

Decision No. R23-0845-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0494E

IN THE MATTER OF PUBLIC SERVICE COMPANY'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE FORM ENERGY LONG DURATION BATTERY PROJECT AT COMANCHE GENERATING STATION.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY GRANTING MOTION FOR
EXTRAORDINARY PROTECTION,
SCHEDULING REMOTE
PREHEARING CONFERENCE AND
REQUIRING PARTIES TO CONFER AND
PUBLIC SERVICE TO FILE A REPORT REGARDING THE
CONFERRAL BEFORE THE REMOTE PREHEARING
CONFERENCE**

Mailed Date: December 19, 2023

I. STATEMENT

A. Background

1. On October 4, 2023, Public Service Company of Colorado (Public Service or Xcel Energy) filed the Verified Application (Application) described above and a Motion for Extraordinary Protection.
2. October 5, 2023, the Commission issued a notice of the Application.
3. On October 10 and November 6, 2023, Holy Cross Electric Association (Holy Cross) and Colorado Energy Consumers (CEC) filed Motions to Permissively Intervene, respectively.

4. On November 1, 2023, the Colorado Solar and Storage Association (COSSA) and the Solar Energy Industries Association (SEIA) filed a Joint Motion to Intervene.

5. On November 3, 2023 and November 13, 2023, the Office of the Utility Consumer Advocate (UCA) and Trial Staff (Staff) of the Commission filed Notices of Intervention by Right, respectively.

6. On November 19, 2023, the Application was automatically deemed complete pursuant to Rule 1303(c)(IV).¹

7. On November 22, 2023, the Commission referred the proceeding to an Administrative Law Judge (ALJ) by minute entry. The proceeding was subsequently assigned to the undersigned ALJ.

B. Motion for Extraordinary Protection

8. In its Motion for Extraordinary Protection, Public Service seeks highly confidential protection for: (a) the project budget and pricing for the proposed Form Energy battery installation; (b) certain negotiated contract terms set forth in the Battery Supply Agreement between Form Energy and Xcel Energy; (c) certain portions of the Battery Supply Agreement containing specific product specifications; (d) certain technical information in testimony regarding specifications and assessments of the Form Energy Battery system; (e) pricing and scope of work for a potential engagement with Argonne National Laboratory; and (f) any other document or information to be created or produced in discovery or testimony with such information.

¹ 4 *Code of Colorado Regulations* (CCR) 723-1.

9. According to Public Service, the information described above is subject to highly confidential protection because:

The information in question consists of confidential pricing information (and budget information derived from that information regarding Form Energy's pricing), other confidential proprietary contract energy storage systems, terms, and information regarding Argonne National Laboratory's proposed pricing and scope of work. Proprietary and confidential information is protectable under § 24-72-204(3)(a)(IV), C.R.S., which states that there is no public right of inspection for trade secrets or confidential commercial information. This information qualifies as it contains trade secrets that are protectable from disclosure. Under the Uniform Trade Secrets Act, which has been adopted in Colorado, trade secrets are defined as: the whole or any portion or phase of any scientific or technical information, design, improvement, confidential business or financial process, procedure, formula, information, the listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. C.R.S. § 7-74-102. The two key requirements are that the information in question is of value and that the owner of the information has taken reasonable measures to maintain confidentiality. The information [Public Service] seeks to protect in this motion satisfies both prongs. [Public Service] and Form Energy both derive value from maintaining the confidentiality of the pricing and contract term information as its disclosure would distort future energy storage procurements for both Public Service and Form Energy. There is also value for Form Energy in maintaining the confidentiality of certain information regarding its product, including specifications from the Battery Supply Agreement, and product information discussed in testimony so as to avoid giving unearned benefits to competitors. Xcel Energy has taken reasonable steps to maintain the confidentiality of the information in question, including through successfully asserting trade secret protection when seeking approval for a similar project in Minnesota, and, on information and belief, so has Form Energy. Similarly, Argonne National Laboratory derives value from keeping pricing information confidential and, on information and belief, reasonable steps are taken to preserve the confidentiality of such information.

10. Under Rule 1100(b) of the Commission's Rules of Practice and Procedure,² information filed with the Commission is presumed to be a public record. Rule 1101 provides

² 4 CCR 723-1.

the procedure and requirements for filing and seeking a document to be designated as highly confidential. Under Rule 1101(b), 4 CCR 723-1, a motion seeking highly confidential treatment:

- (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.

11. Here, Public Service's Motion includes proposed forms of nondisclosure agreements for retained subject matter experts and attorneys, and an affidavit identifying the individuals that have access to the information and stating that extraordinary protection sought for the information must remain in place "indefinitely." Public Service filed unredacted highly-confidential versions of the testimony of Justin M. Tomljanovic (Hearing Exhibit 101), Jack W. Ihle (Hearing Exhibit 102), and Steven T. Christensen

(Hearing Exhibit 103), and Attachment JMT-D-3 to Mr. Tomljanovic's testimony (Hearing Exhibit 101). Finally, no party opposes Public Service's Motion.

12. Based on the foregoing, Public Service has satisfied each of the requirements of Rule 1101(b), and has established good cause for highly-confidential protection of the identified information. Accordingly, Public Service's Motion shall be granted.

C. Motions to Permissively Intervene

13. The unopposed Motions to Intervene filed by Holy Cross and CEC, and the unopposed Joint Motion to Intervene filed by COSSA and SEIA, satisfy Rule 1401(c) of the Commission's Rules of Practice and Procedure. Accordingly, the Motions to Intervene and the Joint Motion to Intervene will be granted.

D. Remote Prehearing Conference

14. It is appropriate to hold a remote prehearing conference in this proceeding. Accordingly, a remote prehearing conference shall be scheduled for January 5, 2024 at 1:30 p.m. The remote prehearing conference will be conducted over the Zoom videoconferencing platform. The ALJ or a member of Commission Staff will email the log-in information in advance of the hearing.

E. Conferral and Conferral Report

15. Public Service shall confer with the other parties in advance of the remote prehearing conference regarding a schedule for this proceeding, any discovery procedures that are inconsistent with the Commission's rules governing discovery, and the method by which the hearing should be conducted. The Commission can conduct in-person, remote, or hybrid hearings. A remote hearing is one in which all of the participants appear and participate from

remote locations over the Zoom web conferencing platform. A hybrid hearing involves the ALJ and at least one party and/or witness participating from one of the Commission's hearing rooms in Denver, and the remaining party(ies) and witness(es) participating from one or more remote locations using the Zoom web conferencing platform. An in-person hearing is one in which the ALJ and all parties and witnesses participate in the hearing at the same location.

16. Public Service shall file a report of the results of the conferral. If there is agreement on a schedule, including dates for the hearing, discovery procedures that are inconsistent with the Commission's rules governing discovery, and/or the method for conducting the hearing (*i.e.*, remote, hybrid, or in-person), the report shall state as much and detail the stipulated procedural schedule, discovery procedures, and/or method for conducting the hearing. If no agreement is achieved, the report shall state as much and identify the competing schedules, discovery procedures, and/or methods for conducting the hearing proposed by the parties. The parties are on notice that the ALJ will retain the discretion to change the method by which the hearing will be conducted.

17. The parties are urged to review the Commission's public calendar to identify suitable days for the hearing in this proceeding and propose more than one date or consecutive dates for the hearing. The latest date on which the hearing can conclude is April 4, 2024, which assumes that the deadline for a final Commission decision will be extended 130 days pursuant to § 40-6-109.5(1), C.R.S. The ALJ will not be available for an in-person or hybrid hearing during the weeks of March 11, 2024 and March 25, 2024. The deadline for Public Service to file the report is January 3, 2024.

18. All parties must appear at the remote prehearing conference. Failure to attend or to participate in the remote prehearing conference is a waiver of any objection to the rulings

made, to the procedural schedule established, and to the hearing dates scheduled during the remote prehearing conference.

II. ORDER

A. It Is Ordered That:

1. The parties in this proceeding are Public Service Company of Colorado (Public Service), Commission Trial Staff, the Office of the Utility Consumer Advocate, Holy Cross Electric Association, Colorado Energy Consumers, Colorado Solar and Storage Association, and the Solar Energy Industries Association.

2. A remote prehearing conference in this proceeding is scheduled as follows:

DATE: January 5, 2024

TIME: 1:30 p.m.

WEBCAST: Commission Hearing Room

METHOD: Join by video conference using Zoom at the link to be provided in an email from the Administrative Law Judge³

3. Nobody should appear in-person for the remote prehearing conference.

4. Public Service shall file the report of the conferral identified above on or before January 3, 2024.

³ Additional information about the Zoom platform and how to use the platform are available at: <https://zoom.us/>. All are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See <https://zoom.us/test>.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director