

Decision No. C23-0446-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0242E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS 2024-2026 TRANSPORTATION ELECTRIFICATION
PLAN

**INTERIM COMMISSION DECISION GRANTING THE
MOTION FOR EXTRAORDINARY PROTECTION,
GRANTING THE MOTION FOR LATE INTERVENTION,
SETTING THE APPLICATION FOR HEARING BEFORE
THE COMMISSION *EN BANC*, AND REQUIRING
CONFERRAL AND FILING OF A PROPOSED
PROCEDURAL SCHEDULE**

Mailed Date: July 7, 2023

Adopted Date: July 5, 2023

I. BY THE COMMISSION

A. Statement

1. On May 15, 2023, Public Service Company of Colorado (Public Service or Company) filed an application (Application) to approve its proposed 2024-2026 Transportation Electrification Plan (TEP), in accordance with Senate Bill (SB) 19-077.

2. By this Decision, the Commission grants the Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Customer Information filed by Public Service on June 13, 2023. We also grant the Motion for Late Intervention that Walmart Inc. (Walmart) filed on June 22, 2023.

3. This Decision sets the Application for hearing before the Commission *en banc* and directs the parties to confer on a procedural schedule, consistent with the discussion below. On or before July 11, 2023, at 12:00 p.m., Public Service shall file a proposed procedural schedule.

B. Motion for Late Intervention

4. On June 22, 2023, Walmart filed a Motion for Late Intervention. Walmart states that it has significant operations and substantial experience in the electric vehicle charging arena within the state of Colorado and throughout the United States and therefore its participation will advance the just resolution of this proceeding. Walmart notes that it participated in both Public Service's inaugural TEP proceeding¹ and Black Hills Colorado Electric, LLC's inaugural TEP proceeding,² as well as in similar proceedings in other states. Moreover, Walmart argues that as part of its renewable energy and carbon reduction efforts, Walmart is committed to supporting the electric vehicle industry by providing publicly accessible electric vehicle charging stations in targeted locations. Walmart contends that if approved, Public Service's TEP could directly and substantially affect Walmart's goal to increase electric vehicle charging capabilities within Public Service's service territory and reduce carbon emissions.

5. Walmart is seeking late intervention in this proceeding for which it claims to have good cause. Walmart states it was unable to file a timely motion due to the time required to take notice of the proceeding and evaluate the impact to its business. Walmart will adhere to all deadlines that have been, and will be, set by the Commission and states it conferred with the parties and all are either unopposed or take no position to Walmart's Motion for Late Intervention.

¹ Proceeding No. 20A-0204E.

² Proceeding No. 20A-0195E.

6. Rule 1401(a) of the Rules of Practice and Procedure, 4 CCR 723-1, related to the untimely filing of motions for permissive intervention states that:

[A]ny person may file a notice of intervention as of right or a motion to intervene by permission within 30 days of notice of any administrative or adjudicatory proceeding, unless the Commission's notice or a specific rule or statute provides otherwise. ... The Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements.

7. We find that Walmart states good cause for its late filing, and meets the requirements of Rule 1401 to be a party to this proceeding.

8. We grant the late intervention filed by Walmart; Walmart is a party to this Proceeding.

C. Motion for Extraordinary Protection

9. Public Service requests extraordinary protection for certain claimed highly confidential documents and invoices for outside legal counsel. Public Service indicates this request includes any documents discussing or identifying any of the highly confidential information including testimony, discovery responses and attachments, and any other associated documents containing such types of information provided in this Proceeding.

10. Public Service explains, consistent with its prior process, it provides to parties, on a confidential basis, outside legal counsel invoices that have been redacted to avoid disclosure of attorney-client privileged communications, confidential litigation strategy, or other privileged attorney work product. Public Service states it also redacts from this confidential version the hourly billing rates and rate-related information, as well as the time spent on each item in order to protect competitively sensitive information.

11. Public Service requests parties' access to these redacted highly confidential invoices be restricted to only the Commissioners, the Administrative Law Judge assigned to this matter (if any), the Commission's advisory staff and advisory attorneys, Trial Staff of the Colorado Public Utilities Commission (Staff) and attorneys for Staff, and the Colorado Office of the Utility Consumer Advocate (UCA) and attorneys for UCA. Other parties to the Proceeding would be able to receive the further redacted, confidential versions of the legal invoices if an appropriate ordinary non-disclosure agreement has been signed and filed with the Commission.

12. To support its request, Public Service states that it negotiates its rates for legal services separately with each legal service provider and thus derives a competitive advantage from maintaining the confidentiality of these rates. Public Service states the protections afforded by the rules governing ordinary confidentiality would provide insufficient protection for this competitively sensitive information. Public Service concludes the requested extraordinary protections strike the appropriate balance between the need for disclosure and the need to protect the interests of Public Service.

13. 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 *Code of Colorado Regulations* (CCR) 723-1. Public Service also provided the affidavit of Jack W. Ihle, identifying the employees in groups with access to the highly confidential information. The affidavit requests the extraordinary protection remain in place until the conclusion of this Proceeding and that at that time parties destroy the highly confidential information or return it to Public Service.

14. No party filed a response opposing the relief requested in the Motion.

15. 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.

16. 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

17. We find the reasoning and arguments in the Motion persuasive. The Motion states good cause to grant the relief sought under Rule 1101, 4 CCR 723-1. The Commission further finds the requested protections are appropriate, are reasonable, and are consistent with the Commission's Rules and past practice. We agree that Public Service's plan to redact certain information on the requested invoices, which would otherwise reveal confidential attorney-client communications, confidential litigation strategy, or other privileged attorney work product, is reasonable and prudent.

18. Based on the foregoing, we grant the Motion and approve the non-disclosure agreements.

19. Access to the highly confidential information shall be limited to the Commissioners, any assigned administrative law judge, the Commission's advisory staff and advisory attorneys, Staff and attorneys for Staff, and UCA and attorneys for UCA.³

20. 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.

D. Conferral on Procedural Schedule and *en banc* Hearing

21. In Decision No. C23-0425-I, issued June 23, 2023, we noted that the Commission would determine whether to refer this matter to an Administrative Law Judge, a hearing Commissioner, or to hear the case *en banc* at a future date. After further review, and considering the important policy considerations at issue in this Proceeding, we will hear the Application *en banc*.

22. In Decision No. C23-0425-I, we directed Public Service to file Supplemental Direct on four topics. The deadline to file this Supplemental Direct Testimony is July 14, 2023.

23. On June 26, 2023, Public Service filed a Response to Decision No. C23-0425-I. In its Response, Public Service asks that the Commission stay the Company's current discovery requirements while the Company prepares the required Supplemental Direct. Public Service clarifies that it will continue processing discovery requests until the Commission considers, and possibly grants, the Company's request to stay discovery. Once the Commission grants the

³ The Commissioners, Commission advisory staff, Commission advisory counsel, administrative law judges, 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.

discovery stay, Public Service will pause responding to discovery requests until it files its Supplemental Direct.⁴ Alternatively, Public Service asks that the Commission withdraw its request for Supplemental Direct.⁵

24. Public Service represents that ChargePoint, SWEEP, Climax Molybdenum Company, Walmart, City of Boulder, Colorado Energy Consumers, City and County of Denver, EV.energy, Tesla, and Energy Outreach Colorado take no position on Public Service's Response. In contrast, Public Service reports that Americans for Affordable Clean Energy, Inc. and Electrify America do not object to the Company's requested stay provided reasonable accommodation is made in the scheduling for testimony deadlines. Similarly, Western Resource Advocates and Sierra Club, the Environmental Justice Coalition, EVgo, and the Colorado Energy Office oppose the requested stay to the extent it will reduce the time otherwise available for discovery before the deadline for Answer testimony.⁶

25. Staff outright opposes Public Service's Response and on June 27, 2023, filed a Response and Objection. In its Response and Objection, Staff argues that if a stay is granted, the parties will lose crucial time in developing their positions through discovery and asks that the Commission deny the requested stay.⁷

26. In the alternative, Staff argues that if the Commission finds merit in the Company's request for a stay of discovery, the Commission should also grant one of Staff's alternative forms of relief. First, Staff suggests that the Commission could find extraordinary circumstances per § 40-6-109.5(4), C.R.S. and extend the statutory deadline an additional 130 days, giving the parties

⁴ Public Service's Response, p. 5.

⁵ *Id.* at 6.

⁶ *Id.* at 2.

⁷ Staff's Response and Objection, p. 2.

more time to develop their cases. Second, Staff asks the Commission to set a procedural schedule with an answer testimony deadline either (a) no earlier than September 15, 2023, if the matter is heard by an administrative law judge/Hearing Commissioner or (b) no earlier than September 29, 2023, if the matter is heard by the Commission *en banc*. Third and finally, Staff notes that instead of allowing the Company to respond to discovery requests in ten business days, the Commission could order that discovery responses be due within ten *calendar* days.⁸

27. We are sensitive to the multiple intervenors who have expressed concern that staying discovery could impact their ability to prepare answer testimony, depending on when answer testimony is due. Accordingly, we direct the parties to confer on a consensus procedural schedule that addresses these competing concerns. Specifically, the parties shall strive to craft discovery procedures and a procedural schedule that allow sufficient time for Public Service to prepare the required Supplemental Direct and for intervenors to conduct discovery and prepare their answer testimony.

28. The procedural schedule must also provide sufficient time for the Commission to issue a final decision in accordance with the statutory deadline. In this context, we note Staff's suggestion that answer testimony be due no sooner than September 29, 2023, is relatively consistent with Public Service's inaugural TEP, in which Answer Testimony was due on September 28, 2020, and Rebuttal Testimony was due on October 23, 2020.⁹ The standard 250-day statutory timeline would require a final decision in this Proceeding in late February 2024. If Public Service is concerned about its ability to process discovery and its other procedural obligations in this

⁸ *Id.* at 2-3.

⁹ See Proceeding No. 20A-0204E, Decision No. C20-0536-I, pp. 2, 4.

Proceeding, it should consider whether waiving the statutory deadline is appropriate as it confers on briefing and potential hearing date proposals.

29. Finally, while we do not alter the scope of Supplemental Direct that we established in Decision No. C23-0425-I,¹⁰ we recognize that extending the July 14, 2023, deadline for Supplemental Direct may be considered in the context of a procedural schedule that addresses the various concerns of the parties. We make clear, therefore, that we could exercise our discretion to amend the deadline for Supplemental Direct Testimony when establishing the procedural schedule.

30. In sum, the parties shall confer on a procedural schedule that addresses the above considerations. Public Service shall file a proposed procedural schedule on or before July 11, 2023, at 12:00 p.m. We will consider the filing(s) and set an appropriate procedural schedule. We acknowledge that the appropriate procedural schedule could potentially include an extended deadline for Public Service to file Supplemental Direct Testimony.

II. ORDER

A. The Commission Orders That:

1. The Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Customer Information that Public Service Company of Colorado (Public Service) filed on June 13, 2023, is granted, consistent with the discussion above.

2. The Motion for Late Intervention that Walmart Inc. filed on June 22, 2023, is granted.

¹⁰ As discussed at the July 5, 2023, Commissioners' Weekly Meeting, the Commission will subsequently issue another decision that raises questions and areas of interest that we invite parties to address throughout the course of the Proceeding. We do not, however, require Public Service to file additional Supplemental Direct Testimony beyond what was set forth in Decision No. C23-0425-I.

3. The Application to approve Public Service’s proposed 2024-2026 Transportation Electrification Plan that Public Service filed on May 15, 2023, is set for hearing before the Commission *en banc*.

4. Consistent with the discussion above, Public Service shall confer with the parties to develop a proposed procedural schedule, including a date for an *en banc* hearing. Public Service shall file the proposed procedural schedule, including discovery procedures, on or before July 11, 2023, at 12:00 p.m.

5. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
July 5, 2023.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White

Rebecca E. White,
Director

THE PUBLIC UTILITIES
COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners