BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL TO RECOVER COSTS ASSOCIATED WITH JOINING THE SOUTHWEST POWER POOL MARKETS+ MARKET THROUGH THE ELECTRIC COMMODITY ADJUSTMENT.	**PROCEEDING NO. 25A-0075E**

PUBLIC SERVICE COMPANY OF COLORADO'S
MOTION TO STRIKE PAGES AND FOOTNOTE FROM THE
STATEMENT OF POSITION OF ADVANCED ENERGY UNITED
AND REQUEST FOR SHORTENED RESPONSE TIME

Pursuant to Rule 1400 of the Colorado Public Utilities Commission's ("Commission") Rules of Practice and Procedure, 4 *Code of Colorado Regulations* ("CCR") 723-1, Public Service Company of Colorado ("Public Service" or the "Company") files this Motion to Strike certain portions of the Statement of Position ("SOP") filed by Advanced Energy United ("AEU") on June 12, 2025. Because time is of the essence in ruling on this Motion to Strike, Public Service respectfully requests that the Commission shorten response time, pursuant to Rule 1308(c), to Friday, June 20, 2025, as described further herein.

I. RELEVANT PROCEDURAL HISTORY[1]

On February 14, 2025, Public Service filed a Verified Application, along with the Direct Testimony and Attachments of two expert witnesses, requesting that the

[1] Other procedural history will be discussed as needed in the text of this Motion.

Commission determine that Public Service's participation in Southwest Power Pool's ("SPP") Markets+ ("Markets+") is in the public interest, and that Public Service can recover the costs of the Company's participation in Markets+ through the Electric Commodity Adjustment ("ECA"). Other relevant procedural history is set forth in Decision Nos. C25-0213-I (issued March 20, 2025) and C25-0318-I (issued April 24, 2025). AEU is one of eleven intervenors in this proceeding. The Commission presided over the evidentiary hearing on Tuesday, May 27, and the afternoon of Wednesday, May 28, 2025. Pursuant to the procedural schedule adopted in Decision No. C25-0318-I, on June 12, 2025, statements of position were filed by Public Service, AEU, and nine of the other intervenors.[2]

Pages 31 through 34 of substantive argument in AEU's SOP exceed the 30-page limit imposed by Rule 1202(d) of the Rules of Practice and Procedure, on all pleadings filed in Commission proceedings. AEU filed no motion for variance, before or at the time it filed its SOP, requesting leave or providing good cause to exceed the 30-page limit. Neither Public Service nor any of the other intervenors violated the 30-page limit. Public Service's rights to a fair proceeding and to due process of law will be seriously prejudiced by this breach of a fundamental Commission Rule of Practice and Procedure if the Commission considers these extra pages, as will be explained in detail in this Motion.

[2] Interventions by right were filed by the Office of the Utility Consumer Advocate ("UCA"); Trial Staff ("Staff"); and Colorado Energy Office ("CEO"). Motions for Permissive Intervention, filed by AEU, Black Hills Colorado Electric, LLC ("Black Hills"), Climax Molybdenum Company ("Climax"), Colorado Energy Consumers ("CEC"), Holy Cross Electric Association, Inc. ("Holy Cross"), Interwest Energy Alliance ("Interwest"), Tri-State Generation and Transmission Association ("Tri-State"), and Western Resource Advocates ("WRA"), were granted by the Commission. Decision No. C25-0182-I (issued on March 14, 2025). Only Interwest did not file a Statement of Position.

In the event the Commission declines to strike pages 31 through 34 of substantive argument in AEU's SOP as a sanction for violating Rule 1202(d), Public Service moves to strike the lines of argument and Footnote 102 on page 31 of AEU's Statement of Position, which reference and argue alleged facts not in evidence and invite the Commission to ignore a fundamental tenet of Colorado administrative law that its decisions must be based upon substantial evidence in the record. This Motion will explain in detail why this argument and Footnote 102 on page 31 are contrary to Colorado law, are highly prejudicial to Public Service, and should be stricken before the Commission deliberates and enters its decision on this Application.

Given that time is of the essence for the issuance of the Commission's decision in this proceeding, time is of the essence for a ruling on this Motion. Therefore, the Company respectfully requests that the Commission shorten response time to three business days, or to and including no later than 5:00 p.m. on Friday, June 20, 2025.[3]

In support of this Motion, Public Service states as follows:

II. STATEMENT REGARDING CONFERRAL

No conferral with the parties is required for motions to strike. *See* Rule 1400(a)(I), 4 CCR 723-1.

III. LEGAL STANDARDS FOR THIS MOTION TO STRIKE

Section 40-6-101(1), C.R.S., provides that, "The commission shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the

[3] Rule 1400(b) and Rule 1308(c), 4 CCR 723-1.

ends of justice."[4] Section 40-6-101(4), C.R.S., defines how Commission proceedings shall be conducted "to best conduce … the ends of justice" and provides that:

> *All hearings and investigations before the commission … shall be governed by this title and by rules of practice and procedure adopted by the commission*; and, in the conduct thereof, neither the commission, nor any individual commissioner, nor any administrative law judge shall be bound by the technical rules of evidence. (Emphasis added.)

Rule 1202(d) of the Rules of Practice and Procedure, 4 CCR 723-1, limits all pleadings in Commission proceedings to 30 pages of substantive argument:

> No pleading shall be more than 30 pages in length, excluding attachments. Attachments shall not be used to evade the page limitation in this rule. The cover sheet, table of contents, certificate of mailing, copies of authorities cited, and copies of a decision that may be the subject matter of the pleading shall not be included for calculating the length of the pleading.

While a party can seek leave to exceed the 30-page limit by seeking a variance from Rule 1202(d) for good cause shown,[5] the Commission's serious intent to enforce the 30-page is demonstrated by the admonition not to use attachments "to evade the page limitation in this rule."

The Commission and its administrative law judges ("ALJs") expect the parties in Commission proceedings to abide by and to comply with the Rules of Practice and Procedure, including Rule 1202(d).[6] In Decision No. C22-0478-I, the Commission found

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[4] Decision No. C22-0478-I, ¶ 16 at 8, (issued on August 12, 2022) in Proceeding No. 22AL-0046G, "While the Commission has latitude in how it conducts its proceedings, its proceedings must provide due process, including the right to be heard and to respond to evidence. §§ 40-6-101(1) and 40-6-109(1), C.R.S."

[5] Rule 1003(a) of the Rules of Practice and Procedure, 4 CCR 723-1, provides: "The Commission has promulgated these rules to ensure orderly and fair treatment of all persons. The Commission may, for good cause shown, grant waivers or variances from … Commission rules…." Rule 1003(c) requires that, "(c) All waiver or variance requests shall include: … (III) a statement of facts and circumstances relied upon to demonstrate why the Commission should grant the request."

[6] *See e.g.*, Decision No. C22-0478-I, ¶¶ 14, 16, and 18 at 7-9, in Proceeding No. 22AL-0046G, striking "supplemental testimony" filed by an intervenor in violation of Rule 1202; Decision No. R24-0510-I, ¶ 26 at 11, (issued on July 16, 2024) in Proceeding No. 24A-0131E, "The Parties are advised and are on notice that this proceeding is governed by the Rules of Practice and Procedure found at 4 *Code of Colorado*

that an intervenor's attempt to file "supplemental testimony" was contrary to the permitted procedural process and violated Rule 1202.[7] The Rules of Practice and Procedure, including Rule 1202(d), set procedural standards and requirements for litigating Commission proceedings with the goals of facilitating the presentation in statements of position of legal arguments based on the evidence in the record and of ensuring the efficiency of the litigation. Ignorance of the law or Commission rules is no excuse[8] for violating the Rules of Practice and Procedure. When a party, especially in an adjudicatory proceeding when Due Process of Law is at stake, fails to comply with the requirements of Rule 1202(d) (or the other Rules of Practice and Procedure), it reveals not only a disregard of Commission rules and proper procedures for litigating Commission proceedings, but puts that party at an advantage as compared to the rest of the parties.

In Commission regulatory practice and procedure, statements of position are filed in lieu of parties making oral closing arguments to the Commission or ALJs. In Commission regulatory proceedings, regulated utilities and other parties are entitled to Due Process of Law, pursuant to Art. II, Section 25, *Colo. Const.,* and Amend. XIV, *U.S. Const.*[9] The "essence of procedural due process is fundamental fairness."[10] The Commission's findings and conclusions – in other words, its decisions – must be

Regulations ("CCR") 723-1. The ALJ expects the Parties to be familiar with and to comply with these rules."; Decision No. R24-0055-I, ¶ 39 at 11, (issued on July 16, 2024) in Proceeding No. 23A-0471E (same); Decision No. R21-0410-I, ¶¶ 29 and 30 at 11, (issued on July 21, 2021) in Proceeding No. 21A-0166E, "30. **The Parties are advised, and are on notice, that** they must be familiar with, and strictly abide by, the Rules of Practice and Procedure, 4 CCR 723 Part 1 (Original emphasis)."

[7] Decision No. C22-0478-I, ¶¶ 14 and 18 at 7-9, in Proceeding No. 22AL-0046G.

[8] Adams v Sagee, 410 P.3d 800, 803 (Colo. App. 2017); People v McPherson, 53 P.3d 679, 682 (Colo App 2001), *cert denied* (2002).

[9] *See Public Utilities Comm'n. v, DeLue*, 486 P. 2d 563 1050, 1052 (Colo. 1971); and *Public Utilities Comm'n. v. Colorado Motorway*, 437 P.2d 44, 47-48 (Colo. 1968).

[10] *Mountain States Tel. & Tel. Co. v. Dept. of Labor and Employment,* 520 P.2d 586, 588-589 (Colo. 1974); *Colorado Motorway, supra*, at 437 P.2d 47-48.

supported by substantial evidence in the record when viewed as a whole.[11] "All evidence [relied upon by the Commission in rendering decisions] must be included in the record."[12] Under Colorado law, it is improper in closing arguments for counsel to misstate or misinterpret the law or to refer to facts not in evidence.[13]

Rule 602, Colorado Rules of Evidence, provides in pertinent part that, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

IV. ARGUMENT

A. AEU Violated the 30-page Limit in Rule 1202(d) and pages 31-34 of its SOP should be Stricken as a Sanction for its Violation.

AEU violated Rule 1202(d) by filing its SOP with 34 pages of substantive argument; its signature block is on page 35. While AEU could have sought leave to exceed the 30-page limit by filing a motion for variance from Rule 1202(d), on or before the due date for SOPs, it did not.[14]

A review of the arguments on pages 31-34 shows that Public Service will be prejudiced if those pages are not stricken, and the Commission considers those arguments in reaching its decision in this proceeding. On pages 31-34 AEU argues about comparative benefits between Market+ and EDAM and its concern about joining WRAP. The heart of AEU's argument starts on page 31, "[T]he fact that a third party conducted

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[11] *City of Boulder v. Public Utilities Comm'n.*, 996 P.2d 1270, 1274 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Comm'n.*, 949 P.2d 577, 585 (Colo. 1997)); *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373, 1377-1378 (Colo. 1994).

[12] *Board of County Comm'rs. v. Colorado Public Utilities Comm'n.*, 157 P.3d 1083, 1093 (Colo. 2007).

[13] *People v Wallace*, 97 P.3d 262, 269 (Colo App 2004), In closing argument, counsel may not misstate or misinterpret the law); *People v Nardine*, 409 P.3d 441, 453-54 (Colo App 2016), In closing argument, it is improper and reversible error for counsel to comment on facts not in evidence; *People v Walters*, 97 P.3d 262, 334 (Colo App 2004), In closing argument, it is improper for counsel to refer to facts not in evidence.

[14] Rule 1003.

exactly such a study – one that specifically calculated costs and benefits for Public Service joining each of EDAM and Markets+, based on Public Service's own loads and resources assumptions – during the pendency of this proceeding suggests how doable such an analysis would have been.[102]" Footnote 102 cites to a public comment, submitted over the Memorial Day weekend prior to the start of the hearing, that included a "study" written by Aurora Energy Research. Neither the public comment nor the alleged "study" was ever introduced into evidence, and they are not in the record.[15] AEU's argument on pages 31-32 carries forward its reliance on the outside-the-record "study." By so doing, AEU's argument improperly relies on material not in evidence, contrary to Colorado law, requiring substantial evidence in the record to support Commission decisions. This argument taints the whole argument exceeding the 30-page limit. Public Service's rights are highly prejudiced by this argument, and it rights to fundamental fairness and due process of law will be denied should the Commission consider the arguments on pages 31-34.

B. AEU's SOP Argument referring to a "Study" Not in Evidence and misstating Colorado Law Should be Stricken.

On pages 31 and 32 and in Footnote 102 of AEU's SOP, AEU refers to, and asks the Commission to rely upon, alleged facts not in evidence and then on pages 31 and 32 invites the Commission to ignore a fundamental tenet of Colorado administrative law that its decisions must be based upon substantial evidence in the record.

The argument heading on page 31 urges that, "The Commission should consider *available information* regarding the potential comparative benefits of other market

[15] Transcript, 05/27/2025 at 56:1 through 57:21. Mr. Taylor had no personal knowledge of the "study" referenced by counsel for AEU. *See* Rule 602, Colorado Rules of Evidence.

options" (Emphasis added.) AEU's argument on pages 31-32 then carries forward its reliance on the outside-the-record "study," asserting that, "When making its decision in this proceeding, the Commission should consider *all available information* regarding the potential benefits of other market options that Public Service would likely forego by joining Markets+ at this juncture." (Emphasis added.) AEU's arguments on page 31-32 improperly rely on the "Aurora "study," material clearly not in evidence, which counsel is prohibited by Colorado law from doing in its closing argument or SOP. The SOP then requests that the Commission ignore Colorado law requiring substantial evidence in the record to support Commission decisions. The words "available information regarding the potential comparative benefits of other market options" and "all available information regarding the potential benefits of other market options" clearly refer to the outside-the-record "study" relied upon by AEU in Footnote 102. This argument heading, the quote on page 31, and the argument on pages 31-32 misstates or misinterprets Colorado law, asserting that the Commission can base its decision in this proceeding on "available information" or on "all available information" not in evidence or the record of this proceeding. Applicable, long-standing Colorado law is clear. "All evidence [relied upon by the Commission in rendering decisions] must be included in the record."[16] The Commission's decisions must be supported by substantial evidence in the record when viewed as a whole.[17] AEU's argument on pages 31 and 32 misstates Colorado law and should be stricken, because this argument, as well at the quoted text and Footnote 102 on page 31, are contrary to Colorado law, refer to materials not in evidence, are highly

[16] *Board of County Comm'rs. v. Colorado Public Utilities Comm'n.*, 157 P.3d 1083, 1093 (Colo. 2007).
[17] *City of Boulder v. Public Utilities Comm'n.*, 996 P.2d 1270, 1274 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Comm'n.*, 949 P.2d 577, 585 (Colo. 1997)); *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373, 1377-1378 (Colo. 1994).

prejudicial to Public Service, and must be stricken before the Commission deliberates and enters its decision on this Application.

In the event the Commission decides not to strike pages 31 through 34 of substantive argument in AEU's SOP based on AEU's violation of Rule 1202(d), Public Service moves to strike the lines of argument and Footnote 102 on pages 31 and 32 of AEU's SOP.[18]

V. REQUEST TO SHORTEN RESPONSE TIME

Given that time is of the essence in ruling on this Motion, the Company respectfully requests that the Commission shorten response time to three business days, or to and including 5:00 p.m. on Friday, June 20, 2025.

VI. CONCLUSION

For the reasons and authorities set forth herein, Public Service respectfully requests that the Commission strike the arguments on pages 31-34 of AEU's Statement of Position on the grounds they have been filed in excess of the 30-page limit required by Rules 1202(d) of the Rules of Practice and Procedure, 4 CCR 723-1, without any timely motion for a variance from the requirements of Rule 1202(d), a timely response from Public Service, and Commission decision granting leave to AEU to file a Statement of Position exceeding 30 pages; and because consideration of AEU's arguments on pages 31-34 of AEU's Statement of Position will be highly prejudicial to Public Service. In the event the Commission decides not to strike pages 31 through 34 of the substantive argument in AEU's Statement of Position, based on AEU's violation of Rule 1202(d),

[18] The text that should be stricken starts on page 31 with the words "Although Public Service…" and continues through page 32 with the words "… in the rulemaking proceeding."

Public Service moves to strike the lines of argument and Footnote 102 on pages 31 and 32 of AEU's Statement of Position, as stated in Footnote 18.

DATED this 17th day of June 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2025, the foregoing document was filed with the Commission via E-Filings and served on those parties shown on the Commission's certificate of service accompanying such filing, as well as on counsel by email.

By: */s/ Braelynn Dunwody*