretion, Trial Staff deems it necessary, it may still pursue civil penalties in addition to any other relief sought through a subsequent request.

III. ORDER

A. It Is Ordered That:

1. The Request for Show Cause Order Against Black Hills Colorado Electric, LLC filed by Trial Staff of the Public Utilities Commission on September 24, 2020 is dismissed.²
2. This Decision is effective upon its Mailed Date.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director

² As a matter of first impression, the undersigned will expressly state this dismissal is not, and cannot be, with prejudice. This preliminary determination does not determine the merits or any factual allegation for this proceeding or any other proceeding. Rule 1302(g)(I)(E).