

Decision No. R23-0126-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0345E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER APPROVING EXPENSES INCURRED FOR THE PERIOD JANUARY 2021 THROUGH DECEMBER 2021 THAT ARE RECOVERED THROUGH THE ELECTRIC COMMODITY ADJUSTMENT AND PURCHASED CAPACITY COSTS RECOVERED THROUGH THE PURCHASED CAPACITY COST ADJUSTMENT FOR THE SAME PERIOD AND APPROVING THE CALCULATION OF 2021 SHORT TERM SALES MARGINS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
GRANTING UNOPPOSED THIRD MOTION FOR
EXTRAORDINARY PROTECTION,
AND WAIVING RESPONSE TIME**

Mailed Date: February 23, 2023

I. STATEMENT

1. On August 1, 2022, Public Service Company of Colorado (Public Service or the Company) filed its verified application seeking approval of the following: (1) the fuel, purchased energy, purchased wheeling, and other expenses incurred from January 1, 2021 through December 31, 2021, that have been reflected in the Company's Electric Commodity Adjustment (ECA); (2) the purchased capacity expenses incurred by the Company from January 1, 2021, through December 31, 2021; and, (3) the Company's calculation of the 2021 Short-Term Sales Margins that have been used to adjust the 2022 ECA Deferred Account Balance.

2. Trial Staff and the Colorado Office of Utility Consumer Advocate (UCA) timely intervened as of right, and Decision No. R22-0688-I, issued November 7, 2022, subsequently

granted the Colorado Independent Energy Association (CIEA) permissive intervention. Public Service, Trial Staff, the UCA, and the CIEA are thus the parties to this Proceeding.

3. On September 21, 2022, the Commission referred this Proceeding to an Administrative Law Judge (ALJ) for disposition.

4. Contemporaneously with the filing of its verified application, Public Service filed its first Motion for Extraordinary Protection, seeking highly confidential status for four categories of documents identified in its motion. That Motion was granted by Decision No. R22-0688-I.

5. On December 15, 2022, the Company filed its Second Motion for Extraordinary Protection, seeking extraordinary protection of six categories of highly confidential information. Public Service's Second Motion was granted by Decision No. R23-0042-I, issued January 20, 2023.

6. The Company filed its Unopposed Third Motion for Extraordinary Protection and Request for Waiver of Response Time on February 1, 2023.

7. Shortly thereafter, on February 9, 2023, Public Service advised the Commission that the parties had reached a settlement and filed an Unopposed Motion to Approve the Unopposed Comprehensive Settlement Agreement.

II. THIRD MOTION FOR EXTRAORDINARY PROTECTION

8. Although the parties have reached a settlement, the ALJ finds that prudence warrants that a decision nonetheless be issued addressing the Company's Third Motion for Extraordinary Protection. The ALJ notes that the Company's Unopposed Motion for Approval of the Settlement Agreement has not yet been ruled upon, pending review of additional information

from the parties clarifying terms in the Settlement Agreement. Moreover, even if the parties' Settlement Agreement is approved, the information the Company seeks to protect in its Third Motion for Extraordinary Protection could remain part of the public record .

9. In this Third Motion for Extraordinary Protection, the Company seeks highly confidential status for two categories of information:

- (1) The Company's Service, Maintenance, and Warranty Agreement ("SMWA") (including exhibits), under which original equipment manufacturer ("OEM") Vestas-American Wind Technology, Inc. ("Vestas") has committed to provide scheduled maintenance on the Company's wind turbine generators for ten years after the final commissioning of the turbines as well as warranty coverage on all turbine components in the first two years after commissioning. The SMWA also establishes, as relevant to this proceeding, a performance guarantee for equipment availability, with associated liquidated damages for underperformance over the term of the contract.; and
- (2) Any pricing information (including indicative pricing estimates) derived from the aforementioned SMWA (including exhibits), or other documents or information that could be used to derive cost figures in the SMWA.

10. Public Service seeks an order imposing highly confidential protections for the above-listed categories of Highly Confidential Information. Based upon extraordinary circumstances, Public Service requests that access be restricted to the following individuals: (a) the Commission, its Advisory and Trial Staff, ALJs, employees of the UCA assigned to this Proceeding, and the Assistant Attorney Generals representing the Commission, its Staff, and the UCA in this Proceeding; and (b) Counsel and subject matter experts of Intervenors to this Proceeding who have signed a non-disclosure agreement provided by the Company and who are *not* developers of energy resources, competitive power producers, existing or potential wholesale customers of developers of energy resources, or entities that might otherwise bid into a future Public Service resource solicitation. Public Service asks that these latter groups be excluded

from access to the highly confidential information at issue in this Third Motion. In accordance with Rule 1101(b)(V) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, the Public Service's Third Motion for Extraordinary Protection was accompanied by a specific form of nondisclosure agreement requested.

11. No objections to the Third Motion for Extraordinary Protection have been filed. Public Service states in the Motion that it has conferred with the three other parties to this Proceeding and is authorized to represent that none of the other parties has taken a position regarding the Third Motion.

12. The Company notes that the Commission has afforded extraordinary protections to similar commercial contracts containing highly confidential information sensitive to it and its vendors in an application it filed for approval of a wind project. *See* Decision No. C19-0139-I, issued Feb. 5, 2019, in Proceeding No. 18A-0905E. Public Service points out that the protections it seeks in this Third Motion are "consistent with the highly confidential treatment granted in that proceeding." It further notes that, more generally, in other proceedings the Commission has designated as highly confidential "competitively sensitive information" to protect such information from "disclosure to a party's competitors." *See* Decision No. R18-0955-I, issued Oct. 25, 2018, in Proceeding No. 18A-0606EG; Decision No. R18-0545-I, issued July 11, 2018, in Proceeding No. 18A-0194E

13. Under Rule 1100(b) CCR 723-1, information filed with the Commission is presumed to be a public record, including (I) annual reports; (II) rates, terms and conditions for regulated services; (III) tariffs and price lists; (V) aggregate data regarding informal consumer complain information; and (X) safety inspection reports or information filed with the Commission or compiled by Commission staff. Rule 1101 provides the procedure and

requirements for filing and seeking highly confidential protections for a document. Rule 1101(c) governs records that are presumed to be public under Rule 1100(b) and allows an entity or person to file a motion requesting highly confidential protection for records in accordance with Rule 1101(b). Rule 1100(d) specifies that the party requesting highly confidential protection carries the burden of proof to establish the need for highly confidential protection.

14. Under Rule 1101(b), 4 CCR 723-1, a motion seeking highly confidential protection:

- (I) shall include a detailed description and/or representative sample of the information for which highly confidential protection is sought;
- (II) shall state the specific relief requested and the grounds for seeking the relief;
- (III) shall advise all other parties of the request and the subject matter of the information at issue;
- (IV) 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;
- (V) shall be accompanied by a specific form of nondisclosure agreement requested;
- (VI) shall be accompanied by an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain subject to highly confidential protection, if known; and
- (VII) shall include an exhibit, filed in accordance with the procedures established in paragraph (a), containing the information for which highly confidential protection is requested. Alternatively, the movant may show why providing the subject information would be overly burdensome, impractical, or too sensitive for disclosure.

15. Public Service provides a detailed description of the information for which it seeks protection and a showing that it deserves and needs highly confidential protection. Its Third Motion for Extraordinary Protection also includes two proposed forms of nondisclosure agreement for legal counsel and for experts in the subject matter. It has also provided the affidavit of Jack W. Ihle, Regional Vice President, Regulatory Policy for Public Service Company of Colorado, identifying the individuals and departments within Public Service that have access to the information. The highly confidential information is referenced in the Company's Hearing Exhibit 109, Rebuttal testimony of Brandon S. Diegel. However, because of the "highly competitive and highly sensitive" nature of the underlying documents, Public Service did not attach redacted or unredacted copies of the information it seeks to protect to its Third Motion for Extraordinary Protection, deeming them "too sensitive for disclosure." Rule 1101(b)(VII), 4 CCR 723-1.

16. Public Service has thus satisfied each of the requirements of Rule 1101(b) and has shown good cause for highly confidential protection of the identified information. Accordingly, Public Service's Motion for Extraordinary Protection will be granted.

III. ORDER

A. It Is Ordered That:

1. Public Service Company of Colorado's Unopposed Third Motion for Extraordinary Protection filed on February 1, 2023, is granted.

2. The Company's Service, Maintenance, and Warranty Agreement ("SMWA") (including exhibits), with original equipment manufacturer ("OEM") Vestas-American Wind Technology, Inc., as well as any pricing information derived from the SMWA, is afforded extraordinary protection consistent with this Decision.

3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in black ink, appearing to read 'G. Harris Adams'.

G. Harris Adams,
Interim Director