

Decision No. R24-0227-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0589EG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS COMBINED ELECTRIC AND NATURAL GAS DEMAND-SIDE MANAGEMENT AND BENEFICIAL ELECTRIFICATION PLAN FOR CALENDAR YEARS 2024-2026.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING MOTIONS FOR EXTRAORDINARY
PROTECTION OF HIGHLY
CONFIDENTIAL INFORMATION**

Mailed Date: April 11, 2024

I. STATEMENT, SUMMARY AND BACKGROUND

A. Summary

1. This Decision grants the Unopposed Second Motion for Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time filed on March 8, 2024 (Second Motion) and the Unopposed Third Motion for Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time filed April 2, 2024 (Third Motion).

B. Procedural History¹

2. On December 1, 2023, Public Service Company of Colorado (Public Service or the Company) filed the above-captioned Application with testimony. At the same time, the Company

¹ Only the procedural history necessary to understand this Decision is included.

filed its First Motion for Extraordinary Protection of Highly Confidential Information (First Motion).

3. During its weekly meeting held January 17, 2024, the Commission referred this matter for disposition to an Administrative Law Judge (ALJ), among other matters.²

4. In addition to the Company, the following entities are parties to this Proceeding: the Colorado Public Utilities Commission Trial Staff (Staff), the Colorado Energy Office (CEO), and the Colorado Office of the Utility Consumer Advocate (UCA); the City of Boulder (Boulder); Western Resource Advocates; Natural Resources Defense Council and the Sierra Club; Southwest Energy Efficiency Projects; the City and County of Denver; Energy Outreach Colorado; Energy Efficiency Business Coalition; Clean Energy Economy for the Region (CLEER); Climax Molybdenum Company; the Colorado Energy Consumers; and Iconergy LTD (Iconergy).³

5. On February 12, 2024, the ALJ granted the First Motion.⁴

6. On March 8, 2024, Public Service filed the Second Motion. No party filed a response to the Second Motion.

7. On April 2, 2024, Public Service filed the Third Motion.

II. FINDINGS AND DISCUSSION

A. **Relevant Law**

8. Responses to motions must be filed within 14 days after service of the motion, but the Commission has discretion to shorten, lengthen or waive that response time.⁵

² Decision No. C24-0054-I (mailed January 23, 2024).

³ Decision No. R24-0086-1 at 23 (mailed February 12, 2024).

⁴ *Id.* Decision No. R24-0086-I-E (mailed February 12, 2024) (correcting mail date on Decision No. R24-0086-I to February 12, 2024).

⁵ Rule 1400(b), of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

9. Rule 1101(b) requires that a motion seeking extraordinary protection of highly confidential information include: a detailed description of the information to be protected; state the specific relief sought and grounds therefor; advise the parties of the request and the subject matter of the information at issue; establish that the information at issue is highly confidential and that highly confidential protection is necessary because rules providing protection for confidential information offer insufficient protection; be accompanied by a proposed nondisclosure agreement and an affidavit with names of all persons who have access to the information and the timeframe for protection; and either file the highly confidential information or establish why doing so would be overly burdensome, impractical or too sensitive for disclosure.⁶

B. Second Motion

10. The Second Motion states the Company conferred with the parties, and that no party opposes the relief sought in the Second Motion.⁷ This is further confirmed by the fact that no party filed a response to the Second Motion.

11. The Second Motion seeks extraordinary protection for the following information: (1) an executed distributed intelligence (DI) platform agreement with Itron Inc. (Itron); (2) an amendment to an Amended and Restated Major Supply Agreement with Itron (Amended Supply Agreement); (3) a change order to the Amended Supply Agreement with Itron; and (4) any documents referencing the foregoing information.⁸ With the Second Motion, the Company filed proposed form nondisclosure agreements as Attachments A and B, and an Affidavit as Attachment C, identifying those with access to the highly confidential information, and requesting that the information be protected indefinitely. The Company did not file the relevant highly confidential

⁶ Rule 1101(b), 4 CCR 723-1

⁷ Second Motion at 2.

⁸ Second Motion at 3.

information because it is information provided through discovery that is not part of the evidentiary record.⁹

12. The Company requests that access to the above highly confidential information be limited to the Commission (including Commissioners, ALJs, and advisory staff and counsel); Staff and its attorneys; and the UCA and its attorneys.¹⁰ The Company also requests that the Commission issue an order limiting party access to the information to two attorneys and two subject-matter experts per party, provided that they sign the appropriate nondisclosure agreement (unless they have already executed one per the existing protective order in this Proceeding).¹¹ The Company requests that the highly confidential information be destroyed or returned to it once this Proceeding and any related court proceedings are concluded.¹²

13. In support, the Company argues that the referenced documents individually and collectively include information or data that is highly sensitive and commercially competitive.¹³ The documents for which the Company seeks highly confidential designation are contracts with a third-party vendor (Itron) providing the Company with DI services, authorized as a part of the Company's Advanced Grid Intelligence and Security (AGIS) initiative.¹⁴ The documents are responsive to discovery requests that Staff issued.¹⁵ Public Service argues that releasing the requested information could hurt the Company by leading to artificial price floors and contract terms for certain products and services that are competitively bid.¹⁶ The Company also argues that

⁹ *Id.* at 6.

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 4.

¹² *Id.* at 6.

¹³ *See id.* at 3-4.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

public disclosure could also harm the third-party or parties that contract with it, and discourage third parties from contracting with the Company in the future.¹⁷ Public Service asserts that ultimately, all of this could harm customers through increased vendor pricing and decreased competition for vendor contracts.¹⁸ The Company adds that it treats the referenced information as highly confidential to maintain its relationship with the vendor (Itron), and to ensure that this vendor and other potential vendors are not discouraged from contracting with the Company.¹⁹

14. The Company submits that its requests are consistent with prior Commission action.²⁰ For all these reasons, Public Service argues that as the Commission has recognized, the information is highly confidential; the protection afforded by Commission rules for confidential information is not sufficient; and highly confidential protection will afford appropriate protection.²¹

15. The ALJ finds that the Second Motion meets the requirements of Rule 1101(b), 4 CCR 723-1, and that the Company has established that the information for which it seeks extraordinary protection is highly confidential and warrants extraordinary protection. For the reasons and authorities discussed, those in the Second Motion, and because the Second Motion is unopposed, the ALJ grants the Second Motion.

C. Third Motion

16. The Third Motion states that it is unopposed.²² Because the Third Motion is unopposed, the ALJ finds good cause to waive the response time to it and does so.²³

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See id.* at 5.

²⁰ *Id.* at 4, citing Decision No. R21-0806-I (mailed December 21, 2021) in Proceeding No. 21A-0279E; Decision No. C22-0843-I (mailed December 30, 2022) in Proceeding No. 22A-0315EG.

²¹ *Id.* at 4-5, citing Decision No. R21-0806-I, ¶ 6.

²² Third Motion at 3-4.

²³ *See* Rule 1400(b), 4 CCR 723-1.

17. The Third Motion seeks extraordinary protection for third-party and vendor bid information and responses to the Company's 2023 Strategic Energy Management competitive all-source solicitation and request for proposals (RFPs), and documents referencing such materials, which are responsive to discovery requests issued in this Proceeding.²⁴ With the Third Motion, the Company filed proposed form nondisclosure agreements as Attachments A and B, and an Affidavit as Attachment C, identifying those with access to the highly confidential information, and requesting that the information be protected indefinitely. The Company did not file the relevant highly confidential information with its Third Motion because it is information provided through discovery that is not part of the evidentiary record.²⁵

18. The Company requests differing protections for the relevant information based upon the party or entity who accesses the information. First, Public Service requests that access to the above information be limited to the Commission (including Commissioners, ALJs, and advisory staff and counsel); Staff and its attorneys; and the UCA and its attorneys.²⁶ As to this first category, the Company does not suggest a limit on the number of people who have access. Second, Public Service requests that Interveners who are competitive suppliers or vendors for demand-side management (DSM) products or services, or entities that might otherwise bid into a future Company competitive solicitation for DSM products or service have *no access* to the highly confidential information.²⁷ This second category includes both Iconergy and CLEER, who the Company asserts are or could become competitive suppliers or vendors for DSM products or services and who might bid into future Company competitive solicitation for DSM products or

²⁴ Third Motion at 1.

²⁵ *Id.* at 8.

²⁶ *Id.* at 2-3; 5.

²⁷ *Id.* at 3; 5.

services.²⁸ For Interveners who do not fall into either of the above, the Company requests that access be limited to counsel and subject-matter experts for such Interveners who execute an appropriate non-disclosure agreement.²⁹ The Company requests that the highly confidential information be destroyed or returned to it once this Proceeding is concluded.³⁰

19. In support, the Company explains that the referenced information includes vendor pricing, services, and offerings, which may cause competitive harm to participating third-party implementers and vendors, thereby placing them at an unfair disadvantage in their future sales and bidding strategies.³¹ Such entities submitted the competitive solicitation responses with the expectation that their submittals would be maintained in confidence, particularly from competing vendors.³² The Company argues that inappropriate disclosure of the information could provide potential third-party implementers and vendors with competitive trade secrets, and strategy or market pricing information that could be used to influence future bids or contract pricing, which may harm customers.³³ For example, Public Service explains that disclosing vendor pricing may set artificial price floors for future solicitations, and negatively impact vendors' future bargaining positions and the Company's ability to negotiate the most favorable contracts for its customers.³⁴ For the same reasons, the Company submits that making the information broadly available may undermine its ability to obtain robust vendor participation.³⁵

²⁸ *Id.* at 3.

²⁹ *Id.* at 3; 5-6.

³⁰ *Id.* at 9.

³¹ *Id.* at 6.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 6-7.

20. The Company argues that its requests are consistent with prior Commission action.³⁶ For example, Public Service asserts that in its recent 2023 DSM and Beneficial Electric Plan, the Commission granted similar protection for executed vendor contracts with third-party implementers, (*i.e.*, contracts with bid winners for DSM programs).³⁷ The Company also relies on similar instances where the Commission afforded extraordinary protection, such as in Proceeding No. 21A-0096E; its 2022-2025 Renewable Energy Plan Application in Proceeding No. 21A-0625EG; DSM Plan Proceeding No. 20A-0287EG; and DSM Strategic Issues Proceeding No. 17A-0462EG.³⁸

21. The ALJ finds that the Third Motion meets the requirements of Rule 1101(b), 4 CCR 723-1, and that the Company has established that the information for which it seeks extraordinary protection is highly confidential and warrants extraordinary protection. For the reasons and authorities discussed, those in the Third Motion, and because the Third Motion is unopposed, the ALJ grants the Third Motion.³⁹

³⁶ *Id.* at 7, citing, for example, Decision No. C21-0343-I in Proceeding No. 21A-0141E; Decision No. C22-0729 in Proceeding No. 22V-0388E; by Decision No. C22-0665-I in Proceeding No. 22A-0315EG; Decision No. C21-0819 in Proceeding No. 21AL-0591E; Decision No. C20-0756-I in Proceeding No. 20A-0345E; Decision No. C19-1017 in Proceeding No. 19AL-0668E; Decision Nos. R20-0121-I and R20-0169-I in Proceeding No. 19AL-0687E; Decision No. C18-1175 in Proceeding No. 18AL-0851E; and Decision No. C17-1090 in Proceeding No. 17AL-0816E.

³⁷ *Id.*, citing Decision No. C22-0843-I in Proceeding No. 22A-0315EG.

³⁸ *Id.*

³⁹ In addition, the ALJ also finds that granting the Third Motion has the added benefit of discouraging parties from filing interventions in proceedings such as this solely as a vehicle to obtain confidential information relating to their competitors.

III. ORDER

A. It Is Ordered That:

1. The remaining response time to the Unopposed Third Motion for Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time filed April 2, 2024 (Third Motion) is waived.

2. Consistent with the above discussion, the Unopposed Second Motion for Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time filed on March 8, 2024 and the Third Motion are granted.

3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director