

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0585E

IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. FOR APPROVAL OF ITS 2023 ELECTRIC RESOURCE PLAN.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
GRANTING, IN PART AND DENYING IN PART, MOTION
FOR EXTRAORDINARY PROTECTION**

Mailed Date: April 26, 2024

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I. STATEMENT

A. Procedural Background

1. On December 1, 2023, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed an Application for Approval of its 2023 Electric Resource Plan (Application). With the Application, Tri-State filed, among other things, its Motion for Extraordinary Protection

of Highly Confidential Information Filed by Tri-State Generation and Transmission Association (First Motion for Extraordinary Protection). As attachment A to the First Motion for Extraordinary Protection, Tri-State attached its proposed Highly Confidential Nondisclosure Agreement.

2. By Decision No. R24-0080-I, issued February 6, 2024, the undersigned Administrative Law Judge (ALJ), among other things, established procedures herein and conditionally granted the First Motion for Extraordinary Protection, subject to Tri-State's filing of an amended affidavit identifying the time period for which extraordinary protection is sought by Tri-State.

3. On February 8, 2024, Tri-State filed the supplemental affidavit noted in Decision No. R24-0080-I.

4. On February 8, 2024, the Second Motion for Extraordinary Protection of EnCompass Files Filed by Tri-State Generation and Transmission Association (Second Motion for Extraordinary Protection) was filed by Tri-State.

5. On February 22, 2024, the Joint Response in Opposition to Tri-State's Second Motion for Extraordinary Protection (Response to the Second Motion for Extraordinary Protection) was filed by the Colorado Solar and Storage Association and Solar Energy Industries Association (CSSA/SEIA), Natural Resources Defense Council (NRDC), Sierra Club (Sierra), the Utility Consumer Advocate, and Western Resource Advocates (WRA) with the attached affidavits of Tyler Comings and Chelsea Hotaling.

6. On March 19, 2024, Tri-State Generation and Transmission Association Inc.'s Third Motion for Extraordinary Protection (Third Motion for Extraordinary Protection) was filed by Tri-State.

7. On April 2, 2024, the Response in Opposition of La Plata Electric Association, Inc. And Mountain Parks Electric, Inc. to Tri-State Generation and Transmission Association, Inc.'s Third Motion for Extraordinary Protection (LPEA's and MPE's Response to the Third Motion for Extraordinary Protection) was filed by La Plata Electric Association, Inc. (LPEA) and Mountain Parks Electric, Inc. (MPE).

8. On April 2, 2024, the Joint Response in Opposition to Tri-State's Third Motion for Extraordinary Protection (CSSA/SEIA's, NRDC's, Sierra's, and WRA's Response to the Third Motion for Extraordinary Protection) was file by CSSA/SEIA, NRD Council (NRDC), Sierra, and WRA.

9. By Decision No. R24-0138-I, issued March 5, 2024, the ALJ, among other things, denied without prejudice Second Motion for Extraordinary Protection and adopted a procedural schedule to govern this Proceeding.

10. On April 3, 2024, the Unopposed Motion of Moffat County and the City of Craig Requesting the Scheduling of a Public Comment Hearing (Motion Requesting a Public Comment Hearing) was filed by Moffat.

B. Motion for Extraordinary Protection

11. In the Motion for Extraordinary Protection, Tri-State states that: (a) it is requesting extraordinary protection for its Excel files that comprise the individual EnCompass simulations Tri-State used to conduct its Phase I modeling within the EnCompass modeling software (the EnCompass Files);¹ (b) the EnCompass Files are technical in nature, and Tri-State uses a particular computing configuration and setup to run its modeling;² (c) The specific

¹ Third Motion for Extraordinary Protection at 2, 6.

² *Id.* at 6.

environment within which Tri-State runs its modeling allows it to achieve faster solutions and lower mixed-integer programming in the maximum time allotted for a solution within the EnCompass software;³ (d) it is requesting that the Commission afford extraordinary protection for the EnCompass Files and order that it be treated as highly confidential and subject to the protective order and nondisclosure agreement that were previously approved in Decision No. R24-0090-I, and that access to the EnCompass Files be limited to only those parties that have a license for the EnCompass software;⁴ (e) The EnCompass Files are populated with numerous commercially-sensitive information related to Tri-State's operations, power plants, and power purchase agreements with independent power producers, the disclosure of which could cause Tri-State irreparable harm;⁵ (f) the Commission's rules governing ordinary confidentiality would provide insufficient protection for the EnCompass Files because they are not specifically tailored to the software-specific nature of the EnCompass Files and the breadth of non-disclosure protection sought by Tri-State goes beyond the Commission's standard confidentiality rules;⁶ (g) the protection sought by Tri-State "will afford sufficient protection to the EnCompass Files by (1) limiting their distribution to only those parties who can make meaningful use of the Files consistent with their software licenses, (2) prohibiting access to the Files by parties that are competitors of Tri-State and could use the data to gain a competitive advantage, and (3) ensuring that any individuals accessing the Files have executed the appropriate highly confidential nondisclosure agreement that further clarifies the Files cannot be used for any purposes (including competitive purposes) outside the scope of this proceeding[;]"⁷ (h) Tri-State's request

³ *Id.* and Attachment B to the Third Motion for Extraordinary Protection.

⁴ Third Motion for Extraordinary Protection at 7.

⁵ *Id.*

⁶ *Id.* at 8-9.

⁷ *Id.* at 9.

for highly confidential treatment of the EnCompass Files is consistent with Commission practice;⁸ Tri-State’s proposed Highly Confidential Nondisclosure Agreement is provided as Attachment C to the Third Motion for Extraordinary Protection;⁹ (i) it provided notice to the parties in this Proceeding by filing the Third Motion for Extraordinary Protection in this Proceeding;¹⁰ (j) Attachment D to the Third Motion for Extraordinary Protection is the affidavit of Lisa Tiffin, Tri-State’s Vice President Planning & Analytics, which verifies the accuracy of the information contained in the Third Motion for Extraordinary Protection, identifies all persons with access to the highly confidential information within the EnCompass Files, and states the period of time for which the information is to remain subject to highly confidential protection;¹¹ (k) it would be overly burdensome and impractical to include the EnCompass Files as an exhibit to the Third Motion for Extraordinary Protection;¹² (l) it requests that at the conclusion of this Proceeding, all parties and their counsel destroy the EnCompass Files provided to them during the course of this Proceeding;¹³ (m) it received a discovery request seeking access to the EnCompass files on January 30, 2024;¹⁴ and (n) it requests that the Commission issue an order providing that access to the EnCompass Files be limited to individuals with a current license for the EnCompass software, and that (1) access to the EnCompass Files be limited to only parties to this proceeding that are not competitors of Tri-State, (2) For parties that are not competitors of Tri-State, access to the EnCompass Files be further limited to a “reasonable number of attorneys” and a “reasonable number of subject matter experts representing a party to this Proceeding,

⁸ *Id.* at 9-11.

⁹ *Id.* at 11.

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 13.

consistent with Rule 3614(b)[, 4 *Code of Colorado Regulations* 726-4]”, (3) Competitors of Tri-State be defined to include the representatives and attorneys for other public utilities and their affiliates, independent power producers and their affiliates, and any other company and their affiliates with business functions that include the sale of energy or the development of facilities for the production of energy, and (4) individuals accessing the EnCompass Files (with the exception of the Commission and Commission trial staff) be required to execute the nondisclosure agreement provided as Attachment C to the Third Motion Requesting Extraordinary Protection.

12. In LPEA’s and MPE’s Response to the Third Motion for Extraordinary Protection, LPEA and MPE state: (a) Tri-State improperly elides the difference between non-proprietary, commonly-shared input information and output information EnCompass files on one hand, and a broader category of internal EnCompass Files that may be proprietary;¹⁵ (b) parties without an EnCompass license can still review all the modeling input and output files of an exported EnCompass database;¹⁶ (c) input and output EnCompass information can and have been provided to parties without a license in Colorado and in other jurisdictions without violating any the EnCompass terms and conditions;¹⁷ (d) Tri-State provides no evidence to rebut the notion that the EnCompass Files are unique compared to other utilities’ EnCompass files;¹⁸ and (e) Tri-State’s reliance on other Commission proceedings in which EnCompass files were granted extraordinary protection, including Plan Proceeding, No. 21A-0141E, is misplaced because in those Proceedings the Commission did not grant extraordinary protection for *all* EnCompass files.¹⁹

¹⁵ LPEA’s and MPE’s Response to the Third Motion for Extraordinary Protection at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 3.

13. In CSSA/SEIA's, NRDC's, Sierra's, and WRA's Response to the Third Motion for Extraordinary Protection, CSSA/SEIA, NRDC, Sierra, and WRA state: (a) the Third Motion for Extraordinary Protection fails to show that limiting access to parties with an active EnCompass license would afford sufficient protection to the EnCompass database files;²⁰ (b) Tri-State's contention that limiting access of the EnCompass Files only to parties with an active EnCompass license would restrict access to the EnCompass files only to those parties who could make meaningful use of the files is unsupported by evidence and contrary to the affidavit of Chelsea Hotaling;²¹ (c) CSSA/SEIA, NRDC, Sierra, and WRA do not oppose Tri-State's request to prohibit its competitors from accessing the database files, which the Highly Confidential Nondisclosure Agreement that was attached to the First Motion for Extraordinary Protection already prohibits;²² (d) and CSSA/SEIA, NRDC, Sierra, and WRA do not oppose ensuring that any individuals who seek access to the EnCompass Files have executed Tri-State's Highly Confidential Nondisclosure Agreement that was attached to the First Motion for Extraordinary Protection, which all parties in this Proceeding have already done.²³

14. Tri-State attached to the Third Motion for Extraordinary Protection Worker Paper Master List which identifies various files, their name, their confidentiality level, and a description of each;²⁴ a document setting forth information regarding the environment in which

²⁰ CSSA/SEIA's, NRDC's, Sierra's, and WRA's Response to the Third Motion for Extraordinary Protection at 3.

²¹ *Id.* at 3; *see also* the Affidavit of Chelsea Hotaling, attached to the Response to the Second Motion for Extraordinary Protection.

²² *Id.* at 4.

²³ *Id.*

²⁴ Attachment A to the Third Motion for Extraordinary Protection.

Tri-State runs its EnCompass modeling;²⁵ Tri-State's proposed Highly Confidential Nondisclosure Agreement;²⁶ and the Affidavit of Ms. Tiffin.²⁷

15. In the Affidavit attached to the Third Motion for Extraordinary Protection, Ms. Tiffin identifies the categories of all persons with access to the EnCompass Files and requests that extraordinary protection be afforded to the EnCompass Files throughout the duration of this Proceeding until its conclusion.²⁸

16. Pursuant to Rule 1101(b)(IV) of the Rules of Practice and Procedure, 4 CCR 723-1, a motion requesting highly confidential protection

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[.]

17. Pursuant to Rule 1101(d) of the Rules of Practice and Procedure, 4 CCR 723-1, “[t]he person seeking highly confidential protection for information shall bear the burden of proof to establish the need for highly confidential protection.”

18. Pursuant to Rule 1500 Rules of Practice and Procedure, 4 CCR 723-1, “[t]he burden of proof... shall be on the party that is the proponent of a decision...”

19. Therefore, as the proponent of a Commission decision seeking protection of its EnCompass Files, Tri-State bears the burden of proving that such files deserve highly-confidential protection.

²⁵ Attachment B to the Third Motion for Extraordinary Protection.

²⁶ Attachment C to the Third Motion for Extraordinary Protection.

²⁷ Attachment D to the Third Motion for Extraordinary Protection.

²⁸ *Id.* at 2-3.

20. The ALJ finds and concludes that Tri-State stated good cause for the granting of extraordinary protection for the EnCompass Files as it relates to all of the parties in this Proceeding (and not only the parties who are EnCompass software license holders).

21. The ALJ further finds and concludes that Tri-State failed to meet the burden of proof with respect to its request to limit access to the EnCompass Files to individuals with a current license for the EnCompass software. More specifically, Tri-State failed to provide compelling evidence showing that only current EnCompass software license holders can make meaningful use of the EnCompass Files. Indeed, the most compelling evidence on the record in this regard is the Affidavit of Chelsea Hotaling,²⁹ which pertinently provides that EnCompass modeling input and output files in Excel format can be – and have been in other proceedings – reviewed by parties who do not possess EnCompass software license.³⁰

22. The Highly Confidential Nondisclosure Agreements that were attached as Attachment A and Attachment C to the First Motion for Extraordinary Protection and Third Motion for Extraordinary Protection, respectively, are identical in all material respects.³¹ The use of the Highly Confidential Nondisclosure Agreement that was attached to the First Motion for Extraordinary Protection was approved to protect Tri-State's highly confidential information by Decision No. R24-0080-I. Nonetheless, the EnCompass Files do not fall within the categories of documents for which extraordinary protection was granted by Decision No. R24-0080-I.

²⁹ See Affidavit of Chelsea Hotaling, attached to the Response to the Second Motion for Extraordinary Protection.

³⁰ *Id.* at ¶¶ 2-4.

³¹ Compare Attachment A to the First Motion for Extraordinary Protection with Attachment C to the Third Motion for Extraordinary Protection.

23. Based on the forgoing, the ALJ will grant, in part, and deny in part, the Third Motion for Extraordinary Protection. Parties who seek access to the EnCompass Files will be required to execute the Highly Confidential Nondisclosure Agreement that is attached herein as Attachment A, unless a substantially identical version of the same has already been executed in connection with the extraordinary protection granted by Decision No. R24-0080-I, as ordered below. Further, consistent with the discussion herein, the ALJ will deny Tri-State's request to limit distribution of the EnCompass files to only current EnCompass software license holders, as ordered below.

C. Motion Requesting a Public Comment Hearing

24. The Motion Requesting a Public Comment Hearing will be addressed by a separate decision.

II. ORDER

A. It is Ordered That:

1. Consistent with the discussion above, Tri-State Generation and Transmission Association Inc.'s Third Motion for Extraordinary Protection, filed March 19, 2024 by Tri-State Generation and Transmission Association, Inc. (Tri-State) is granted, in part, consistent with the discussion above.

2. Access to the Excel files that comprise the individual EnCompass simulations Tri-State used to conduct its Phase I modeling within the EnCompass modeling software (the EnCompass Files) shall be limited to only parties to this Proceeding who:

- a) are not competitors of Tri-State; and
- b) have executed the non-disclosure agreement that is attached to this decision as Attachment A, unless a substantially identical version of the same has already been executed in connection with the extraordinary protection granted by Decision No. R24-0080-I.

3. Tri-State request to limit access to the EnCompass Files to individuals with a current license for the EnCompass software is denied.
4. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director