

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0315EG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS COMBINED ELECTRIC AND NATURAL GAS
DEMAND-SIDE MANAGEMENT AND BENEFICIAL ELECTRIFICATION PLAN FOR
CALENDAR YEAR 2023.

**INTERIM COMMISSION DECISION GRANTING SECOND
MOTION FOR EXTRAORDINARY PROTECTION AND
GRANTING MOTION FOR LEAVE TO REPLY**

Mailed Date: December 30, 2022

Adopted Date: December 21, 2022

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission grants the Motion for Extraordinary Protection (Motion for Extraordinary Protection), filed by Public Service Company of Colorado (Public

Service or the Company) on December 2, 2022. Through the Motion for Extraordinary Protection, Public Service seeks an order granting highly confidential treatment to executed vendor contracts that are responsive to one or more discovery requests received in this Proceeding concerning third-party implementer contracts. Upon review of the Motion for Extraordinary Protection and its attachments, we find good cause to grant the relief sought in the Motion for Extraordinary Protection.

B. Procedural History

2. On July 1, 2022, Public Service initiated this matter by filing its Application and Direct Testimony requesting Commission approval of the Company's 2023 Electric and Natural Gas Demand-Side Management (DSM) and Beneficial Electrification (BE) Plan (2023 DSM & BE Plan or Plan). In its Application, Public Service states the 2023 DSM & BE Plan is a combined electric and gas Plan that contains comprehensive descriptions of each of the electric and gas DSM programs that Public Service proposes to implement for calendar year 2023, including BE measures. Public Service explains, while the Company first introduced its existing BE offerings as part of its 2021-22 DSM Plan, this filing is the Company's first DSM Plan to incorporate the new BE Plan elements required by Senate Bill 21-246, effective September 7, 2021.

3. Through Decision No. C22-0530-I, issued September 8, 2022, the Commission established the following parties to this Proceeding: Public Service, Trial Staff of the Commission, the Office of the Utility Consumer Advocate, Colorado Energy Office, City and County of Denver, City of Boulder, Climax Molybdenum Company, Colorado Energy Consumers Group, Energy Efficiency Business Coalition, Energy Outreach Colorado, Iconergy LTD (Iconergy), Southwest Energy Efficiency Project, and Western Resource Advocates.

4. Public Service states no party except Iconergy opposes the requested relief.

5. On December 16, 2022, Iconergy filed a response to Public Service's Motion for Extraordinary Protection (Iconergy Response).

6. On December 20, 2022, Public Service filed Motion for Leave to Reply and Reply to Iconergy's Response to Motion for Extraordinary Protection (Motion for Leave to Reply).

C. Motion for Extraordinary Protection

7. The Motion for Extraordinary Protection seeks highly confidential treatment of the final executed vendor contracts with third-party implementers that are the bid winners for the following DSM programs: (1) New construction, Energy Design Assistance; (2) Business Energy Assessments, (Building Assessment & Targeted Building Assessment) and Business Energy Assessments (Commercial Streamlined Assessment); and (3) Strategic Energy Management.

8. Public Service requests access to these categories of information be limited to Commissioners, Commission Advisors and Commission Advisory Counsel, Commission Staff and Staff Counsel, and the UCA and its attorneys. Public Service also includes highly confidential non-disclosure agreements for counsel and subject matter experts who access any of the highly confidential information as Attachments A and B, respectively.

9. In support of its Motion for Extraordinary Protection, Public Service argues that the Commission has previously recognized that negotiated terms and conditions of vendor contracts are extremely sensitive, and disclosure of such information could result in unfair advantages between potential competitive business interests so extraordinary remedies are reasonable and necessary to protect this type of highly confidential information. The Company contends that the Commission as afforded similar protections in previous proceedings, including Proceeding No. 21A-0096E and 21A-0625EG. Public Service further states that pursuant to Colorado statute,

there is no right of public inspection for “[t]rade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data.” § 24-72-204(3)(a)(IV), C.R.S.

10. Public Service notes that it already provided parties to this proceeding with form agreements that are used as the basis for negotiations with these vendors as well as summary information describing these agreements and is willing to provide parties with the individual scopes of work agreed to by each of the applicable vendors. Public Service only seeks extraordinary treatment for protection of specific vendor pricing information, and the terms and conditions individually negotiated between each vendor and Public Service beyond those included in the form agreements.

11. Public Service argues that disclosure of this information could cause competitive harm to third party implementers and vendors as well as to the Company’s ability to obtain the most favorable vendor pricing and terms and conditions. It also notes that Iconergy is a direct competitor of at least one or more of the vendors Public Service has executed an agreement with that would be covered by the request in this Motion for Extraordinary Protection.

12. Pursuant to Rule 1101(b)(VII) of the Commission’s Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, the movant for extraordinary protection shall include an exhibit containing the information for which highly confidential protection is requested, or alternatively, the movant may show why providing the information would be overly burdensome, impractical, or too sensitive for disclosure. Public Service contends that because the highly confidential information at issue in its Motion for Extraordinary Protection relates to discovery requests, Public Service has not attached these documents as exhibits to the Motion for Extraordinary Protection.

13. Public Service filed form highly confidential non-disclosure agreements and an affidavit containing a list of individuals at Public Service who have access to the claimed highly confidential information.

D. Iconergy Response

14. Iconergy requests that the Commission deny the Company's Motion for Extraordinary Protection for two reasons. First, it argues that the contracts the Company seeks to protect as highly confidential information are old and second, that maintaining the confidentiality of the information will perpetuate the inability of accomplished DSM firms to participate in the Company's programs and offer their expertise to customers. Iconergy asserts that because the contracts have already been awarded, Iconergy cannot be a direct competitor for the third-party implementer contracts at issue. Further, it argues that the contracts are outdated because of changes to the economy, the COVID pandemic, and renewed focus on DSM. Finally, Iconergy argues that keeping this information confidential puts existing providers at an unfair competitive advantage for future requests for proposals.

E. Motion for Leave to Reply

15. In Its Motion for Leave to Reply, Public Service requests the Commission considers its reply to Iconergy's Response. Public Service contends that it is appropriate to grant its Motion for Leave to Reply because Iconergy's Response contains a material misrepresentation of fact. Public Service asserts that Iconergy misrepresents the contracts as "old" when they are actually the currently in effect vendor contracts.

16. Under Rule 1400(e) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, a motion for leave to file a reply must demonstrate either a material representation of fact, a surprise, newly discovered facts or issues, or an incorrect statement or error of law.

17. We find good cause to grant Public Service's Motion for Leave to Reply and therefore consider its response.

18. Public Service's response in its Motion for Leave to Reply emphasizes that protection for these contracts is appropriate because they are currently in effect, and the vendors and public service both have a direct competitive interest in protecting the terms of the current contracts. With a new request for proposals process beginning in 2023, Public Service contends that disclosure of existing contracts to potential new bidders would create an uneven playing field by creating an unfair advantage to new bidders, while undermining the Company's bargaining power with potential new vendors.

F. Findings and Conclusions

19. We find that, pursuant to Rule 1101(b) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, the Motion for Extraordinary Protection appropriately designates the categories of competitively sensitive information identified in the Motion for Extraordinary Protection as highly confidential; that the protection afforded by the Commission's rules for furnishing confidential information provides insufficient protection for the highly confidential information; and that the highly confidential protections proposed by Public Service will afford sufficient protection for the highly confidential information. We are unpersuaded by Iconergy's argument that the age of the highly confidential information here makes it less competitively sensitive or that disclosure of the highly confidential information would allow for more

competitive future bids. We therefore find good cause to grant the Motion for Extraordinary Protection.

20. Access to the categories of competitively sensitive information identified in the Motion for Extraordinary Protection is limited to Commissioners, Commission Advisors and Commission Advisory Counsel, Commission Staff and Staff Counsel, and UCA and its attorneys. Individuals accessing the protected information must comply with the approved non-disclosure agreement (Attachments A and B to the Motion for Extraordinary Protection), including that they may not use the information for commercial purposes, or disclose the information to any unauthorized person, including those within the intervening organization, for any reason.

II. ORDER

A. It Is Ordered That:

1. The Motion for Extraordinary Protection, filed by Public Service Company of Colorado (Public Service), on December 2, 2022, is granted, consistent with the discussion above
2. The Motion for Leave to Reply and Reply to Iconergy's Response to Motion for Extraordinary Protection filed by Public Service on December 20, 2022, is granted.

3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 21, 2022.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "G. Harris Adams".

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners