

Decision No. C16-0158-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15A-0867G

IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO GAS UTILITY COMPANY, LP, FOR APPROVAL OF PARTICIPATION IN PROPOSED COST OF SERVICE GAS PROGRAM AND FOR ALLOWANCE OF COST RECOVERY.

PROCEEDING NO. 15A-0868E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP FOR APPROVAL OF PARTICIPATION IN PROPOSED COST OF SERVICE GAS PROGRAM AND FOR ALLOWANCE OF COST RECOVERY.

**INTERIM DECISION GRANTING
MOTION FOR A PROTECTIVE ORDER**

Mailed Date: March 1, 2016
Adopted Date: February 18, 2016

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I. BY THE COMMISSION**A. Statement**

1. This matter comes before the Commission for consideration of a Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information and Documents (Motion) filed by Black Hills/Colorado Gas Utility Company, LP (Black Hills or Company) on January 27, 2016. No party filed responses to the Motion. We grant the Motion consistent with the discussion below.

B. Motion

2. Black Hills seeks extraordinary protection, under Rule 1101(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, for highly confidential and proprietary information and documents to be provided by Black Hills in response to discovery requests by Staff of the Colorado Public Utilities Commission (Staff) and the Office of Consumer Counsel (OCC).¹ Black Hills asserts that it will be harmed by the disclosure of this information to the public and to intervener Constellation NewEnergy-Gas (Constellation), which is a competitor of Black Hills.

3. Black Hills states that the responsive documents contain the following highly confidential information:

- Black Hills Corporation's (BHC) five-year strategic plan;
- The back-up data for that plan, which includes forecasted financial data;
- Strategic proposals and business strategy documents presented to BHC's board of directors; and
- Historical actual gas cost and quantities by month, by contract, and by day for the previous five years.

¹ Black Hills states that it is seeking extraordinary protection for the information and data it intends to provide in response to Staff Data Request 4-2 and to OCC Data Request 1-3.

4. According to Black Hills, the responsive information includes extremely sensitive and non-public financing information, assumptions, and forecasts. Black Hills asserts that its confidential commercial and financial information is protected from public inspection under § 24-72-204(3)(a)(IV), C.R.S., and by the Securities and Exchange Commission. Black Hills also asserts that responsive documents contain extremely sensitive competitive information, including historical gas purchase prices, forecasted financial data, and strategic proposals and business strategy documents presented to Black Hills's board of directors relating to the potential cost of service gas program.

5. Black Hills requests that the Commission limit disclosure of this information to: the Commissioners, Commission Administrative Law Judges, the Commission's advisory staff and advisory attorneys, the Commission's trial staff and attorneys for trial staff, OCC staff and attorneys, and counsel of record for the following interveners: Energy Outreach Colorado, Pueblo County, Western Resource Advocates, Interwest Energy Alliance, the Board of Waterworks of Pueblo, and Fountain Valley Authority, along with subject matter experts participating in this proceeding on behalf of those intervenors.

6. Black Hills seeks to prevent disclosure to intervener Constellation, because the Company would be at a competitive disadvantage if Constellation were privy to its commercially sensitive competitive and business information because Constellation could potentially use it to "design, develop, provide, or market any product, service, or business strategy that would compete with Black Hills."²

² Black Hills Motion for Protective Order, filed January 27, 2016, ¶ 8.

7. Black Hills prepared highly confidential non-disclosure agreements for attorneys and subject matter experts, as required by Rule 1101(b)(V), and attached them to the Motion. Black Hills requests that the Commission limit access to its highly confidential information to “individuals that have signed a non-disclosure agreement in the form attached [to the Motion.]”³

8. Black Hills also requests that “the Commission and parties served destroy [the highly confidential information] by shredding upon the conclusion of this proceeding as provided for in Rule 1101(a)(3)(E).”⁴

9. Black Hills states that, with the exception of Constellation, no party objects to this Motion. Constellation did not file a response.

C. Discussion

10. Constellation has stated in its motion to intervene that it is a competitor to Black Hills,⁵ and Constellation did not oppose this Motion. We find that it is appropriate for Black Hills to withhold sensitive financial and competitive information from its competitors under § 24-72-204(3)(a)(IV), C.R.S., and Rule 1101. We therefore grant Black Hills’s motion for a protective order.

11. We clarify that under Rule 1100(h) of the Rules of Practice and Procedure, 4 CCR 723-1, Commissioners, Commission Staff, and Commission counsel do not need to sign the non-disclosure agreements provided by Black Hills because we sign annual non-disclosure agreements that include a provision requiring us to “maintain and to treat information to which

³ *Id.* ¶ 14.

⁴ *Id.* ¶ 15.

⁵ Constellation Motion to Permissively Intervene, filed on December 3, 2015, ¶¶ 1, 3.

the Commission has granted highly confidential protection pursuant to paragraph 1101(b) in accordance with the decision granting highly confidential protection.”

12. We also order parties to destroy the highly confidential information and documents at the conclusion of this proceeding at Black Hills’s request. We clarify that, under Rule 1101(l), the Commission retains the highly confidential information in its archival files. The Commission will notify the Company in writing if it intends to use the highly confidential information in a later proceeding.

II. ORDER

A. It Is Ordered That:

1. The Motion for a Protective Order Affording Extraordinary Confidential Protection for Highly Confidential Information and Documents filed by Black Hills/Colorado Gas Utility Company, LP on January 27, 2016, is granted, consistent with the discussion above.

2. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING February 18, 2016.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean, Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

Commissioners

COMMISSIONER FRANCES A. KONCILJA
DISSENTING IN PART.

III. COMMISSIONER FRANCES A. KONCILJA DISSENTING IN PART

1. I agree that the Motion for a Protective Order should be entered to protect highly confidential information from either public disclosure or to prevent production of that information to a competitor.

2. I dissent, however, from the Order granting permanent confidentiality status to these documents and information.

3. It is my understanding that Rule 1101(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, has been interpreted so that no party who has agreed to the Protective Order or the Commission can raise the issue of confidentiality later in this proceeding, unless there is a change in the circumstances raised.

4. The Commission or the signatories to the confidentiality agreement could, at a later date, come to the conclusion that the information, is not entitled to this type of protection.

5. As I understand the Rule and how it has been applied in the past, once a party or the Commission agrees to treat the information as confidential or highly confidential, then no party can raise the issue in these proceedings at a later time, because the parties have waived that right. It is my further understanding that this waiver applies to the Commission. The only exception to this blanket waiver is if there are changed circumstances that a party asserts as a reason to lift confidentiality in a motion.

6. Public access to information is critical to transparency and only full public discussion provides credibility for decision making bodies, such as the Commission.

7. A permanent waiver to challenge a designation of confidentiality is unwise public policy, especially here where there has been no *in camera* review by an administrative law judge.

8. In other matters, the Commission has been understandably reluctant to approve agreements that might bind the Commission to future policy decisions. *See, e.g.*, Decision No. C16-0027, page 8, paragraph 18.⁶

9. It could occur that later in these proceedings, the Commission believes that the information designated by Black Hills/Colorado Gas Utility Company, LP (Applicant) as Highly Confidential is not entitled to those protections. The Commission and the parties to the Protective Order should retain the ability to later challenge the Applicant's designation. As I understand the application of the Rule, the only remedy is the above mentioned challenge based on changed circumstances and/or a Motion for Sanctions.

10. A Motion for Sanctions under Rule 1101(b) is not an acceptable or efficient means of challenging an improper designation of confidentiality. Parties and their attorneys are, understandably reluctant to create litigation within litigation by seeking sanctions.

11. If the current rule of the Commission does not provide a process for later challenging a designation of confidentiality, the rule should be changed.

12. Thus, I dissent from the decision of the majority to the extent that it prevents parties to this proceeding or this Commission from later challenging a designation that improperly limits public access.

THE PUBLIC UTILITIES
COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Commissioner

⁶ Decision No. C16-0027 was issued on January 11, 2016 in consolidated Proceeding Nos. 15M-0158T and 14M-0947T.