

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16AL-0326E

IN THE MATTER OF ADVICE LETTER NO. 721 FILED BY BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP TO INCREASE ITS BASE RATES FOR ALL RATE SCHEDULES, IMPLEMENT A GENERAL RATE SCHEDULE ADJUSTMENT, REVISE ITS TRANSMISSION COST ADJUSTMENT TARIFF, AND IMPLEMENT OTHER PROPOSED CHANGES TO ITS COLORADO PUC NO. 9-ELECTRIC TARIFF TO BE EFFECTIVE JUNE 5, 2016.

**DECISION UPHOLDING COMMISSIONER KONCILJA’S
DECISION DENYING MOTION TO DISQUALIFY
COMMISSIONER KONCILJA FROM
FURTHER PARTICIPATION IN THIS PROCEEDING**

Mailed Date: April 7, 2017
Adopted Date: March 1, 2017

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I. BY THE COMMISSION

A. Statement

1. This Decision upholds Commissioner Frances Koncilja’s Decision denying Black Hills/Colorado Electric Utility Company, LP’s (Black Hills or Company) Motion to Disqualify Commissioner Koncilja. Chairman Jeffrey Ackermann votes to uphold the Decision, as does Commissioner Koncilja. Commissioner Wendy Moser dissents.

2. On February 13, 2017, Black Hills filed a Request for Full Commission Review of Motion to Disqualify Commissioner Koncilja from Further Participation in this Proceeding (Request). Black Hills files its Request pursuant to Commission Rule 4 *Code of Colorado Regulations* 723-1-1109 of the Commission’s Rules of Practice and Procedure which provides for a party to request a full Commission review of a motion for disqualification within ten days of a Decision denying such a motion.

B. Background

3. On December 19, 2016, the Commission issued Decision No. C16-1140 in this Proceeding which permanently suspended tariff sheets, established rates, and required compliance filings in this Phase I rate case.

4. On January 9, 2017, Black Hills filed an Application for Rehearing, Reargument, or Reconsideration (RRR) of Decision No. C16-1140, enumerating at least ten points of contention for which it seeks rehearing.

5. Contemporaneous with its RRR filing, Black Hills filed its Motion to Disqualify Commissioner Koncilja from Further Participation in this Proceeding. Black Hills argued that Commission Koncilja showed bias or prejudice in statements and in her conduct. According to Black Hills, that conduct indicated a bent of mind predisposed and prejudiced against Black Hills.

6. Further, Black Hills contended that it filed its request as a measure to prevent further appearance of impropriety by a Commission that affects its fundamental due process right to a fair and impartial hearing. Black Hills cited to various statements made by Commissioner Koncilja in the transcript of the evidentiary hearing, as well as statements made in other proceedings at Commission Weekly Meetings. According to Black Hills, it was deprived of an unbiased and impartial Commission decision, which in turn violated its due process rights.

7. On January 23, 2017, the City of Pueblo, the Board of Water Works of Pueblo, and the Fountain Valley Authority (collectively, the Public Intervenors) filed a response to Black Hills' Motion to Disqualify Commissioner Koncilja. On that same date, the County of Pueblo (County) filed its response to Black Hills' motion. The Public Intervenors and the County argued in their respective pleadings that Black Hills' motion to disqualify was untimely and substantively without merit and therefore should be denied. The Public Intervenors noted that it has long been the law in Colorado that the failure to promptly assert known grounds of disqualification or grounds that could be ascertained by the exercise of due diligence may well

constitute a waiver of such a claim.¹ Specifically, “when the grounds for disqualification are known, a motion to disqualify should be filed prior to taking any other steps in the case.”²

8. In response to Black Hills’ specific arguments, the Public Intervenors observed that the law on disqualification simply does not contemplate that a party may rely on “hope” as an excuse for failing to protect its due process rights to be free from bias. Because Black Hills waited so long to file its motion for disqualification, the Public Intervenors took the position that Black Hills’ objections are untimely and therefore waived as a matter of law.³

9. In addition to its untimely claim, the Public Intervenors also argued that Black Hills’ motion was without merit. While Commission Rule 1109 requires a “good faith belief” that a Commissioner may not be impartial, the Public Intervenors maintain that given the timing and the unique circumstances of this case with the appointment of two new Commissioners, Black Hills’ good faith cannot be assumed.⁴

10. The County agreed with the Public Intervenors that the Motion to Disqualify was untimely and was barred by waiver. Further, the County argued that Commissioner Koncilja’s comments and conduct do not rise to the level of an appearance of personal bias or impropriety.

¹ *Citing, Aaberg v. District Court of Seventh Judicial Dist.*, 319 P.2d 491, 494 (Colo. 1957).

² *Johnson v. District Court*, 674 P.2d 952, 957 (Colo. 1984).

³ *Citing, Aaberg* at 493-494; *Bishop & Co. v. Cuomo*, 799 P.2d 444, 447 (Colo. App. 1990) (noting that after a party learned about a potentially disqualifying circumstance “[a]fter consultation with his attorney, [the party] neither asked for a continuance nor moved for disqualification of either the court or counsel, but stated instead that he was willing to proceed. ... [W]e conclude that, under these circumstances, [the party] waived any objection he might otherwise have had.”).

⁴ The Public Intervenors point out that Black Hills’ actions, including its delay in filing the motion to disqualify, coupled with the fact that it ignored the requirements of Rule 1109 that the challenged Commissioner rule on the motion initially, and, that if the motion is denied by the challenged Commissioner and heard by the Commission itself, that all Commissioners may then fully participate in such review, were procedurally incorrect. Instead, the Public Intervenors point out that Black Hills asked that the two new Commissioners initially consider and grant the motion to recuse Commissioner Koncilja from further participation in this proceeding. As such, the Public Intervenors take the position that Black Hills’ motion should be denied as failing to meet Rule 1109’s good faith requirement.

11. On February 2, 2017, Commission Koncilja issued her Decision No. C17-0099-I, denying Black Hills' motion for disqualification. Commissioner Koncilja agreed with the Public Intervenors and the County that the motion was not timely filed. Commissioner Koncilja found that her comments and questioning during the hearing and deliberations did not rise to the level of bias or prejudice and therefore denied the motion.

12. Subsequently, on February 13, 2017, Black Hills filed this Request for full Commission review of its Motion to Disqualify. In its Request, Black Hills argues that despite Commissioner Koncilja's statement that Black Hills waived its right to seek her recusal by failing to file its motion in a timely manner; Black Hills did seek disqualification in a timely manner. Black Hills asserts that its only interest in filing the Motion to Disqualify is that it receives a fair hearing in which the evidence and the law are fully and fairly considered.

13. Black Hills states that its motion is based on Commissioner Koncilja's deep rooted antagonism toward the Company as demonstrated during the deliberations by her statements that reflect her failure to give consideration to maintaining the financial integrity of Black Hills, as well as repeatedly trying to influence her fellow Commissioners to disregard applicable legal standards and the legal effect of past Commission Decisions.

14. By Interim Decision No. C17-0144-I, issued February 17, 2017, the Commission established a response time to Black Hills' motion for February 27, 2017.

15. Responses were received again by the Public Intervenors and the County. Both parties reiterated their previous arguments that Black Hills' motion was untimely filed and should be barred by waiver. The Public Intervenors and the County further argue that the motion fails to advance the interests of administrative efficiency.

16. The Public Intervenors list six factors it argues creates serious administrative law and policy problems. Those factors include: 1.) the current Commission did not participate in the hearing or pre-hearing motions; 2.) the current Commission did not have the benefit of the give-and-take with witnesses during the hearing; 3.) the current Commission did have the benefit of hearing witnesses respond to examination depriving it of the ability to weigh and form an opinion on findings based on the credibility of witnesses; 4.) merely reading the transcript and pre-filed testimony is insufficient to determine witness credibility; 5.) the new Commissioners did not participate in the public comment hearing; and, 6.) the new Commissioners will not have the benefit of personally participating in the Commission deliberations following the conclusion of the evidentiary hearings. According to the Public Intervenors, these six factors are all important considerations to take into account in evaluating whether the Black Hills' motion was timely filed and in deciding the merits of the motion.

II. FINDINGS

A. Standard of Review

17. Under the provisions of § 40-6-123, C.R.S., Commissioners are to conduct themselves in such a manner as to ensure fairness in the discharge of the duties of the Commission; to provide equitable treatment of the public, utilities, and other parties; to maintain public confidence in the integrity of the Commission's actions; and, to prevent the appearance of impropriety or of conflict of interest.

18. Section 40-6-124, C.R.S., provides in relevant part that Commissioners and presiding administrative law judges shall disqualify themselves in any proceeding in which their impartiality may reasonably be questioned, including, but not limited to, instances in which they

have a personal bias or prejudice concerning a party; or have engaged in conduct which conflicts with their duty to avoid the appearance of impropriety or of conflict of interest.

19. Under the terms of Rule 1109(a):

Whenever any party has a good faith belief that a Commissioner or Administrative Law Judge has engaged in a prohibited communication or may not be impartial, the party may file a motion to disqualify the Commissioner or Administrative Law Judge. Such a motion shall be supported by an affidavit describing the nature and extent of the alleged prohibited communication or bias. Within ten days after any response has been filed, the Commissioner or Administrative Law Judge shall rule on the motion on the record. If the motion is denied, the movant may file a request within ten days, requesting the full Commission to review the denial of the motion. All Commissioners may fully participate in such review.

Rule 1109 sets forth the procedural requirements for a party to bring a motion for disqualification. It does not set forth the standard of review of such motions.

20. Black Hills argues that in addition to §§ 40-6-123 and 124, C.R.S., as well as Commission Rule 1109, the Commission is subject to Colorado Rule of Civil Procedure (C.R.C.P.) 97 and Judicial Canons of Ethics Nos. 3(C) and 8 of the Colorado Code of Judicial Conduct. As support for this claim, Black Hills cites prior Commission Decision No. C10-0124 in Proceeding No. 09A-0325E, issued February 10, 2010.⁵

21. However, Black Hills fails to recognize the type of hearing in this matter. It has long been established that the making of rates to govern public utilities (as the proceeding at issue here) is a legislative and not a judicial function. In Colorado, that legislative function has

⁵ In that Decision, the Commission found that “Canon 3 and C.R.C.P. 97 do apply to the Commissioners acting in their adjudicatory capacity because of the plain language in Canon 8 and court precedent. Further, the Colorado Court of Appeals has held that the officials presiding in a quasi-judicial administrative proceeding should be treated as judges.” *Citing, Venard v. Department of Corrections*, 72 P.3d 446, 449 (Colo. App. 2003).

been delegated to the Commission.⁶ As has long been recognized, ratemaking is not an exact science, but a legislative function involving many questions of judgment and discretion, and that judgment or discretion must be based upon evidentiary facts, calculations, known factors, relationships between known factors, and adjustments which may affect the relationship between known factors.⁷ Therefore, the Commission has been provided much deference in ratemaking proceedings to obtain evidence and consider what best suits the public interest.

22. On the other hand, in the proceeding cited by Black Hills, Consolidated Proceeding Nos. 09A-324E and 325E, the Commission was asked to consider separate requests for recusal of each of the three Commissioners due to a claim of *ex parte* communications in that Consolidated Proceeding. Of note, those requests for recusal did not involve a claim of bias or bent of mind prejudicial to the movant, as Black Hills' motion in this Proceeding.

23. Further, and most significant, the underlying Consolidated Proceedings in the matter cited by Black Hills involved applications of Tri-State Generation and Transmission Association, Inc. and Public Service Company of Colorado for separate certificates of public convenience and necessity to construct a transmission line project in Colorado. Those previous Consolidated Proceedings involved the Commission's quasi-judicial authority, rather than its legislative authority as in this ratemaking matter. As a result, because the Commission acts pursuant to its legislative function here, Black Hills' citations to the Code of Judicial Conduct

⁶ *City and County of Denver v. People ex rel. Pub. Utils. Comm'n.*, 226 P.2d 1105 (1954); *Mountain States Tel. and Tel. Co. v. Pub. Utils. Comm'n.*, 491 P.2d 582 (1971); *Pub. Utils. Comm'n v. District Court*, 527 P.2d 233 (1974); *City of Montrose v. Pub. Utils. Comm'n.*, 629 P.2d 619 (Colo. 1981); *Office of Consumer Counsel v. Pub. Service Company*, 877 P.2d 867 (Colo. 1994); *Public Service Company v. Pub. Utils. Comm'n.*, 26 P.3d 1198 (Colo. 2001).

⁷ *Colo. Ute Elec. Ass'n v. Pub. Utils. Comm'n.*, 602 P.2d 861 (1979); *City of Montrose*, 629 P.2d 619; *Office of Consumer Counsel v. Pub. Utils. Comm'n.*, 786 P.2d 1086 (Colo. 1990); *Integrated Network Services v. Pub. Utils. Comm'n.*, 875 P.2d 1373 (Colo. 1994); *Public Service Company*, 26 P.3d 1198 (Colo. 2001).

and C.R.C.P. 97 as controlling are unavailing here. While the Code of Judicial Conduct is instructive to our findings, it is appropriate that we look to the Commission's organic statutory language contained in §§ 40-6-123 and 124, C.R.S., as well as Commission Rule 1109, which directly address Commissioner conduct, for guidance in the majority's analysis and findings.

B. Analysis

24. The argument was put forth by Black Hills in its original motion for disqualification that utility commissioners have an obligation to balance a regulated utility's interests with its customers. While this obligation is not disputed, this statement is also recognized as an incomplete description of the obligations of commissioners, particularly pertaining to the rate case proceeding within which its motion and request for full Commission review were filed. What Black Hills failed to recognize, the Commission ultimately is in pursuit of determining the public interest, which includes, but is not limited to the interests of the regulated utility and its customers.

25. While there may be no specific statutory standard governing the Commission's pursuit of the public interest, the Commission nonetheless is granted broad constitutional and statutory authority in carrying out the duties of the Commission.⁸

26. As noted above, within a proceeding such as this, the Commission performs its legislative function of ratemaking, rather than utilizing its judicial function. This has a bearing not only upon the standards of Commissioner conduct, but also reinforces the broad and unique function of pursuing a determination of the public interest. For within this context, and toward

⁸ See, e.g., Colo. Const. Art. XXV: "... all power to regulate the facilities, service and rates and charges ... is hereby vested in [the Commission]." § 40-3-102, C.R.S.: "The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate rates, charges, and tariffs of every public utility ...; and to do all things, ... which are necessary or convenient in the exercise of such power ..."

this objective, the Commission must engage the parties and pursue the facts in a more dynamic manner than a traditional judicial role in order to gather sufficient evidence to understand the myriad of issues that arise in a typical rate case.

27. Thus, the Commission is tasked with determining the public interest in all proceedings, but particularly when performing its legislative function of ratemaking, and is broadly empowered to determine how to best achieve this task. Assessing the sentiments and concerns of the customers is an integral part of determining the public interest, through convening public comment hearings, receiving and reviewing written comments filed into the record, and actively incorporating these comments and sentiments into the formal proceeding.⁹

28. We are not persuaded by Black Hills' assertions that Commissioner Koncilja's Decision denying its Motion to Disqualify should be overturned. Rather, the arguments put forth by Black Hills as support for a claim of bias or prejudice on the part of Commissioner Koncilja in this proceeding are instead seen as the Commissioner performing her legislative ratemaking duty in pursuit of determining the public interest.

III. CONCLUSION

29. Based on the analysis above, we find good cause to uphold Commissioner Koncilja's Decision denying Black Hills' Motion to Disqualify Commissioner Koncilja from Further Participation in this Proceeding is denied. Commissioner Koncilja will not be disqualified from this Proceeding.

⁹ Throughout this proceeding there has been no denying as fact that the Black Hills customer sentiments and concerns have been consistently and strongly negative regarding the utility's rates, charges, and services.

IV. ORDER

A. The Commission Orders That:

1. The Request for Full Commission Review of Motion to Disqualify Commissioner Koncilja from Further Participation in this Proceeding is denied consistent with the discussion above.

2. After full Commission review, Commissioner Koncilja’s Decision denying Black Hills/Colorado Electric Utility Company, LP’s Motion to Disqualify Commissioner Koncilja from Further Participation in this Proceeding is upheld in its entirety consistent with the analysis above.

3. Commissioner Frances Koncilja is not disqualified from this Proceeding.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
March 1, 2017.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

Commissioners

COMMISSIONER FRANCES A. KONCILJA
SPECIALLY CONCURRING.

COMMISSIONER WENDY M. MOSER
DISSENTING.

V. **COMMISSIONER FRANCES A. KONCILJA SPECIALLY CONCURRING**

1. In addition to the above, I vote to deny the Motion to Disqualify on the basis of timeliness as set forth in Decision No. C17-0099-I.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Commissioner

ATTEST: A TRUE COPY

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

Doug Dean,
Director

VI. COMMISSIONER WENDY M. MOSER DISSENTING**A. Introduction**

1. The pending Motion to Disqualify Commissioner Frances Koncilja from Further Participation in this Proceeding (Motion to Disqualify or Motion) is based on a single issue, limited to this proceeding:

Did Commissioner Koncilja's statements and conduct during the Black Hills rate case proceeding rise to the level of the appearance of impropriety (bias or prejudice) such that the Commissioner should be recused from further participation in this proceeding?

B. Background

2. On January 9, 2017, Black Hills/Colorado Electric Utility Company, LP (Black Hills or Company) filed a Motion to Disqualify Commissioner Frances A. Koncilja from further participation in Proceeding No. 16AL-0326E (2016 Rate Case).¹⁰ The Motion alleges the appearance of bias or prejudice from multiple statements and conduct by Commissioner Koncilja during the course of the 2016 rate case hearing.¹¹ The Motion was filed pursuant to §§ 40-6-123, 40-6-124, C.R.S., and Commission Rule 1109 (found in the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1).

3. Also on January 9, 2017, Chairman Ackermann and Commissioner Moser were sworn in as Commissioners, based on Governor Hickenlooper's January 4, 2017, announcement of their appointments to the Colorado Public Utilities Commission (Commission or PUC).

¹⁰ The Office of Consumer Counsel, Energy Outreach Colorado, Public Intervenors, and Lafarge/Holcim (US), Inc. objected to the Motion. Commission Staff took no position. Pueblo County did not respond prior to the time Black Hills filed its motion.

¹¹ A complete rendition, with references, of the alleged improper conduct and statements by Commissioner Koncilja are set forth in Black Hills' Motion to Disqualify, pages 3 through 5, and Attachment A and B (the transcripts of the Evidentiary Hearing) and will not be repeated here.

4. Pursuant to Rule 1109, responsive pleadings objecting to Black Hills' Motion to Disqualify Commissioner Koncilja were filed on January 23, 2017, by two parties: the County of Pueblo and the Public Intervenors (consisting of the City of Pueblo, the Board of Water Works of Pueblo, and the Fountain Valley Authority).¹²

5. On January 25, 2017, Commissioner Koncilja verbally announced her decision to not recuse herself. Commissioner Koncilja issued her written response on February 2, 2017 in Decision No. C17-0099-I.

6. On February 13, 2017, Black Hills filed its Request for a full Commission Review of Commissioner Koncilja's Response, consistent with Rule 1109. In addition, Black Hills addressed the timeliness of its motion.

7. Responses opposing Black Hills' Request were filed on February 27, 2017, by Pueblo County and the Public Intervenors, reiterating their previous arguments and asserting that the Motion fails to advance the interests of administrative efficiency. The Public Intervenors also asserted six factors which they allege create serious administrative law and policy problems.

8. At the regularly scheduled Commissioner Weekly Meeting of March 1, 2017, all three Commissioners voted on the Motion to Disqualify. Commissioner Koncilja and Chairman Ackermann voted to deny recusal of Commissioner Koncilja. I, Commissioner Moser, voted to recuse Commissioner Koncilja based on the statutory requirements for recusal and disqualification because I believe that the facts in the record demonstrate an appearance of impropriety (bias or prejudice) in this proceeding.

¹² The other parties to the case made no responsive filings: the Office of Consumer Counsel, Energy Outreach Colorado, the Staff of the Public Utilities Commission, and LafargeHolcim (US), Inc.

C. Commissioner Moser's Dissent from the Majority as to Disqualification of Commissioner Koncilja

9. There are two statutes that govern this situation. In summary, they provide for the following:

- C.R.S. § 40-6-123. **Standards of Conduct**: Commissioners shall conduct themselves in such a manner as to:
 - ensure fairness in the discharge of the duties of the commission;
 - provide equitable treatment of the public, utilities and other parties;
 - maintain public confidence in the integrity of the commission's actions; and
 - prevent the appearance of impropriety or of conflicts of interest.

C.R.S. § 40-6-124. **Disqualification**: Commissioners shall disqualify themselves in any proceeding in which their impartiality may reasonably be questioned, including, but not limited to, instances in which they:

- Have a personal bias or prejudice concerning a party;
- Have served as an attorney or other representative of any party concerning the matter at issue, or were previously associated with an attorney who served during such association, as an attorney or other representative of any party concerning the matter at issue;
- Know that they or any member of their family ... has a financial interest ... is a party to the proceeding ... has any interest that could be substantially affected by the outcome of the proceeding; or
- Have engaged in conduct with conflicts with their duty to avoid the appearance of impropriety or of conflict of interest.

There does not have to be actual impropriety; the duty is to avoid the appearance of impropriety.

10. "Impartiality" has been defined to mean the lack of bias for or against any party to a proceeding. Further, any supporting affidavits must state actual facts and statements evidencing impartiality or bias.¹³ Black Hills attached an affidavit to its Motion, as well as the

¹³ *Republican Party of Minn. v. White*, 536 U.S. 765, 779 (2002); *In re Goellner*, 770 P.2d 1387 (Colo. App. 1989).

hearing transcript portions, that state the actual facts and statements that it believes support recusal.

11. The interest that triggers disqualification must relate to the subject matter of the litigation, or be of a pecuniary interest in the outcome of the litigation, and not as it might relate to a determination of the facts and legal questions presented.¹⁴ Applying a similar standard under 28 U.S.C. § 455 applicable to federal judges, it was recognized:

Judges inevitably bring their personal experiences to the bench. “Judges are human; like all humans, their outlooks are shaped by their lives’ experiences. It would be unrealistic to suppose that judges do not bring to the bench those experiences and the attendant biases they may create. A person could find something in the background of most judges which in many cases would lead that person to conclude that the judge has a “possible temptation” to be biased. But not all temptations are created equal. We expect—even demand—that judges rise above these potential biasing influences, and in most cases we presume judges do.”¹⁵

12. Further, impartiality does not require gullibility or child-like innocence. *Liteky*, 510 U.S. at 552: “[T]he disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.”¹⁶

13. I would submit that judicial decorum is a reasonable expectation and that all witnesses to a proceeding can expect to be treated with respect, even when there are disagreements as to the resolution of the matters at issue before the Commission. Commissioner Koncilja’s statements and conduct, characterized by the majority as acting in a

¹⁴ *Kubat v. Kubat*, 238 P.2d 897 (1951).

¹⁵ *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994) (en banc).

¹⁶ *In re Allied Signal*, 891 F.2d at 970 (emphasis in original); *Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 296 (D.P.R.; 2002).

“more dynamic manner,” convey neither decorum nor respect. For example, the following statements are but a sample:¹⁷

- Black Hills is “a regulated utility that knows they can put this turd in the pocket of the ratepayers” ;
- “This is a company that if they were going to be competing in the market would be bankrupt”;
- The Company has spent money “like a drunken sailor”;
- “I would say you are the most despised company down in the southern part of the state”; and
- Black Hills “acts like a colonial power that can loot the citizens of Southern Colorado.”

14. Commissioner Koncilja was actively involved in all of the rate case “matters at issue” that were presented in this proceeding. She did not deny that she engaged in the conduct as alleged in Black Hills’ Motion and supporting affidavit, nor did she deny that she made the alleged statements. She publicly, in writing and verbally, explained her intent and her view of her conduct and statements as “doing her job.”

15. Noticeably, in her decision to not recuse herself, the Commissioner talked at great length about living in Pueblo, the economic challenges of that community, her obligations to consumers, and her fondness for the people in southern Colorado. We all agree that customers have a statutory right to adequate service and reasonable rates.¹⁸ There is no dispute about this: it is a right of consumers to pay a rate which accurately reflects the cost of service rendered, and we all agree that the rates need to be set at a level that are just and reasonable. However, in discussing rate levels, the Commissioner did not refer to any of her statutory obligations to the utility. This obligation includes that the utility is entitled to a reasonable return on the value of

¹⁷ Black Hills Motion to Disqualify, pg. 3.

¹⁸ § 40-3-101, C.R.S.

property which is used and useful in the rendering of its service to the public,¹⁹ and that, in addition to the public having a right to a rate that is “fair,” the utility has a right to a rate that is sufficiently compensatory to the utility to ensure a fair return on its investments.²⁰ The lack of a balanced discussion about the obligations post-hearing, in conjunction with her conduct and statements during the hearing, suggests to me that the Commissioner has a bent of mind towards the consumers in Pueblo to the detriment of Black Hills.

16. Even though Commissioner Koncilja is from Pueblo, her background does not mean that she cannot be impartial. The law states that “[i]n order to disqualify a decision-maker, more is required than to establish a mere relationship. The closeness of the relationship and its bearing on the underlying case (the matters at issue) must be established.”²¹

17. What I find most telling is that Commissioner Koncilja characterizes actions by Black Hills as “bad behavior” when, in fact, the Company was acting consistent with the requirements of prior Commission decisions. In paragraph 15 and 16 of her written response, Commissioner Koncilja states that the rates in southern Colorado are high “in part because BH takes hundreds of thousands of dollars a year from ratepayers in southern Colorado to pay for corporate overhead.”²² What she does not state is that Black Hills does not establish rates, even in part, nor does it get to decide what ratepayers in southern Colorado pay for corporate overhead. The rates that customers have been paying were rates that were established by a prior Commission in a prior rate proceeding where the Commission at the time determined what rate levels were just and reasonable. Commissioner Koncilja has been a sitting Commissioner since

¹⁹ *Peoples Natural Gas Div. of N. Natural Gas Co. v. Pub. Utils. Comm’n*, 193 Colo. 421, 567 P.2d 377 (1977).

²⁰ *Pub. Serv. Co. v. Pub. Utils. Comm’n*, 644 P.2d 933 (Colo. 1982).

²¹ *Schupper v. People*, 157 P.3d 516 (Colo. 2007).

²² Decision No. C17-0099-I at ¶ 15.

January, 2016; however, despite this experience, she attributes bad behavior to Black Hills even when they acted pursuant to, and in accordance with, prior Commission decisions.

18. The Colorado Supreme Court has recognized: “The purpose of statutes and court rules which provide for the disqualification of a trial judge is to guarantee that no person is forced to litigate before a judge with a ‘bent of mind.’”²³ The Colorado Court of Appeals has issued decisions as well: Further, “[i]f facts have been set forth that create a reasonable inference of a ‘bent of mind’ which will prevent the judge from dealing fairly with the party seeking disqualification, the judge must recuse.”²⁴

19. The record in this matter is very clear as to Commissioner Koncilja’s statements and conduct both before and during the hearing. Given the standard in the statute, I think her statements and conduct rise to a level which requires disqualification from participating further in this proceeding.

D. Black Hills’ Motion was Timely Filed on January 9, 2017

20. Both the Public Intervenors and the County of Pueblo argue that Black Hills’ Motion was not timely filed, and that Black Hills had an obligation to file the motion as soon as it suspected bias, or impartiality, or appearance of impropriety, rather than wait until the day the two new commissioners took office. These two parties also raised the issue of “forum shopping” given the “turn over” in Commissioners with prior Chairman Epel’s midterm resignation (which was announced December 6, 2016 effective January 1, 2017) and prior Commissioner Vaad’s four-year term (expiring at the end of 2016.)

²³ *Johnson v. District Court of County of Jefferson*, 674 P.2d 952, 956 (Colo. 1984).

²⁴ *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. Ct. App. 2006).

21. The burden to show “untimeliness of the motion” rests with the Public Intervenors and the County of Pueblo. I find that neither the Public Intervenors nor the County of Pueblo has met its burden, for the following reasons:

- a. First, the complaining parties do not establish that they were prejudiced in any way by the timing of the filing. Second, they do not demonstrate bad faith on the part of Black Hills.
- b. Black Hills articulated its rationale for the timing, indicating that its “knowledge” of Commissioner’s Koncilja’s apparent bias and partiality did not fully materialize until the Commissioner’s deliberations on the merits of the rate case held on November 30, 2016, and her written dissent in Decision No. C16-1140, which decision was issued on December 19, 2016.
- c. Black Hills acknowledged that the decision to move to disqualify a PUC Commissioner by a regulated utility subject to the Commission’s jurisdiction is a difficult one that must be carefully and fully considered. It fully recognizes that it will be continuously required to come before the Commission for various approvals and authorizations over the course of Commissioner Koncilja’s term.
- d. Black Hills indicates that rather than simply refile another rate case, which it has the statutory right to do, it chose instead to file an Application for Rehearing, Reargument or Reconsideration (ARRR) of the Commission’s 2016 Rate Case decision and its Motion to Disqualify, in order to exhaust administrative remedies.
- e. There is no dispute that the ARRR was timely filed. From an administrative procedure standpoint, the ARRR deadline was a matter of public record and most likely the “last practical date” to file such a motion.
- f. Black Hills also expressed its willingness to accept the hearing record as it exists or to participate in further hearings and other procedures to the extent the Commission deems them necessary.
- g. In administrative law, there is no “Commission decision” until it is reduced to writing. Clearly, the “best evidence” of statements or conduct which clearly show an appearance of impropriety would be after the hearing, with a full and complete written transcript, and after a written Commission decision is issued.
- h. The plain language of Commission Rule 1109, its history, and the Commission’s procedural process also provides the clarity to determine that the Motion was timely filed. The Rule states: “whenever any party has a good faith belief that a Commissioner ... may not be impartial ... the

party may file a motion ... supported by an affidavit describing the nature and extent of the alleged prohibited communication or bias....”

- i. The rule does not require “timely filing”; the plain wording refers to “whenever.” One can speculate on how long a party must wait to have enough facts supported by an affidavit to be able to show the requisite “good faith belief” that the conduct is such so as to establish an appearance of impropriety (bias or prejudice). And, one can also speculate on how many instances of bias or impartiality have to occur before one can file, *i.e.*, is the first instance of misconduct or improper statement not only fully sufficient to support a motion of recusal, or does it in fact require such a motion, in order to meet the alleged “timely” requirement? I do not think that the referenced speculations or any other speculation is required, based on the clear language of Commission Rule 1109.
- j. The Company’s last chance at exhausting administrative remedies is in its ARRR, which it timely filed on January 9, 2017.
- k. The procedural history of Rule 1109 also supports this finding, as Rule 1109 at one time required a “timely filing.” The language of the prior wording of the Rule is consistent with some of the cases cited by the opposing parties. However, the prior Rule was repealed and the revised rule (current Rule 1109) became effective on April 1, 2006.
- l. Accordingly, the case law cited in the responsive motions by Pueblo County and the Public Intervenors is not dispositive as the cited cases were issued prior to April, 2006. There is no citation to any case law that interprets the Commission’s currently effective Rule 1109 and no showing of harm based on the timing of the filing.
- m. Finally, based on the additional costs to customers that may result from either a “complete redo” of the rate case or the prospect of an appeal and remand and then a “complete redo” of the rate case hearing process, I find an “ARRR” process a preferred solution.

22. In response to the two parties’ allegations of “forum shopping,” the Company reiterated its right to have its rehearing application fully and fairly considered by the Commission. The Company expresses concern with the sole remaining prior Commissioner Koncilja participating, given her prior statements and conduct.

- a. The “forum shopping” argument is not totally without merit. It is right to question whether the Company’s timing of the filing of the motion was based on its good faith belief regarding bias, sufficiently supported by facts based on a full record, including the written decision, and filed as

soon as reasonable, given the intervening holiday season, or whether the Company was opportunistic in its choice of filing dates.

- b. I would agree that it is rare that the Commission loses two of its three Commissioners at the same time. The four-year appointments are staggered such that under normal circumstances, a new Commissioner is appointed once every one or two years. This process allows for continuity at the Commission and helps ensure that at least some of the Commissioners have regulatory experience and are familiar with recent case history at the Commission.
- c. The fact that Commissioner Vaad's term was up for reappointment was clearly public information from the time he was first appointed. The announcement of Chairman Epel's resignation, to be effective January 1, 2017, was known in early December. Further, the Commissioners' decisions from the bench on the various rate case issues were made November 30, 2016. The official written decision, which included Commissioner Koncilja's concurrence in part and dissent in part, was issued and available to the Company as of December 19, 2016. The Company filed its Motion to Recuse three weeks later, along with its ARRR.
- d. Given the discretion of the Commissioners, and the power that they hold because of their Constitutional office, one would surmise that one needs fairly strong and documented evidence in order to prove a good faith belief accompanied by an affidavit of facts, as required by Rule 1109. Add to this, the procedural fact that there is no Commission Decision until it is reduced to writing. Accordingly, it is not reasonable to assume that statements and conduct by a Commissioner during the hearing process will automatically translate into how that Commissioner and the other Commissioners will vote in the final deliberations. Under most circumstances, it is the final written decision that reflects the opinions and decisions of the full Commission, and one cannot determine how nor why an individual Commissioner decides issues the way they do. However, in this proceeding, (16AL-0326E), Commissioner Koncilja issued her own "concurring in part and dissenting in part" decision as part of Decision No. C16-1140 issued on December 19, 2016. The Company filed its Motion to Disqualify within three weeks of that date, a reasonable timeframe given the holidays.
- e. Thus, based on the following, I find the Motion by Black Hills to have been timely filed:
 - (1) the rare event of two new Commissioners at the same time;
 - (2) the Commission's procedural rules indicating that no decision is final until it is in writing;
 - (3) the plain language of the currently effective Rule 1109;

- (4) the timing of the issuance of written Decision No. C16-1140;
- (5) no showing of prejudice nor bad faith by the opposing parties; and
- (6) the procedural deadline for filing an ARRR in order to exhaust administrative remedies was the same day as the Motion to Disqualify was filed.

E. Administrative Law and Policy Problems

23. Public Intervenors listed six factors that it argued creates serious administrative law and policy problems for the Commission if Commissioner Koncilja were to be disqualified. All six of these factors are without merit.

24. The Commission operates in an environment where every witness' testimony is pre-filed, the hearing is transcribed, and all motions are made in writing. It is a customary and routine practice of the Commission to rule on an ARRR based on the written record, without conducting a "rehearing" of the case. As these parties know, the Commission routinely rules on ARRR motions, whether they arise out of a hearing heard by the full Commission, a hearing conducted by one of the Commission's Administrative Law Judges or one of the Commissioners acting as a Hearing Officer. In fact, the written record provides the Commission with the benefit of being able to read the "give and take" with witnesses which occurred during the hearing, the benefit of being able to weigh and form an opinion as to credibility based on the answers by witnesses to questions asked, and the benefit of a full transcript and pre-filed written testimony that can be referred to and reviewed, at any time. It is true that the new Commissioners did not participate in the public comment hearing; however, we have an E-filings system where public comment is submitted for our review. Lastly, the Public Intervenors suggest that we will not have the benefit of personally participating in the Commissioner deliberations. True, but we do have the prior Commissioners' decisions on each of the Company's contested issues and we have the written and transcribed record of the case. Further, Black Hills offered to

participate in further hearings, if the Commission desired. Accordingly, a rehearing, reargument or reconsideration of this case with two new Commissioners does not constitute “serious administrative law and policy problems,” as argued by the Public Intervenors.

F. Different Standard of Conduct

25. Based upon the clear language in § 40-6-123, C.R.S., Standards of Conduct, I disagree with the majority opinion that there is a different standard of conduct applied to a Commissioner acting in a legislative role versus a judicial role. I also disagree that there is “something unique about a rate case that requires pursuing the public interest and obtaining evidence in order to understand the myriad of issues contained therein” that somehow eviscerates the bounds of the statutory constructs that dictate acceptable behavior. There is no exception in the Colorado statute, nor in case law, which permits a Commissioner to behave “in a more dynamic manner” when acting in a legislative role in a rate case, than if one were in a traditional judicial role overseeing a complaint proceeding, especially since they both involve a judicial procedure that requires the presentation of evidence and a judicial process being used to rule based upon the evidence presented.²⁵ There is also no statute nor case law precedent which suggests one has to “act in a more dynamic manner” in order to gain sufficient evidence to understand the myriad of issues that arise in a typical rate case. Acting in the pursuit of the

²⁵ See *Colo. Office of Consumer Counsel v. Mountain States Tel. & Tel.*, 816 P.2d 278 (Colo. 1991)(Although the commission has broad power to accomplish its legislative and constitutional purpose, **its powers are restricted by the statutory provisions governing utilities**, and the commission’s delegated powers do not extend generally to adjudicatory matters.); *Colo. Ute Elec. Ass’n v. Pub. Utils. Comm’n*, 198 Colo. 534, 602 P.2d 861 (1979)(Ratemaking is not an exact science, but a legislative function involving many questions of judgment and discretion, and that judgment or discretion **must be based upon evidentiary facts....**) (“*Emphasis added in “bold.”*”)

public interest is part and parcel of the job of a Commissioner, whether one is in a tariff hearing, a rulemaking, a complaint case, a resource planning proceeding or a rate case. These Colorado statutes were written to explicitly apply to the Members and Staff of the Colorado Public Utilities Commission in all proceedings and all the time. In fact, this directive is explicitly stated in the applicable statute:

40-6-123. Standards of conduct. (1) Members and staff of the commission shall conduct themselves in such a manner as to ensure fairness in the discharge of the duties of the commission, to provide equitable treatment of the public, utilities, and other parties, to maintain public confidence in the integrity of the commission's actions, and to prevent the appearance of impropriety or of conflict of interest. The standards set forth in this section **apply at all times** to the commissioners, to their staff, including administrative law judges, and to parties under contract with the commission for state business. (*Emphasis added.*)

The majority opinion accurately states that the statutes provide the Commission with much deference in regulating rates, but in contrast to their conclusion, it is also very clear that the standard of conduct is not variable.

G. Ruling

26. Based on the statutory requirements of Commissioners to avoid the appearance of impropriety, case precedent, Commission Rule 1109, and the uncontested facts, I conclude that Commissioner Koncilja was required by statute to recuse herself from this proceeding and when

she did not, the Commission was required to grant Black Hills' Motion to Disqualify, which was timely filed.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

WENDY M. MOSER

Commissioner

ATTEST: A TRUE COPY

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

Doug Dean,
Director