

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15A-0424E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP, FOR APPROVAL OF ITS ELECTRIC DEMAND SIDE MANAGEMENT (DSM) PLAN FOR PROGRAM YEARS 2016-2018 AND FOR APPROVAL OF REVISIONS TO ITS ELECTRIC DSM COST ADJUSTMENT TARIFF.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
VACATING PREHEARING CONFERENCE,
SCHEDULING EVIDENTIARY HEARING,
ESTABLISHING PROCEDURAL SCHEDULE,
ADDRESSING DISCOVERY AND OTHER
PROCEDURAL MATTERS, SHORTENING
RESPONSE TIME TO MOTIONS AND
DISCOVERY, AND CONTAINING ADVISEMENTS**

Mailed Date: August 11, 2015

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I. STATEMENT

1. On May 29, 2015, Black Hills/Colorado Electric Utility Company, LP (Black Hills, Company, or Applicant), filed a Verified Application (Application) in which the Company seeks Commission approval of its Demand Side Management (DSM) Plan for 2016, 2017, and 2018 (DSM Plan) and Commission approval of changes to the Company's Electric DSM Cost Adjustment Tariff. That filing commenced this Proceeding.

2. On June 3, 2015, the Commission issued its Notice of Application Filed (Notice). That Notice established an intervention period and contained a procedural schedule. This Interim Decision will vacate that procedural schedule.

3. On June 11, 2015, Black Hills filed an Affidavit of Publication of Additional Notice. On June 22 and 25, 2015, the Company filed proofs of publication.

4. On July 16, 2015, by Minute Order, the Commission referred this Proceeding to an Administrative Law Judge (ALJ).

5. On July 16, 2015, by Minute Order, the Commission deemed the Application to be complete within the meaning of § 40-6-109.5, C.R.S. Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1303(c).¹ On July 21, 2015, by Decision No. R15-0740-I and pursuant to § 40-6-109.5(1), C.R.S., the ALJ extended the time for Commission decision in this matter. Absent a further enlargement of time by the Commission² or Applicant's waiver of § 40-6-109.5, C.R.S., a Commission decision on the Application should issue not later than February 11, 2016.

¹ This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

² Section 40-6-109.5(4), C.R.S., allows an additional 90 days upon a finding of extraordinary circumstances.

6. The following intervened as of right or were granted permission to intervene: Board of Water Works of Pueblo, Colorado (Board); Colorado Energy Office (CEO); Colorado Office of Consumer Counsel (OCC); the Energy Efficiency Business Coalition (EEBC); Fountain Valley Authority (FVA); the Southwest Energy Efficiency Project (SWEEP); and Trial Staff of the Commission (Staff).

7. The Board, EEBC, CEO, FVA, OCC, Staff, and SWEEP, collectively, are the Intervenors; each individually is an Intervenor. Each Intervenor opposes the Application.

8. Black Hills and the Intervenors, collectively, are the Parties; each individually is a Party. Each Party is represented by legal counsel.

9. Energy Outreach Colorado (EOC) is participating in this Proceeding as an *amicus curiae*. EOC is represented by legal counsel.

A. August 10, 2015 Prehearing Conference.

10. On August 5, 2015, Applicant filed a Proposed Procedural Schedule and Discovery Procedures and Initial Positions of the Parties (August 5 Filing). In that filing, Applicant represents that all Parties agree to the content of the filing.

11. The August 5 Filing satisfactorily addresses the issues to be discussed at the August 10, 2015 prehearing conference, as identified in Decision No. R15-0740-I. As a result, the ALJ will vacate the August 10, 2015 prehearing conference.³

B. Procedural Schedule and Service Requirements.

12. The August 5 Filing contained a proposed procedural schedule, including evidentiary hearing dates, to which the Parties agreed. The ALJ will modify the proposal as

³ On August 5, 2015, by electronic mail correspondence, the ALJ informed the Parties of this ruling. This Interim Decision memorializes the ruling.

noted below. With the modification, the ALJ finds the proposed procedural schedule to be acceptable as it will permit the Commission to issue its decision on the Application not later than February 11, 2016.

13. The ALJ will adopt the following procedural schedule, including hearing dates: (a) not later than **September 4, 2015**, each Intervenor will file its answer testimony and attachments; (b) not later than **September 25, 2015**, Applicant will file its rebuttal testimony and attachments; (c) not later than **September 25, 2015**, each Intervenor will file its cross-answer testimony and attachments;⁴ (d) not later than **September 29, 2015**, each Party will file its corrected testimony and attachments;⁵ (e) not later than **September 30, 2015**, each Party will file its prehearing motions, including (without limitation) dispositive motions, motions *in limine*, and motions to strike testimony and attachments; (f) not later than **October 6, 2015**, the Parties will file any stipulation⁶ and any settlement⁷ reached;⁸ (g) not later than **October 7, 2015**, each Party will file its response to prehearing motions filed on or after September 24, 2015;⁹ (h) the evidentiary hearing will be held **October 15 and 16, 2015**; and (i) not later than **October 28, 2015**, each Party will file its post-hearing statement of position, to which (absent further order) response will not be permitted.

⁴ Cross-answer testimony responds only to answer testimony.

⁵ This is a modification made by the ALJ. The Parties proposed the filing be made on October 7, 2015.

⁶ **The Parties are advised and are on notice that** the ALJ will not admit by stipulation prefiled testimony and attachments unless they are verified (*e.g.*, accompanied by an affidavit). A stipulation of fact may be signed by counsel.

⁷ A settlement must be supported by either oral testimony or by prefiled testimony that is verified (*e.g.*, accompanied by an affidavit).

⁸ The ALJ strongly encourages the Parties to file stipulations and settlements before October 6, 2015.

⁹ The ALJ will shorten, to and including October 7, 2015, the response time to prehearing motions filed on and after September 24, 2015. Absent further order, Rule 4 CCR 723-1-1400(b) governs response time for motions filed on or before September 23, 2015.

These response times do not apply to a motion pertaining to discovery. The response time for a motion pertaining to discovery is discussed *infra*.

14. On the next business day following the filing of testimony and attachments, a Party that filed testimony and attachments will serve on all Parties the work papers pertaining to that Party's testimony and attachments filed the previous business day. As Applicant filed its direct testimony and attachments on May 29, 2015, the associated work papers will be served on Intervenor not later than August 12, 2015.

15. **The Parties are advised, and are on notice, that** absent a showing of unusual circumstances, the ALJ will not permit a Party to ask its witness, as part of the witness's oral direct testimony, to make corrections to prefiled testimony or to an attachment to prefiled testimony. The sponsoring Party must assure that all necessary corrections are prefiled in accordance with the procedural schedule and must assure that, when offered as a hearing exhibit, its witness's testimony and attachments are as prefiled, including the corrections filed pursuant to the procedural schedule.

16. With respect to all documents (including testimony and attachments) that contain confidential information¹⁰ or highly confidential information,¹¹ or both, the ALJ will order:

a) If an entire document is not confidential, each portion that contains confidential information must be clearly marked (that is, shaded),¹² and each page on which the confidential information appears must state at the top (*e.g.*, in the heading): "This page contains confidential information as shown."

¹⁰ As used in this Interim Decision, confidential information is information that a party claims is confidential and that is filed under seal with the Commission.

¹¹ As used in this Interim Decision, highly confidential information is information that the ALJ has determined, in this Proceeding, is highly confidential and that is subject to an order for extraordinary protection.

¹² As an example: This portion of the sentence is **confidential**.

b) If an entire document is not highly confidential, each portion that contains highly confidential information must be clearly marked (that is, shaded),¹³ and each page on which the highly confidential information appears must state at the top (*e.g.*, in the heading): “This page contains highly confidential information as shown.”

c) If the same page contains both confidential information *and* highly confidential information, the highly confidential information must be differentiated from the confidential information (that is, by use of different shading),¹⁴ and each page must state at the top (*e.g.*, in the heading): “This page contains highly confidential information and confidential information as shown.”

d) The public version of a document that contains confidential information or highly confidential information, or both, must have the confidential and highly confidential information redacted¹⁵ and must be marked as the public version.

e) The sponsoring Party must assure that, where possible, the page numbers and the line numbers are the same on the public version of a document, the confidential version of the document, and the highly confidential version of the document.

f) Rule 4 CCR 723-1-1100(a)(I) requires the cover page of a document to state that the document (*e.g.*, testimony and attachments) contains confidential information and to identify where in the document the confidential information is found.

¹³ As an example: This portion of the sentence is highly confidential.

¹⁴ As an example: This sentence contains both confidential information and highly confidential information.

¹⁵ As an example: This portion of the sentence is [REDACTED].

The same notice requirement applies to a document that contains highly confidential information. The Parties must comply with this Rule requirement.

C. Discovery and Related Matters.

17. Except as modified by this Interim Decision, Rule 4 CCR 723-1-1405 will govern discovery in this matter. As used in this Interim Decision, discovery refers to and includes discovery requests, data requests, and Staff audit requests.

18. Discovery requests that do not include confidential information or highly confidential information will be served by electronic mail. Discovery responses that do not include confidential information or highly confidential information will be served by electronic mail.

19. Subject to Rules 4 CCR 723-1-1100 and 723-1-1101, discovery requests and discovery responses containing confidential information will be served on each person who has signed, filed, and served an appropriate Non-Disclosure Agreement. Except as agreed by the Parties, discovery requests that include confidential information will not be served by electronic means. Except as agreed by the Parties, discovery responses that include confidential information will not be served by electronic means.

20. Parties may serve discovery on Monday through Thursday until 5:00 p.m. Mountain Time (MT) and may serve discovery on Friday until 3:00 p.m. MT. Discovery served later than these stated times will be deemed to be served on the next business day.

21. Parties may not serve discovery on days on which the Commission is not open for business (*i.e.*, Saturday, Sunday, and a Colorado state holiday). Discovery served on these days will be deemed to be served on the next business day.

22. Parties may not serve written discovery requests using the E-Filings System and may not serve written discovery responses using the E-Filings System. **The Parties are advised and are on notice that**, if the E-Filings System is used to propound written discovery, the discovery is deemed not to be served. **The Parties are advised and are on notice that**, if the E-Filings System is used to respond to written discovery, the response is deemed not to be served.

23. The ALJ will order these cut-off dates for the service of discovery requests: (a) for *discovery addressed to direct testimony and attachments*: the cut-off date is the date on which answer testimony and attachments are to be filed; (b) for *discovery addressed to answer testimony and attachments*: the cut-off date is the date on which rebuttal testimony and attachments and cross-answer testimony and attachments are to be filed; (c) for *discovery addressed to rebuttal testimony and attachments*: the cut-off date is October 2, 2015; and (d) for *discovery addressed to cross-answer testimony and exhibits*: the cut-off date is October 2, 2015.

24. The ALJ will order the following response times to discovery: (a) for *discovery addressed to direct testimony and exhibits*: response time to discovery is ten calendar days; and (b) for *discovery addressed to all other testimony and exhibits*: response time to discovery is seven calendar days.

25. The Parties will work cooperatively with one another (*e.g.*, to accommodate, where possible, requests for additional time within which to respond to discovery).

26. A motion pertaining to discovery may be filed at any time. Unless otherwise ordered, response to a motion pertaining to discovery will be written and will be filed within

*five business days of service of the motion.*¹⁶ If necessary, the ALJ will hold a hearing on a motion pertaining to discovery as soon as practicable after the motion is filed.

D. Confidential Information and Highly Confidential Information.

27. Except as modified by this Interim Decision, Rules 4 CCR 723-1-1100 and 723-1-1101 govern the treatment of confidential information (*i.e.*, information claimed to be confidential) and of information for which extraordinary protection is sought.

28. Rules 4 CCR 723-1-1101(b) and 723-1-1101(d) specify the process by which information is designated as highly confidential and extraordinary protection is granted to that highly confidential information. **The Parties are advised and are on notice that** -- and the ALJ will order that -- a party that claims that information is highly confidential must file an appropriate motion in this Proceeding to obtain a ruling that the information is highly confidential and a ruling on the extraordinary protection to be afforded to that highly confidential information. **The Parties are advised and are on notice that** -- and the ALJ will order that -- information is not highly confidential for purposes of this Proceeding unless there is a decision in this Proceeding that finds the information to be highly confidential and that establishes the extraordinary protection to be afforded to that information.¹⁷

29. A motion to designate information as highly confidential and to obtain extraordinary protection may be filed at any time. Absent further order, response to a motion to designate information as highly confidential and to obtain extraordinary protection will be written and will be filed within *three business days of service of the motion.*¹⁸ If necessary,

¹⁶ By this Interim Decision, the ALJ will shorten response time with respect to motions pertaining to discovery.

¹⁷ The extension to other proceedings of a determination that information is highly confidential, which extension is afforded by Rule 4 CCR 723-1-1100(f), is inapplicable in this Proceeding.

¹⁸ By this Interim Decision, the ALJ will shorten the response time to this type of motion.

the ALJ will hold a hearing on such a motion as soon as practicable after the motion and response are filed.

30. **The Parties are advised and are on notice that** Staff has access to all highly confidential information and to all information claimed to be confidential. A party may neither refuse to provide nor delay providing information to Staff based on a claim that the information is highly confidential or confidential.

E. Marking the Hearing Exhibits.

31. Each type of a witness's testimony and attachments (*e.g.*, direct, answer, rebuttal) will be one hearing exhibit.

32. Hearing exhibits will be marked numerically and sequentially, beginning with the number 1, irrespective of the sponsoring party.

33. Prefiled testimonies and attachments will be the first hearing exhibits and will be given hearing exhibit numbers such that all testimonies and attachments sponsored by one witness are together. As an example, assume that Applicant witness Smith prefiles direct testimony and rebuttal testimony. His testimonies and attachments will be marked as Hearing Exhibits No. 1 (direct) and No. 2 (rebuttal).

34. There may be testimony and attachments that contain confidential information or highly confidential information, or both. With respect to such testimony and attachments, **the Parties are advised and are on notice that:**

a) a witness's testimony and attachments that contain *confidential information* will be marked as Confidential Hearing Exhibit No. XXA and, at the hearing, will be in a separate and sealed envelope marked in accordance with Rule 4 CCR 723-1-1101(a)(III),

disregarding the reference to filing through the E-Filings System. The confidential information must be shaded to differentiate it from the public information;

b) a witness's testimony and attachments that contain *highly confidential information* will be marked as Highly Confidential Hearing Exhibit No. XXB and, at the hearing, will be a separate and sealed envelope marked in accordance with Rule 4 CCR 723-1-1101(a)(III), disregarding the reference to filing through the E-Filings System. The confidential information and the highly confidential information must be shaded to differentiate them from the public information and from each other;

c) if a page contains both confidential information and highly confidential information, the highly confidential information will be redacted from the page in the Confidential Hearing Exhibit No. XXA; and

d) if a page contains both confidential information and highly confidential information, the highly confidential information will be differentiated (*e.g.*, by different shading) from the confidential information in the Highly Confidential Exhibit No. XXB.

35. As an example of hearing exhibit marking, assume that Staff witness Green files answer testimony and attachments that contain both confidential information and highly confidential information and files cross-answer testimony and attachments that contain highly confidential information. Her answer testimony and attachments have one hearing exhibit number (in the example, Hearing Exhibit No. 10); the version that contains the confidential information is Confidential Hearing Exhibit No. 10A; and the version that contains both the confidential information and the highly confidential information is Highly Confidential Hearing Exhibit No. 10B. Her cross-answer testimony and attachments have one hearing exhibit number

(in the example, Hearing Exhibit No. 11); and the pages containing the highly confidential information are Highly Confidential Hearing Exhibit No. 11B.

II. ORDER

A. It Is Ordered That:

1. The prehearing conference scheduled for August 10, 2015 is vacated.
2. The evidentiary hearing in this Proceeding is scheduled for the following dates,

at the following times, and in the following location:

DATES: October 15 and 16, 2015

TIME: 9:00 a.m. on each day

PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

3. The following procedural schedule is adopted: (a) not later than September 4, 2015, each Intervenor shall file its answer testimony and attachments; (b) not later than September 25, 2015, Applicant shall file its rebuttal testimony and attachments; (c) not later than September 25, 2015, each Intervenor shall file its cross-answer testimony and attachments; (d) not later than September 29, 2015, each Party shall file its corrected testimony and attachments; (e) not later than September 30, 2015, each Party shall file its prehearing motions; (f) not later than October 6, 2015, the Parties shall file any stipulation and any settlement reached; (g) not later than October 7, 2015, each Party shall file its response to prehearing motions filed on or after September 24, 2015; and (h) not later than October 28, 2015, each Party shall file its post-hearing statement of position, to which (absent further order) response will not be permitted.

4. The Parties shall serve work papers as set out in ¶ 14.

5. Unless otherwise ordered, response time to a prehearing motion (other than a motion pertaining to discovery) that is filed on or after September 24, 2015, is shortened to and including October 7, 2015.

6. Except as modified by this Interim Decision, Rule 4 *Code of Colorado Regulations* 723-1-1405 shall govern discovery in this Proceeding.

7. The provisions of ¶¶ 17-26 shall govern discovery in this Proceeding.

8. Unless otherwise ordered, response time to a motion pertaining to discovery is shortened to five business days.

9. Except as modified by this Interim Decision, Rules 4 *Code of Colorado Regulations* 723-1-1100 and 723-1-1101 shall govern the treatment of information claimed to be confidential in this Proceeding.

10. Except as modified by this Interim Decision, Rules 4 *Code of Colorado Regulations* 723-1-1100 and 723-1-1101 shall govern the treatment of information claimed to be highly confidential in this Proceeding.

11. The Parties shall comply with the requirements contained in Rules 4 *Code of Colorado Regulations* 723-1-1101(a)(I) and 723-1-1101(a)(III).

12. Information is not, and will not be treated as, highly confidential information in this Proceeding unless a motion seeking extraordinary protection for the information has been granted in this Proceeding.

13. Rules 4 *Code of Colorado Regulations* 723-1-1101(b) and 723-1-101(d) shall govern motions for extraordinary protection of information claimed to be highly confidential in this Proceeding.

14. Unless otherwise ordered, response time to a motion to designate information as highly confidential and to obtain extraordinary protection is shortened to three business days from the date of service.

15. The Parties are held to the advisements in the Interim Decisions issued in this Proceeding.

16. This Interim Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director