

Decision No. C04-1282

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-214E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS 2003 LEAST-COST RESOURCE PLAN.

DOCKET NO. 04A-215E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR AN ORDER APPROVING A REGULATORY PLAN TO SUPPORT
THE COMPANY'S 2003 LEAST-COST RESOURCE PLAN.

DOCKET NO. 04A-216E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR THE COMANCHE UNIT 3 GENERATION FACILITY.

**ORDER ON GRANTING MOTION TO STRIKE,
IN PART; SHORTENING RESPONSE TIME;
AND GRANTING REPLY TO RESPONSE**

Mailed Date: October 27, 2004
Adopted Date: October 27, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Motion to Strike Cross-Answer Testimonies of Stephen Thome, David Rhodes, John Thompson, Michael Ruffatto, James White, Steven Schleimer, and Darryl Winer (Motion to Strike) filed by Public Service Company of Colorado (Public Service or Company) on October 22, 2004. Public Service also requests that response time be shortened to noon on October 26, 2004. Responses to

the Motion to Strike were filed by the Colorado Independent Energy Association (CIEA), City of Boulder, North American Power Group, City and County of Denver, Western Resource Advocates, and Calpine Corporation (Calpine).

2. Now, being duly advised in the matter, we grant in part and deny in part, Public Service's motion, consistent with the discussion below.

3. The testimonies that Public Service seeks to strike fall into two general categories: testimony filed in response to Commission Staff (Staff) witness Sharon Podein's request for additional answer testimony in the form of cross-answer testimony; and testimony which Public Service characterizes as merely bolsterism of the other parties' answer testimony, or which is testimony that should have been filed within the deadline for filing answer testimony. As to the first group of cross-answer testimony, Public Service seeks to strike (Stephen Thome, David Rhodes, and Michael Ruffatto), the Company argues that Staff witness Ms. Podein improperly suggested in her Answer Testimony that parties should file cross-answer testimony responding to Public Service's arguments that the All-Source solicitation would not likely result in competitive firm-priced coal bids. Public Service contends that both CIEA and LS Power Associates (LS Power) acknowledged that Ms. Podein's request was improper, but felt compelled to file cross-answer testimony nonetheless, to respond to her request. In the Company's opinion, the proper procedural mechanism available to the Staff to obtain this information from other parties is through discovery, not the solicitation of cross-answer testimony. Public Service is also concerned that there is inadequate time for it to conduct discovery, probe the validity of these testimonies, and file rebuttal.

4. In response to Public Service's claims, North American Power Group argues that Mr. Ruffatto's testimony was in direct response to Staff's request in its answer testimony, not to

Public Service's direct case, and was therefore proper and should not be stricken. CIEA contends that the Motion to Strike is actually directed at Staff's answer testimony and not at Mr. Rhodes and Mr. Thome. CIEA also argues that if there ever was an issue here, Public Service, by waiting until October 22, 2004 to file its motion to strike, has waived its right to complain.

5. We agree with Public Service that Staff witness Podein's solicitation was improper. The proper procedural mechanism for Staff to collect the information it sought was for it to conduct discovery. We also agree that by its very nature, the cross-answer testimony in question goes to one of the main issues of Public Service's direct case – whether the All-Source solicitation would result in competitive firm-priced coal bids. Consequently we find that the cross-answer testimony at issue should have been filed as answer testimony, which was due on September 13, 2004. Therefore, the cross-answer testimonies of witnesses Stephen Thome, David Rhodes, and Michael Ruffatto are stricken.

6. The second group of testimonies (John Thompson, James White, Steven Schleimer, and Darryl Winer), according to Public Service, either bolster other parties' answer testimony or are simply testimony that should have been filed within the deadline for filing answer testimony.

7. Public Service contends that the testimony of Western Resource Advocates (WRA) witness John Thompson makes a very belated plug for an alternative combustion technology at Comanche 3, known as Integrated Gasification Combined Cycle (IGCC). In the Company's opinion, his testimony is very plainly in the nature of answer testimony to the technology screening and certificate of public convenience and necessity testimony filed by

Public Service on April 30, 2004 and, as such, was required to be filed by the September 13, 2004 deadline.

8. In its response, WRA asserts that the Motion to Strike is both untimely and improper. WRA contends that, even though the Answer testimony was filed on September 13, 2004, Public Service waited until four days after the filing of Cross-Answer testimony to object to Staff's request. WRA notes that this is after the parties had already taken the time and effort and incurred the expense to submit Cross-Answer testimony. WRA contends that the purpose of its IGCC testimony is to respond to Staff's critique of Public Service's choice of supercritical pulverized coal technology and the Staff's recommendation for Public Service to conduct model runs where both the supercritical and subcritical technologies are compared. According to WRA, should the Commission grant Staff's recommendation, IGCC technology should be considered as part of the model runs.

9. We deny the Motion to Strike the Cross-Answer testimony of John Thompson. We agree with WRA that the IGCC testimony of Mr. Thompson responds to a specific proposed Staff recommendation on the type of technology that could be considered for the Comanche 3 coal plant.

10. According to Public Service, the testimony of Calpine witness Steven Schleimer purports to comment on the answer testimony of witnesses Karlton Kunzie and James Ross regarding the Company's proposal to use a debt equivalence cost imputation factor in the evaluation of bids offered in response to the All-Source solicitation. However, in Public Service's opinion, Mr. Schleimer's testimony merely supports the testimony of Messrs. Kunzie and Ross, rather than refuting it. As a result, the Company contends that this testimony is not Cross-Answer testimony, but instead Answer testimony.

11. In its response, Calpine maintains that Public Service is relying on an overly restrictive test for the proper scope of Cross-Answer testimony, and that Mr. Schleimer's testimony in fact responds to, and disagrees with, the Answer testimony of Office of Consumer Counsel (OCC) witness Schechter. Calpine claims that the use of Public Service's overly restrictive test would hinder the development of a full and complete record. Calpine claims that Mr. Schleimer's testimony actually expands on certain points made by Witnesses Kunzie and Ross, rather than merely supporting their respective testimonies. Moreover, Calpine asserts that Mr. Schleimer's testimony disagrees with Dr. Schechter's testimony and that should be sufficient by itself as a reason to deny the Motion to Strike its witness' testimony.

12. Upon closer examination and review of Dr. Schechter's testimony, we disagree with Calpine's position that Mr. Schleimer's testimony refutes a position taken by Dr. Schechter. Within this case there are two different debt imputation issues: 1) the possible impact on credit ratings because of the imputation of debt associated with purchase power contracts in the calculation of the financial metrics; and 2) whether a debt imputation adjustment should be made for bid evaluation purposes. Dr. Schechter's testimony addresses the former, while Mr. Schleimer's testimony addresses the latter. Moreover, we agree with Public Service that Mr. Schleimer's testimony does not refute either Mr. Kunzie's or Mr. Ross' testimonies. The Commission will grant the Motion to Strike for Mr. Schleimer's testimony.

13. According to Public Service, the testimony of City of Boulder witness James White relates to the societal impacts of greenhouse gases as relates to global warming, an issue which the Commission has already ruled in Decision No. C04-0710 is outside the scope of this case and of the Least Cost Planning Rules. The Company concludes that on that basis alone the Commission should strike Mr. White's testimony. To further buttress its opinion, Public

Service contends that Mr. White's testimony is not responsive to any of the answer testimony of other witnesses.

14. In its response, the City of Boulder states that global warming and CO₂ emissions are clearly at issue in this docket, and inclusion of CO₂ concepts is evident in the testimony filed by Public Service and numerous intervenors in this proceeding. The City of Boulder cites the Office of Consumer Counsel Answer Testimony of Dr. Richard Rosen that discusses a possible carbon tax in the future. We note that WRA witness Neilsen's Answer testimony also addresses the issue of a possible carbon tax and how it should be accounted for in the determination of a least-cost resource plan.

15. Because Mr. White's cross-answer testimony directly responds to the testimony of several witnesses regarding the issue of a carbon tax in this proceeding, we find it relevant and therefore deny Public Service's Motion to Strike the testimony of Mr. White. The issue of a possible carbon tax and its impact on the determination of a least-cost resource plan is relevant testimony and will therefore be permitted. However, at this juncture, we find it important to remind the parties that global warming issues¹ are beyond the scope of this proceeding. We therefore instruct the parties to maintain their environmental testimony and evidence focused on the issue of a carbon tax.

16. Public Service also requests that we strike the cross-answer testimony of City and County of Denver (Denver) witness, Darryl Winer. According to Public Service, Mr. Winer's testimony simply refers to and endorses the answer testimony filed by other witnesses in these

¹ Such as whether global warming, and mankind's affect on it, have been scientifically proven. It is unquestionably beyond this Commission's purview to decide these issues.

consolidated dockets and as such constitutes “friendly” cross-answer testimony which should be stricken.

17. Denver responds that Public Service’s interpretation of the limitations on cross-answer testimony is overly restrictive and has no basis in law. Denver argues that nothing in the Commission’s Rules of Practice and Procedure or in our Decision No. C04-0836 disallow “friendly” cross-answer testimony. Denver takes the position that if Mr. Winer’s cross-answer testimony can be considered cumulative, then the amount of time necessary at hearing to cross-examine him would be minimal.

18. We are not persuaded by Denver’s arguments. Upon a review of Mr. Winer’s cross-answer testimony, we indeed find it cumulative and merely repetitive of other testimony already submitted in this matter. Given the limited time we have available for hearing, compounded by the fact that 54 witnesses have so far been identified to testify in this matter, we find that Mr. Winer’s testimony shall be stricken. We find nothing in his cross-answer testimony that adds to the proceeding. Given that it is merely supportive of other pre-filed testimony, we find that the issues discussed by Mr. Winer will be adequately addressed by other parties’ witnesses.

19. In determining the import of the cross-answer testimony at issue here, we are also cognizant of our Rule 4 *Code of Colorado Regulations* 723-1-81, which governs the admissibility of evidence and provides us with the mechanism to ensure the evidentiary record is as complete as possible. Specifically, Rule 81(b)(1) provides that:

When necessary to ascertain facts affecting substantial rights of the parties to a proceeding, the Commission may receive and consider evidence not admissible under the rules of evidence, *if the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.*

(Emphasis added)

20. We make the determinations today, regarding which testimony shall be stricken and which testimony shall remain, utilizing the standard articulated in Rule 81. In our estimation, testimony that addressed issues from Public Service's direct case, or that was cumulative or merely supported the findings of other parties' witnesses should be excluded for lack of probative value. However, when we found that the cross-answer testimony in question did possess probative value, we determined it was reasonable to allow it, despite the fact that it may not have been usually admissible under the rules of evidence.

21. In order to allow Public Service to address the two cross-answer testimonies not stricken, Messrs. Thompson and White, we order that any discovery request served by Public Service on WRA and the City of Boulder relating to these cross-answer testimonies shall be responded to within three business days. Public Service shall be allowed to orally respond to the cross-answer testimonies of Messrs. Thompson and White at hearing.

22. On October 25, 2004, LS Power filed a Motion to Strike Portions of Rebuttal Testimony and Exhibits filed by Public Service witness Karen Hyde and Request for Shortened Response Time. LS Power requests that response time be shortened to permit a decision prior to the commencement of the hearings on November 1, 2004. The Commission notes that on October 26, 2004, Public Service filed a response to the motion to strike. Within that pleading, the Company stated that, in the spirit of compromise, it was willing to strike some portions of her testimony and modify other portions. Because of the modifications to Ms. Hyde's testimony, we are unsure whether LS Power agrees that the modifications address their concerns. As a result, we will allow LS Power to file a reply to Public Service's response by noon October 29, 2004. We intend to rule on this as a preliminary matter at the start of the hearings on November 1, 2004.

II. ORDER

A. The Commission Orders That:

1. The motion of Public Service Company of Colorado to strike cross-answer testimonies of Stephen Thome, David Rhodes, Michael Ruffatto, Steven Schleimer, and Darryl Winer is granted consistent with the discussion above.

2. The motion of Public Service Company of Colorado to strike cross-answer testimonies of James White and John Thompson is denied consistent with the discussion above.

3. Both Western Resource Advocates and the City of Boulder shall respond to any discovery submitted by Public Service Company of Colorado within three business days as that discovery relates to the cross-answer testimonies of Messrs. Thompson and White, respectively.

4. Response time to the Motion to Strike Portions of Rebuttal Testimony and Exhibits of Public Service Company of Colorado Witness Karen Hyde filed by LS Power Associates is shortened to noon October 29, 2004.

5. LS Power Associates shall have until noon October 29, 2004 to file a reply to the Public Service Company of Colorado response to the LS Power Associates' Motion to Strike Portions of Rebuttal Testimony and Exhibits of Public Service Company of Colorado Witness Karen Hyde.

6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 27, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners