

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24A-0140E

IN THE MATTER OF THE VERIFIED APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE ROCKY MOUNTAIN 325 MW SOLAR PLUS 200 MW STORAGE GENERATION FACILITY AND THE 335 MW ARROYO 2 SOLAR GENERATION FACILITY.

**INTERIM COMMISSION DECISION: (1) ESTABLISHING PARTIES;
(2) GRANTING, IN PART, AND DENYING, IN PART, MOTION TO
EXPEDITE; (3) ESTABLISHING PROCEDURAL SCHEDULE;
(4) SCHEDULING REMOTE EVIDENTIARY HEARING;
(5) ESTABLISHING PROCEDURES FOR EVIDENTIARY HEARING;
AND (6) GRANTING MOTION FOR EXTRAORDINARY PROTECTION**

Mailed Date: May 6, 2024
Adopted Date: April 24, 2024

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I. BY THE COMMISSION

A. Statement

1. On March 25, 2024, Public Service Company of Colorado (Public Service or Company) filed a Verified Application for Approval of Certificates of Public Convenience and Necessity (CPCNs) for the Rocky Mountain Project and Arroyo 2 Project (Application). Through this Application, Public Service requests that the Commission issue two CPCNs to the Company to construct, own, and operate the Rocky Mountain project (a 325 MW solar plus storage facility) and the Arroyo 2 project (a 335 MW solar facility). Concurrently with the Application, Public Service filed a Motion for Expedited Notice, Shortened Notice and Intervention Period, Commission Hearing *en banc*, and an Expedited Decision (Motion to Expedite) and a Motion for Extraordinary Protection.

2. Through this Decision, we establish the parties to this Proceeding. Specifically, we grant the requests for permissive intervention filed by Colorado Energy Consumers (CEC) and Climax Molybdenum Company (Climax) and acknowledge the interventions as of right filed by Trial Staff of the Colorado Public Utilities Commission (Staff) and the Office of Utility Consumer Advocate (UCA).

3. In addition, through this Decision we (1) address the remaining issues in the Motion to Expedite and adopt, with modifications, Public Service’s proposed procedural schedule set forth in the Motion to Expedite, (2) schedule a remote *en banc* evidentiary hearing, (3) grant the Motion for Extraordinary Protection, (4) refer discovery disputes and future motions for extraordinary protection to an Administrative Law Judge (ALJ), and (5) establish procedures for the remote evidentiary hearing.

B. Procedural History

4. Public Service’s Application in this Proceeding stems from the Commission’s Phase II Decision (Decision No. C24-0052) in Proceeding No. 21A-0141E, addressing Public Service’s 2021 Electric Resource Plan (ERP) and Clean Energy Plan (CEP). In Decision No. C24-0052, we approved a modified CEP and authorized the Company to pursue the generation resources in the Alternative Portfolio.¹ Two of the utility-owned generation projects within the Alternative Portfolio are the Rocky Mountain and Arroyo 2 projects. The Commission required the Company to pursue the Alternative Portfolio of resources and further required that all Company-owned generation resources be subject to a cost to construct performance incentive mechanism (PIM) and an operational PIM.²

5. On March 25, 2024, Public Service filed the present Application. Citing Rule 3617(d)(II), the Company argues that because these projects arise from the 2021 ERP/CEP, the Commission has already made a finding of need for these generation resources through the ERP process. Public Service asserts if “another party challenges the need for the approved resources, the challenging party has the burden of overcoming the Commission’s prior approval.”³

¹ Proceeding No. 21A-0141E, Decision No. C24-0052 (issued January 23, 2024), ¶ 8.

² Decision No. C24-0052, ¶ 8.

³ HE 101 (Pascucci Direct), p. 16.

Public Service states it is “critical” that construction of the Rocky Mountain project commences by mid-August 2024 in order to meet the December 31, 2025, commercial operation date contemplated in Proceeding No. 21A-0141E.⁴

6. By Decision No. C24-0210-I, issued April 3, 2024, the Commission gave notice of this Application to all interested parties pursuant to § 40-6-108(2), C.R.S., and established a shortened notice and intervention period for the Application through April 15, 2024. By the same Decision, the Commission granted, in part, and denied, in part, the Motion to Expedite and indicated it would take up the remaining requests in the motion by separate order. The Commission also clarified it would hear the matter *en banc*, set a response time of April 19, 2024, for any responses to motions for permissive intervention, and required that parties file with their interventions any responses to the Company’s Motion to Expedite and Motion for Extraordinary Protection. In addition, the Commission directed Public Service to make a supplemental filing by April 19, 2024, addressing certain questions regarding the interaction between the Rocky Mountain and Arroyo 2 projects in this Proceeding and the subsequent implementation of the cost to construct PIM.

7. In accordance with Decision No. C24-0210-I, on April 15, 2024, Colorado Energy Consumers (CEC) and Climax Molybdenum Company (Climax) each filed a request for permissive intervention. Also on April 15, 2024, Staff and UCA each filed a notice of intervention as of right.

8. On April 19, 2024, Public Service filed the Supplemental Direct Testimony of Michael Pascucci. Among other matters, in his Supplemental Direct Mr. Pascucci responds to the Commissions questions regarding the Rocky Mountain and Arroyo 2 projects and the

⁴ HE 101 (Application), pp. 2, 5.

implementation of the cost to construct PIM. He explains that in the Company's initial filings it inadvertently depicted incorrect cost to construct numbers. Mr. Pascucci corrects these errors and shows that the cost to construct numbers set forth in Proceeding No. 21A-0141E are the same as what the Company sponsors in this Proceeding.⁵ Similarly, Mr. Pascucci clarifies that the Company agrees that the cost to construct baseline includes the allowance for funds used during construction, consistent with its position in Proceeding No. 21A-0141E.⁶

9. Public Service did not submit any responses to the motions for permissive intervention that CEC and Climax filed.

C. Discussion, Findings, and Conclusions

1. Completeness

10. The Application was deemed complete by operation of law on April 30, 2024, for purposes of § 40-6-109.5, C.R.S.

2. Intervenor

a. Intervenor as of Right

11. In UCA's notice of intervention as of right and a request for hearing, it states it plans to inquire into whether there are discrepancies between the cost-to-construct point costs Public Service provided in Proceeding No. 21A-0141E versus what the Company now presents in this Proceeding and whether the baseline for the cost to construct PIM includes the allowance for funds used during construction appears inconsistent with what Public Service represented in Proceeding No. 21A-0141E.

12. In Staff's notice of intervention as of right and request for hearing, it states that it plans to raise and address the appropriate process for establishing the PIM baseline; whether the

⁵ HE 103 (Pascucci Supplemental), pp. 9-10.

⁶ *Id.* at 11.

CPCN application is consistent with the project characteristics bid into the ERP; whether the Company's construction plan, schedule, project management, and other decisions are reasonable and appropriate; whether the transmission generation intertie project plan, cost, schedule, and management are just, reasonable, and in the public interest; whether the Company's proposed reporting and communications regarding the project are reasonable; and whether and how system curtailments should be addressed through this CPCN application.

13. Pursuant to Rule 1401(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, no decision is required in response to appropriately filed notices of intervention by right. We acknowledge the notices of intervention of right, and that Staff and UCA are parties to this Proceeding.

b. Permissive Intervenor

14. In CEC's motion to permissively intervene and a request for hearing, CEC indicates that none of Public Service, Staff, or UCA object to its intervention.

15. CEC states it is an unincorporated association of corporate entities. CEC states all of its members operate facilities within Public Service's service territory and purchase electricity and related energy services from the Company.

16. CEC states, if approved, the projects will have a direct and substantial impact on its members' electric rates and may have impacts on the reliability and emissions profile of electric service they receive, thus impacting their respective business operations and goals. CEC contends its members have pecuniary and tangible interests in ensuring the projects become used and useful, and that the Company's proposed and actual budget and cost recovery result in just and reasonable electric rates. CEC adds it has a direct, tangible, and pecuniary interest in the PIMs, both in terms of ensuring reasonable costs to customers, and compliance with the Phase II Decision in

Proceeding No. 21A-0141E. CEC states it further has a direct, tangible, and pecuniary interest in the Company's cost recovery proposals.

17. CEC further states its members are all large commercial and industrial electric customers with respectively unique service requirements. CEC states no other party or putative intervenor could adequately represent CEC's interests due to the unique service requirements and characteristics of each CEC member, and of CEC as a group.

18. In Climax's motion to permissively intervene, Climax states that it conferred with Public Service about its intervention and the Company takes no position.

19. Climax states it operates molybdenum mines and related facilities near Leadville and Empire, Colorado. Climax states it receives electric service from Public Service at its respective facilities and is one of Public Service's largest customers. Climax states the cost and reliability of Public Service's electric service are major factors in Climax's ability to conduct its operations. Climax states its electric service requirements are unique among Public Service's electric customers.

20. Climax contends, as one of Public Service's largest customers, Climax has a substantial interest in cost recovery issues, including how the decision in one proceeding may constrain the scope of a subsequent proceeding. Climax concludes the Commission's decision in this case will directly and substantially affect Climax's electricity costs necessary for mining and milling molybdenum. Climax states its interests as a substantial electric customer of Public Service are unique among its customers and, therefore, its interests will not be adequately represented unless it is allowed to intervene.

21. No party filed a response objecting to these permissive interventions.

22. Rule 1401(c) sets forth the following standard for permissive intervention:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented.

23. Under this standard, the test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative.

24. In addition, Rule 1401(c) requires that a movant who is a residential consumer, agricultural consumer, or small business consumer discuss whether the distinct interest of the consumer is either not adequately represented by UCA or inconsistent with other classes of consumers represented by UCA. As set forth in § 40-6.5-104, C.R.S., UCA has a statutory mandate to represent the public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers by appearing in proceedings before the Commission.

25. We find that, as required by Rule 1401(c), 4 CCR 723-1, each entity discussed above that seeks to permissively intervene has sufficiently demonstrated that this Proceeding may substantially affect its pecuniary or tangible interests and its interests would not otherwise be adequately represented. Therefore, we grant the requests for permissive intervention. In doing so, we direct the parties to work together where their interests align to maximize efficiency. The following are parties to this Proceeding: Public Service, Staff, CEC, and Climax.

3. Motion to Expedite and the Procedural Schedule

26. In the Motion to Expedite, Public Service proposes the following procedural schedule:

Date	Deadline/Action
May 15, 2024	Answer Testimony due
June 5, 2024	Rebuttal Testimony due
June 17-18, 2024	Evidentiary Hearing
June 28, 2024	Statements of Position due
August 1, 2024	Commission Decision

27. While no party opposes the proposed procedural schedule, we find it necessary to make certain modifications. First, the schedule fails to include a settlement deadline. Given the Commission's constrained schedule in June, if the hearing needs to be rescheduled because of a late-filed settlement agreement, it could be several weeks before the next available hearing date. To help prevent unnecessary delays because of a late-filed settlement, we establish a settlement deadline of Friday, June 7, 2024. Similarly, to help ensure the efficient administration of the evidentiary hearing, we set a deadline of Monday, June 10, 2024, for any corrections to pre-field testimony and exhibits and any pre-hearing motions. The deadline for the witness list and cross examination matrix will also be June 10, 2024.

28. Due to the press of business and the Commissioners' limited availability, the only time currently available for hearing is June 17, 2024. Accordingly, we schedule a remote *en banc* evidentiary hearing for June 17, 2024, at 11:00 a.m. That said, the Commission might reevaluate the start time of the evidentiary hearing after the cross-examination matrix is filed.

The Commission consequently establishes the modified procedural schedule shown below:

Date	Deadline/Action
May 15, 2024	Answer Testimony due
June 5, 2024	Rebuttal Testimony due
June 7, 2024	Settlement Deadline
June 10, 2024	Corrections to pre-filed testimony and exhibits, pre-hearing motions, and the witness list and cross examination matrix due
June 17, 2024, at 11:00 a.m.	Remote Evidentiary Hearing
June 28, 2024	Statements of Position due

29. In the Motion to Expedite, Public Service requests a decision deadline by August 1, 2024. We find merit in the Company's assertions that urgency is needed in this Proceeding, and the requested decision deadline currently appears feasible. However, we decline to commit to an August 1, 2024, decision deadline at this time. The timing of the Commission's decision will ultimately depend on how the Proceeding develops.

30. The evidentiary hearing scheduled for June 17, 2024, will be conducted using the Zoom platform. To minimize the potential that the remote hearing may be disrupted by non-participants, Commission staff will distribute the link and meeting ID, or access code, to attend the hearing to the parties by email approximately one week before the hearing, and the parties and witnesses are prohibited from distributing that information to anyone not participating in the hearing.

31. For procedural efficiencies, we refer all future discovery disputes and motions for extraordinary protection to an ALJ.

4. Procedures for Evidentiary Hearing

a. Instructions Provided in Attachments

32. Attachment A to this Decision provides the information addressing how to use the Zoom platform for participating in the remote evidentiary hearing scheduled for June 17, 2024. Attachment B provides detailed instructions governing the preparation and presentation of exhibits at hearing. The parties shall review and follow all requirements in this Decision and Attachments A and B, which are incorporated into and made part of this Decision.

b. Assignment of Hearing Exhibit Number Blocks

33. Hearing exhibits shall be marked numerically and sequentially for identification by the filing parties within their respective blocks of numbers. In order to efficiently organize the numbering and preparation of exhibits for the hearing, all parties shall use a unified numbering system for all hearing exhibits. Parties should not duplicate hearing exhibits or attachments previously filed by another party.

34. The party initiating the proceeding is assigned hearing exhibit numbers 100 to 299.

35. Each intervening person or entity is assigned a block of 100 hearing exhibit numbers (*e.g.*, 300-399, 400-499, etc.) in the chronological order that notices of intervention by right and petitions for permissive intervention are filed, as reflected in the Commission's E-Filings System. As a result, the first person or entity noticing an intervention by right or requesting permissive intervention is assigned hearing exhibit numbers from 300 to 399, the second person or entity is assigned hearing exhibit numbers from 400 to 499, etc. Parties shall rely upon the Commission's E-Filings system to determine sequencing of requests for intervention (*i.e.*, without regard to whether or when the interventions were granted). To determine the sequencing and avoid duplicative use of blocks, parties are encouraged to confer as needed.

5. Motion for Extraordinary Protection

a. Public Service Motion

36. On March 24, 2024, Public Service filed the Motion for Extraordinary Protection, requesting extraordinary protection for competitively sensitive and highly confidential information associated with the Rocky Mountain and Arroyo 2 projects. Public Service requests the Commission enter an order restricting access to documents and information in each of the following categories:

(1) Contract Terms and Conditions

37. Public Service requests extraordinary protection of negotiated commercial contract terms and conditions that are highly sensitive to the Company and the vendors the Company is transacting with in order to develop these projects. Public Service states it would cause all parties significant competitive harm if the terms and conditions of these agreements became known to competitors, potential counterparties, or potential future customers for both the Company and these vendors. Public Service explains, if future potential bidders had access to the highly confidential terms and conditions in these contracts, it would disadvantage the Company's and the counterparties' negotiating position for future deals and it would jeopardize the Company's relationship with these counterparties and vendors, and therefore the Company's ability to obtain favorable contract terms for the Company's customers.

(2) Pricing Information

38. Public Service requests extraordinary protection of pricing information associated with those commercial contracts or other information that could be used to derive cost figures. Public Service states it would cause all parties significant competitive harm if the terms of these agreements became known to competitors, potential counterparties, or potential future customers for both the Company and these vendors. Public Service explains, if future potential bidders had

access to the highly confidential pricing information and cost estimates, it would disadvantage the Company's and the counterparties' negotiating position for future deals and it would jeopardize the Company's relationship with these counterparties and vendors, and therefore the Company's ability to obtain favorable prices for the Company's customers.

(3) Cost Information

39. Public Service requests extraordinary protection of any actual or estimated cost information associated with land rights and acquisitions for these projects. Public Service states such information is proprietary and highly sensitive since the Company's land rights acquisition efforts are ongoing. Public Service explains, as is the case for pricing information and cost estimates, if prices that have been negotiated or estimates of those costs became public, it would jeopardize the Company's ability to obtain the lowest prices.

(4) Protected Information

40. Public Service requests extraordinary protection of any information that is considered highly confidential information pursuant to a protective order in related Proceeding No. 21A0141E, the Company's 2021 ERP & CEP proceeding. Public Service states that including this information in the order issued in this Proceeding will ensure that information designated as highly confidential in one proceeding does not and cannot become public in a related proceeding.

41. Public Service states this request is intended to cover any discovery responses or documents otherwise filed or served in this Proceeding that contain any of this claimed highly confidential information.

42. Public Service requests the Commission limit access to this information to the following entities: the Commission, its advisory staff, Commission ALJs, members of Staff, employees of UCA assigned to this Proceeding, and the assistant attorneys general representing the Commission, its staff, and UCA in this Proceeding.

43. As to other intervenors, Public Service requests denying access to intervenors that are developers of energy resources, competitive power producers, competitive suppliers or vendors, existing or potential wholesale customers of developers of energy resources, or entities that might otherwise bid into a future Public Service resource solicitation or compete with the suppliers or vendors that are counterparties to these agreements. Public Service requests remaining intervenors be allowed access but limited to counsel and subject matter experts and those intervenors would have to provide executed highly confidential non-disclosure agreements.

44. Public Service explains, if any of the claimed highly confidential information was disclosed to developers of energy resources, competitive power suppliers, competitive suppliers or vendors, or existing or potential wholesale customers of developers of energy resources, it would negatively impact the Company's ability to solicit resources, negotiate beneficial terms, and obtain the best possible prices to acquire resources in the future. Public Service adds it could also negatively impact other vendors by disclosing the terms and conditions of contracts deemed confidential and proprietary. Public Service concludes access to sensitive strategic information amongst the litigants should therefore be limited to prevent disclosure in a manner that could cause great harm to the Company, to Public Service's customers, and to each individual vendor.

45. Public Service prepared non-disclosure agreements for attorneys and subject matter experts, as required by Rule 1101(b) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. Public Service also provided the affidavit of Michael V. Pascucci, identifying the employees in groups with access to the highly confidential information and attesting that this information must remain protected as highly confidential indefinitely.

b. Findings and Conclusions

46. When presented with a motion for extraordinary protection of claimed highly confidential information, the Commission determines whether the information is, in fact, highly

confidential, the level of extraordinary protection that may be warranted, and to whom access should be granted.

47. The operative language in Rule 1101(b)(IV) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, which concerns motions requesting highly confidential protection, requires that the motion:

shall include a showing that the information for which highly confidential protection is sought is 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, if adopted, the highly confidential protections proposed by the movant will afford sufficient protection for the highly confidential information ...

48. We find persuasive the reasoning and arguments in the Motion for Extraordinary Protection. The motion states good cause to grant the relief sought under Rule 1101. The Commission further finds the requested protections are appropriate, are reasonable, and are consistent with the Commission's Rules and past practice.

49. Based on the foregoing, we grant the unopposed Motion for Extraordinary Protection and approve the Company's proposed non-disclosure agreements.⁷

50. We remind counsel and the parties that individuals permitted access to the highly confidential information may use it only for purposes of this Proceeding, consistent with the Commission's confidentiality rules. The protected highly confidential information may not be disclosed to any unauthorized persons.

⁷ The Commissioners, Commission advisory staff, Commission advisory counsel, ALJs, Staff, and Staff counsel sign annual non-disclosure agreements covering all confidential and highly confidential information filed with the Commission and are not required to sign separate agreements in individual cases. See Rule 1100(i) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

II. ORDER**A. It Is Ordered That:**

1. The notices of intervention filed by Trial Staff of the Colorado Public Utilities Commission (Staff) and the Office of Utility Consumer Advocate (UCA), on April 15, 2024, are acknowledged.

2. The motion to intervene filed by the Colorado Energy Consumers (CEC) on April 15, 2024, is granted.

3. The motion to intervene filed by Climax Molybdenum Company (Climax) on April 15, 2024, is granted.

4. The parties to this Proceeding are Public Service Company of Colorado (Public Service), Staff, UCA, CEC, and Climax.

5. The Motion for Expedited Notice, Shortened Notice and Intervention Period, Commission Hearing *en banc*, and an Expedited Decision (Motion to Expedite) that Public Service filed on March 25, 2024, is granted, in part, and denied, in part, consistent with the above discussion.

6. The procedural schedule proposed in the Motion to Expedite is adopted, with the modifications and additions set forth in the discussion above.

7. A remote evidentiary hearing is scheduled in this Proceeding as follows:

DATE: June 17, 2024

TIME: 11:00 a.m. to 5:00 p.m.

METHOD: Join by videoconference using Zoom at the link to be provided to parties by e-mail.

8. All participants must comply with the requirements in Attachments A and B to this Decision, which are incorporated into this Decision.

9. The parties and witnesses are required to participate in the evidentiary hearing by video conference using Zoom. The parties must ensure that they and their witnesses are ready and able to participate in the evidentiary hearing by video conference, including presenting evidence electronically during the hearing using Zoom.

10. The parties are responsible for sharing the Zoom link, meeting ID code, and passcode to witnesses and others participating in the hearing. Participants in the hearing may not distribute the link, meeting ID code, and passcode to anyone not participating in the hearing.

11. All future discovery disputes and motions for extraordinary protection are referred to an Administrative Law Judge.

12. The Motion for Extraordinary Protection of Highly Confidential Information, filed by Public Service on March 25, 2024, is granted.

13. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 24, 2024**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners