

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24AL-0275E

IN THE MATTER OF ADVICE LETTER NO. 871 FILED BY BLACK HILLS COLORADO ELECTRIC, LLC DOING BUSINESS AS BLACK HILLS ENERGY TO INCREASE BASE RATES FOR RESIDENTIAL AND SMALL COMMERCIAL CUSTOMER CLASSES, TO BECOME EFFECTIVE JULY 15, 2024.

**INTERIM DECISION ADDRESSING MOTIONS FOR
EXTRAORDINARY PROTECTION**

Issued Date: August 27, 2024

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I. STATEMENT, SUMMARY, AND PROCEDURAL HISTORY

A. Statement and Summary

1. This Decision partially grants the Motion for Protective Order Affording Extraordinary Protection and Request for Temporary Waiver of Rule 1101(b)(VII) to Provide Public Versions of Certain Workpaper Attachments (“First Motion”) that Black Hills Colorado

Electric, LLC doing business as Black Hills Energy (“Black Hills” or the “Company”) filed on June 14, 2024; requires Black Hills to make a filing by September 12, 2024, clarifying its requested relief as to two documents identified in the First Motion; and grants the Second Motion for Protective Order Affording Extraordinary Protection for Highly Confidential Information filed on August 6, 2024 (“Second Motion”).

B. Procedural History¹

2. On June 14, 2024, Black Hills filed Advice Letter No. 871 with tariff sheets to revise base rate revenue for all electric service in the Company’s Colorado PUC No. 11 Tariff.

3. Also on June 14, 2024, the Company filed its First Motion.

4. On August 6, 2024, Black Hills filed its Second Motion.

5. On August 13, 2024, the Commission referred discovery disputes and motions seeking extraordinary protection of highly confidential information to an Administrative Law Judge (“ALJ”).² At the same time, the Commission granted requests to permissively intervene and acknowledged interventions of right, establishing the following entities as parties to this Proceeding (in addition to Black Hills): Staff of the Colorado Public Utilities Commission (“Staff”); the Colorado Office of the Utility Consumer Advocate (“UCA”); Energy Outreach Colorado; City of Pueblo; County of Pueblo; Pueblo Economic Development Corporation; Laborers International Union of North America, Local 720; Colorado Solar and Storage Association; the Solar Energy Industries Association; Board of Water Works of Pueblo; the Fountain Valley Authority; Colorado Springs Utilities/Southern Delivery System; City of Canon

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

² Decision no. C24-0580-I at 13 (issued August 13, 2024). *Id.* at 13.

City; City of Florence; Electrify America, LLC; Western Resource Advocates; the Sierra Club; and Holcim (U.S.) Inc.³

6. To date, no party has filed a response to the Company's First and Second Motions.

II. RELEVANT LAW, FINDINGS, ANALYSIS, AND CONCLUSIONS

A. Relevant Law

7. Generally, responses to motions must be filed within 14 days after the motion is served.⁴ The Commission may deem a failure to respond to a motion as confessing the motion.⁵

8. 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

³ *Id.* at 11-12.

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

⁵ Rule 1400(d), 4 CCR 723-1

⁶ Rule 1101(b), 4 CCR 723-1

B. Findings, Analysis and Conclusions

9. Because no party filed a response to the Company's First and Second Motions, and the time to do so has elapsed, the ALJ deems the Company's First and Second Motions confessed and unopposed.⁷

1. First Motion for Extraordinary Protection

10. The First Motion seeks extraordinary protection for information relating to certain customer information included in attachments to Hearing Exhibits 110 and 111 and any other disclosures in the same categories of information in whatever form or variation that may be produced in this Proceeding.⁸ The Company requests that access to the highly confidential information be limited to: the Commission (including Commissioners, ALJs, and their attorneys); Staff, the UCA and their counsel.⁹ The Company requests that the highly confidential information be destroyed or returned to it once this Proceeding is concluded.¹⁰

11. With its First Motion, the Company filed a proposed form nondisclosure agreement as Attachment A, and an Affidavit identifying those with access to the highly confidential information, and requesting that the information be protected indefinitely as Attachment B.¹¹ The Company asks that Rule 1101(b)(VII)'s requirement to file highly confidential information for which it seeks protection be waived "to provide only the public versions of Company Witness Mr. Hyatt's workpaper and attachments," as it would be overly burdensome and impractical to file

⁷ See Rule 1401(d), 4 CCR 723-1. As noted, the Commission granted interventions on August 13, 2024, after the First and Second Motions were filed. Decision No. C24-0580-I at 11-12. Given the timing of this Decision, the ALJ concludes that the parties have had ample opportunity to file responses to the First and Second Motions since the Commission addressed interventions on August 13, 2024, and deems their failure to respond as confessing both Motions.

⁸ First Motion at 1-2.

⁹ *Id.* at 5.

¹⁰ *Id.* at 6.

¹¹ Attachments A and B to First Motion.

the highly confidential information.¹² It appears that the Company filed highly confidential versions of the hearing exhibit attachments identified in the First Motion on June 14, 2024. The ALJ finds that this is sufficient to meet the spirit and intent of Rule 1101(b)(VII), 4 CCR 723-1, and that it is unnecessary for the Company to refile these for the purpose of complying with this Rule. As such, to the extent necessary, the ALJ grants the Company's request to waive Rule 1101(b)(VII), 4 CCR 723-1 for purposes of the First Motion.

12. In support of its argument that the information should receive extraordinary protection, the Company states that Rule 3027(b) and 3033(b) of the Commission's Rules Regulating Electric Utilities, 4 CCR 723-6, prohibit a utility from disclosing aggregated customer information unless such information contains at least 15 customers. The Company explains that it has less than 15 customers in the following customer classes, whose records are at issue: Large Power Service Primary, Large Power Service Secondary, Large Power Service Transmission, and Large General Service Primary Net-Meter.¹³ Black Hills asserts that while the aggregated customer information in the identified documents do not include customer identifying information, they do include aggregated information for billing determinants, revenues, and allocated costs for these customer classes.¹⁴ Black Hills submits that the requested extraordinary protection is consistent with Rules 3025 through 3035, which protect certain customer data from disclosure absent written customer consent.¹⁵

13. The Company asserts that the Colorado Supreme Court's decision in *Public Service Co., v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316 (Colo. 1999) supports

¹² First Motion at 1.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 4.

its position.¹⁶ There, the Court held that the Commission’s “authority to keep the customer names confidential derives from statute and implementing rules, as well as its legislative authority to take action necessary or convenient to discharging its constitutionally and legislatively delegated responsibilities.”¹⁷ The Court upheld the Commission’s protective order providing extraordinary protection for customer names, contracts, and notification letters, and held that the Commission “did not abuse its discretion in ruling that disclosure of the customer names would jeopardize the existing customer/utility provider relationship . . .”¹⁸

14. Except as discussed below, for the reasons in the First Motion, the ALJ finds that the First 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.

15. That said, there are several anomalies with two documents for which the Company seeks extraordinary protection that must be addressed or clarified for the documents to receive extraordinary protection. Specifically, the ALJ will require the Company to clarify its requested relief as to the protections sought for the documents identified in the First Motion as “Hearing Exhibit 111, Executable Attachments DSA-3, DNH-9, DNH-10, EJF-9HC,” and “Hearing Exhibit 111, Executable Attachments EJF-6, 7HC,” (both filed on June 14, 2024).¹⁹

16. The document referred to in the First Motion as “Hearing Exhibit 111, Executable Attachments DSA-3, DNH-9, DNH-10, EJF-9HC,” combines numerous different attachments into one filing and physically identifies the attachments with different names than the one in the

¹⁶ *Id.* at 4.

¹⁷ *Id.*, quoting *Public Service Co.*, at 324.

¹⁸ *Id.*, quoting *Public Service Co.*, at 324.

¹⁹ First Motion at 2.

First Motion and in the Commission's E-Filing System ("E-Filings"). Specifically, in this Attachment:

- Pages 1 to 6 are marked as "Hearing Exhibit 113, Attachment DSA-3."
- Page seven is marked as "Hearing Exhibit 110, Attachment DNH-9."
- Pages 8 to 9 are marked as "Hearing Exhibit 110, Workpaper #."
- Pages 10 to 53 are marked as "Hearing Exhibit 111, Attachment EFJ-9HC."
- Pages 54 to 55 are marked as "Hearing Exhibit 110, Attachment DNH-10."
- Pages 56 to 60 are not marked at all (including no page numbers).
- Page 61 is marked as "Hearing Exhibit 11, Workpaper 27HC."

17. The document identified in the First Motion as "Hearing Exhibit 111, Executable Attachments EJF-6, 7HC," includes similar issues. For one, in the E-Filing System, the document is titled "Hearing Exhibit 111, Executable Attachments EJF-6, 7 – Billing Determinants HC," which is different from how it is identified in the First Motion. To make matters more confusing, the administrative record includes documents with similar titles, such as "Hearing Exhibit 111, Executable Attachment EJF-7HC," and "Hearing Exhibit 111, Attachment EJF-6."²⁰ Like the other document discussed above, this document combines numerous different attachments into one filing and physically identifies the attachments with different names than the one in the First Motion and in the E-Filing System. Specifically, in this Attachment:

- Page one is marked as "Hearing Exhibit 111, Attachment EJF-6."
- Pages 2 to 21 are marked as "Hearing Exhibit 111, Attachment EJF-7HC."
- Page 22 is marked as "Hearing Exhibit 111, Attachment EJF-4."
- Page 23 is marked as "Hearing Exhibit 111, Attachment EJF-5."
- Pages 24 to 25 are marked as "Hearing Exhibit 111, Workpaper 9HC."
- Pages 26 to 27 are marked as "Hearing Exhibit 111, Workpaper 10HC."

²⁰ See Hearing Exhibit filings made June 14, 2024, in E-Filings.

- Pages 28 to 29 are marked as "Hearing Exhibit 111, Workpaper 11HC."
- Pages 30 to 31 are marked as "Hearing Exhibit 111, Workpaper 12HC."
- Page 32 is marked as "Hearing Exhibit 111, Workpaper 13HC."
- Page 33 is marked as "Hearing Exhibit 111, Workpaper 14."
- Page 34 is marked as "Hearing Exhibit 111, Workpaper 15."
- Page 35 is marked as "Hearing Exhibit 111, Workpaper 16."
- Page 36 is marked as "Hearing Exhibit 111, Workpaper 17."
- Page 37 is marked as "Hearing Exhibit 111, Workpaper 18."
- Page 38 is marked as "Hearing Exhibit 111, Workpaper 19HC."
- Page 39 is marked as "Hearing Exhibit 111, Workpaper 20."
- Page 40 is marked as "Hearing Exhibit 111, Workpaper 21HC."
- Page 41 is marked as "Hearing Exhibit 111, Workpaper 22."
- Page 42 is marked as "Hearing Exhibit 111, Workpaper 23HC."

18. Given that these two Attachments include documents that are not marked as highly confidential and are physically marked inconsistent with the naming conventions in the First Motion and in E-Filings, it is unclear whether the Company seeks highly confidential protection for the entirety of these two Attachments. At minimum, since highly confidential documents are combined with possibly non-confidential documents into single pdf Attachments, granting the Company's requested relief may result in providing extraordinary protection for documents that may not be entitled to such protection. As a result, the Company is required to make a filing that clarifies its requested relief as to both "Hearing Exhibit 111, Executable Attachments DSA-3, DNH-9, DNH-10, EJF-9HC" and "Hearing Exhibit 111, Executable

Attachments EJF-6, 7HC,” filed on June 14, 2024.²¹ If the Company seeks extraordinary protection for information in these two Attachments that is not confidential, the Company must establish grounds therefore, including why it is unable to include the non-confidential documents in a separate and public filing. If the Company asserts that the entirety of both Attachments are highly confidential, the Company should explain why each page of the Attachments, when filed, were not identified as highly confidential (*i.e.*, with an “HC” following the attachment number).

19. For the reasons discussed, those in the First Motion and because the First Motion is unopposed, the ALJ grants the First Motion, except as it relates to the two documents discussed above.²²

2. Second Motion for Extraordinary Protection

20. The Second Motion seeks extraordinary protection for three categories of information: (1) compensation surveys, employee salary and severance pay; (2) material non-public financial information responsive to discovery requests propounded by the Staff and the UCA; and (3) other disclosures in these same categories that may be produced in this Proceeding.²³ The

²¹ The Commission recently issued a decision with requirements for identifying, filing, and marking exhibits and attachments. Decision No. C24-0608-I (issued August 21, 2024) and Attachment B thereto. The Company is encouraged to remark and refile the two Attachments discussed above to comply with these requirements and to clarify the record. Corrections may include correcting naming convention errors; sequentially page numbering the entire attachment(s); and separating each different document into a different attachment filing. It would be helpful to remove non-confidential documents from highly confidential filings to the extent possible and refile them as separate attachments. Because the Commission did not refer issues relating to requirements for identifying, filing, and marking exhibits and attachments to the ALJ, the ALJ encourages, but does not require the Company to refile these documents. That said, the way the Company marked these attachments confuses the relief it seeks in the First Motion; creates an unclear and muddled record that is sure to create issues for the Commission and parties when the matter proceeds to an evidentiary hearing; and is not consistent with Attachment B to Decision No. C24-0608-I. This is particularly the case with Hearing Exhibit 111, Executable Attachments EJF-6,7HC.

²² In rejecting the Company’s request for extraordinary protection for the two documents discussed above, the ALJ does not find that the referenced documents should be made or treated as public, but only that the record is unclear as to the Company’s requested relief as to these documents.

²³ Second Motion at 1.

Company requests that access to the highly confidential information be limited to: the Commission (including Commissioners, ALJs, and their attorneys); Staff, the UCA and their counsel.²⁴

21. With the Second Motion, the Company filed the following attachments: Attachment A, form nondisclosure agreement; Attachment B, Affidavit identifying those with access to the information and requesting it be protected indefinitely; and Attachments C, D, E, and F, the relevant highly confidential information (filed as highly confidential).²⁵ Black Hills also states that it does not have salary surveys responsive to one of Staff's discovery requests (no. 1-14), but will file it as Attachment H once it has the documents and its vendors have given it permission to do so.²⁶

22. Black Hills argues that discovery responsive to Staff's request no. 1-14 covers the first two categories of highly confidential information, that is, proprietary, non-public, and confidential commercial and financial information, as well as compensation-related information.²⁷ Disclosure would also require it to violate strict non-disclosure requirements of the subscription service(s) used to obtain the documents (salary surveys).²⁸ The Company has maintained this information as highly confidential within its organization and its affiliates.²⁹

23. Black Hills submits that discovery responsive to Staff's request nos. 1-17 and 1-40 covers the first category of highly confidential information, and includes extremely sensitive personal financial information that contains employee-specific salary or other compensation-related information.³⁰ The Company has maintained this information as highly confidential within

²⁴ *Id.* at 7.

²⁵ *See* Attachments A to G to Second Motion; Second Motion at 7-8. The Company also filed public versions of Attachments C to G with its Second Motion.

²⁶ Second Motion at 8.

²⁷ *See* Second Motion at 2-4.

²⁸ *Id.* at 3.

²⁹ *Id.* at 4.

³⁰ *See id.*

its organization and its affiliates.³¹ The Company seeks protection against disclosing employee identifying information that would allow parties to determine individual employees' salaries or other compensation, except for salary and other compensation information for certain high-level officers and directors (which are routinely made publicly available).³²

24. As to the first category of highly confidential information, Black Hills argues that utility employees have the right to privacy concerning their individual compensation. It argues that the right to privacy protects "the individual interest in avoiding disclosure of personal matters," and includes the "power to control what we shall reveal about our intimate selves, to whom, and for what purpose."³³

25. The Company asserts that when the right to privacy or confidentiality is invoked, the Commission must conduct a three-part balancing that requires it to consider: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether disclosure is required to serve a compelling state interest; and (3) where a compelling state interest necessitates disclosure of otherwise protected information, how disclosure may occur in a manner which is least intrusive with respect to the right to confidentiality.³⁴ As to the first element, Black Hills submits that protecting employees' individual salary and other compensation-related information finds support in the Court's decision in *Alcon v. Spicer*, 113 P.3d 735, 743 (Colo. 2005), where the Court held that individuals have a privacy right that protects against disclosure of their tax returns.³⁵ As to the last two elements, the Company states that because it understands that certain salary and other compensation-related information may be relevant to this Proceeding, it does not seek a blanket

³¹ *Id.*

³² *Id.*

³³ *Id.*, citing *Corbetta v. Albertson's*, 975 P.2d 718, 720-721 (Colo. 1999); *Martinelli v. Dist. Court*, 612 P.2d 1083 (Colo. 1980).

³⁴ *Id.* at 4-5, citing *Corbetta*, 975 P.2d at 720-721.

³⁵ *Id.* at 5.

prohibition on providing this information. Rather, Black Hills seeks to limit the parties who have access to the information (*i.e.*, only Staff and the UCA), and to require that the information be maintained as highly confidential.³⁶

26. The Company explains that discovery responsive to Staff's request nos. 2-16, 2-17 and UCA's requests no. 5-6 covers the second category of highly confidential information, that is, material, non-public financial information that has not been previously disclosed to the investment community.³⁷ Black Hills submits that disclosure without a protective order would expose to public view material, non-public information concerning equity infusions and the capital structures of various Black Hills' subsidiaries that has not been reported in its financial statements.³⁸ The Company submits that § 24-72-204(3)(a)(IV), C.R.S., protects confidential financial information from public inspection, and obligates the Company to treat such information as non-public highly confidential information.³⁹ The Company carefully monitors and restricts internal distribution of this extremely sensitive information, treating it as confidential within its organization.⁴⁰ The Company has disclosed this information outside its organization subject to strict non-disclosure requirements.⁴¹

27. Black Hills notes that although it filed the Second Motion due to the referenced discovery requests, it seeks such protection for any similar material, proprietary, non-public information and non-public financial information that may arise in this Proceeding, including, but not limited to responsive discovery.⁴²

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.* at 5-6.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² *Id.*

28. The Company asserts that the Commission has given extraordinary protection to this same type of information (*i.e.*, in the second category), in the past.⁴³ Black Hills submits that due to the highly sensitive nature of the information at issue, the protections afforded by the Commission's rule governing confidentiality do not provide insufficient protection and that disclosure without extraordinary protection would likely result in serious harm.⁴⁴

29. For the reasons stated in the Second Motion, 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 these reasons, and because the Second Motion is unopposed, the ALJ grants the Second Motion.

III. ORDER

A. It Is Ordered That:

1. The Motion for Protective Order Affording Extraordinary Protection and Request for Temporary Waiver of Rule 1101(b)(VII) to Provide Public Versions of Certain Workpaper Attachments ("First Motion") that Black Hills Colorado Electric, LLC doing business as Black Hills Energy ("Black Hills" or the "Company") filed June 14, 2024, is partially granted, consistent with the above discussion.

2. On or by September 12, 2024, Black Hills must make a filing consistent with the requirements in ¶ 18 above, that at minimum, clarifies its requested relief as to the documents

⁴³ *Id.*, citing, Decision No. R23-0485-I issued in Proceeding No. 23AL-0231G (July 26, 2023); Decision No. R23-0072-I issued in Proceeding No. 22AL-0426G (February 3, 2023); Decision No. R21-0459-I issued in Proceeding No. 21AL-0236G (July 27, 2021); Decision No. R19-0351-I issued in Proceeding No. 19AL-0075G (April 19, 2019); Decision Nos. R18-0038-I (January 11, 2018) and R17-0144-I (December 15, 2017) issued in Proceeding No. 17AL-0654G; Decision No. C16-0717-I issued in Proceeding No. 16AL-0326E. (August 4, 2016). The ALJ cannot locate Decision No. R17-0144-I in Proceeding No. 17AL-0654G, but there is a Decision No. R17-1044-I in that Proceeding; the ALJ construes the Company's citation to be to this Decision.

⁴⁴ *See id.* at 6-7.

identified in the First Motion as “Hearing Exhibit 111, Executable Attachments DSA-3, DNH-9, DNH-10, EJF-9HC” and “Hearing Exhibit 111, Executable Attachments EJF-6, 7HC,” filed on June 14, 2024. The Administrative Law Judge defers ruling on the Company’s requested relief as to these two documents until after it makes this filing.

3. The Second Motion for Protective Order Affording Extraordinary Protection for Highly Confidential Information filed August 6, 2024, is granted.

4. 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

Rebecca E. White,
Director