

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 07R-325ALL

IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE,
4 CODE OF COLORADO REGULATIONS 723-1.

ORDER ADDRESSING EXCEPTIONS

Mailed Date: March 10, 2008
Adopted Date: February 13, 2008

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions to Recommended Decision No. R07-0924 (Recommended Decision) filed by Western Resource Advocates (WRA) on November 20, 2007. In its Exceptions, WRA asks the Commission to reverse, in part, the Administrative Law Judge’s (ALJ) finding that it is unnecessary to amend Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1100(a)(III) of the *Rules of Practice and*

Procedure to require the parties seeking extraordinary protection to file the materials for which such protection is sought for an *in camera* review. Public Service Company of Colorado (Public Service) filed a response to WRA's Exceptions on December 4, 2007.

2. This matter also comes before the Commission for consideration of Exceptions to the Recommended Decision filed by Qwest Corporation (Qwest) on November 21, 2007. In its Exceptions, Qwest argues against the modifications proposed by the ALJ with respect to Rule 1401(a). The Colorado Office of Consumer Counsel (OCC) responded to Qwest's Exceptions on December 4, 2007.

3. Now, being fully advised in the matter, we grant WRA's Exceptions, in part, and grant Qwest's Exceptions, in part, consistent with the discussion below.

B. Background

4. The Commission issued the Notice of Proposed Rulemaking (NOPR), which commenced this docket, on August 30, 2007. *See* Decision No. C07-0737. The NOPR stated that:

This NOPR proposes to modify Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1100(a)(III). The proposed rule generally... (b) specifies that the Commission may enter an order either requiring additional information or requiring a party to file an original and an appropriate number of copies of the complete version of the information for which extraordinary protection is sought...*Id.*, at ¶4.

This NOPR proposes to modify Rule 4 CCR 723-1-1401(a) by clarifying that the Commission may consider any application or petition without a hearing if no notice of intervention as of right or motion to permissively intervene requests a hearing or contests or opposes the application or petition. *Id.*, at ¶5.

5. The hearing in this matter was held on October 5, 2007 before ALJ Mana L. Jennings-Fader. WRA, Ratepayers United of Colorado, LLC (RUC), Public Service, Qwest, and

OCC, among other parties, submitted written and/or oral comments. The ALJ took the matter under advisement and issued the Recommended Decision on November 5, 2007.

6. With respect to Rule 1100(a)(III), Qwest, recommended among other things, that the Commission clarify the circumstances, if any, under which a complete copy of the materials for which the extraordinary protection is sought must be filed with the Commission for an *in camera* review. See Recommended Decision, at ¶28. Qwest recommended adopting the language that would make it explicit that a complete copy of the materials for which extraordinary protection is sought would not be filed with the Commission for an *in camera* review unless this was specifically ordered. *Id.* WRA, on the other hand, argued that the party seeking extraordinary protection should always file, and the Commission should always review *in camera*, a complete copy of the materials for which such protection is sought. *Id.*, at ¶29.

7. The ALJ agreed with Qwest. The ALJ stated that the decisions regarding whether the extraordinary protection should be granted are never routine and must be made on a case by case basis. *Id.*, at ¶30. The ALJ stated that the Commission is in the best position to know what information it needs to examine to decide a motion for extraordinary protection and that it is important to maintain discretion and flexibility. *Id.*

8. Qwest also suggested that the language of Rule 1100(a)(III) should be consistent with Rule 1405(b), which provides that discovery requests and responses generally are not filed with the Commission except when necessary to support a pleading or as an exhibit. Qwest pointed out that the information subject to extraordinary confidentiality is mainly exchanged during discovery. *Id.*, at ¶31. The ALJ agreed that the language of Rule 1100(a)(III) should be consistent with Rule 1405(b). *Id.*, at ¶32.

9. With respect to Rule 1401(a), the ALJ pointed out that the language proposed in the NOPR contained the two requirements that must be met before the Commission could consider an application or a petition without a hearing: (1) no intervention or request to intervene requests a hearing; and (2) no intervention or request to intervene contests the application or petition. *Id.*, at ¶47. The ALJ adopted OCC's unopposed recommendation that an intervenor must specifically request a hearing in the intervention filing. *Id.*, at ¶64.

10. In addition, OCC recommended that Rule 1401(a) be amended to state that, if any party requests a hearing, the Commission must hold one. Public Service, however, argued that the Commission must retain its flexibility and discretion to decide on a case by case basis the process best suited to resolve each matter. *Id.*, at ¶65. The ALJ found the argument made by Public Service to be persuasive and rejected OCC's recommendation. *Id.*, at ¶69.

C. Issues on Exceptions

1. Motions for extraordinary protection

11. WRA asked in its Exceptions that the Commission reconsider the ALJ's finding that it is not necessary to require the party seeking extraordinary protection to file the materials for which such protection is sought for an *in camera* review with respect to the dockets where another party would be *completely prevented* from accessing the potential evidence and that party has no commercial interest in the contents and is willing to enter into a confidentiality agreement. *See* WRA's Exceptions. WRA states that this requirement would only apply to a narrow category of extraordinary protection requests. *Id.*

12. WRA also argued that requests for extraordinary protection must be accompanied by an affidavit providing: (1) the names of persons with access to the information; (2) the description of the harm which could ensue if the information were provided to a party that signed

a confidentiality agreement and has no commercial interest in the information; and (3) the period of time for which the information must remain undisclosed to avoid exposure to the harm and a justification for that time period. *Id.*

13. Public Service stated in its response that the majority of requests for extraordinary protection are filed because some information is so sensitive that only Staff, OCC and the Commission should have access. The modifications proposed in WRA's Exceptions, therefore, would apply not just to a small portion of requests for extraordinary protection but to most of them. See Public Services Response to Exceptions. Public Service argued that the reasons why the ALJ rejected the position that the parties seeking extraordinary protection should always file a complete copy of the materials for which such protection is sought for an *in camera* review remain persuasive.

14. We agree with the ALJ and Public Service that the Commission needs to retain its discretion and flexibility in these matters. The Commission is in the best position to know what information it needs to review when deciding a motion for extraordinary protection. We find that the approach where the party seeking extraordinary protection must automatically file a complete copy of the information for which such protection is sought, even if in limited circumstances, may impose undue cost on the moving party and the Commission.

15. We emphasize, however, that, if we determine that we must review a complete copy of the materials for which extraordinary protection *in camera* to decide a motion, we will not hesitate to ask for it. We do not believe that requests for extraordinary protection are routine and we will grant them only if the moving party meets its high burden. We will also consider solutions such as allowing counsel for intervening parties to review the materials.

16. We agree, in part, with WRA that an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain undisclosed, if known, will be useful and therefore we amend Rule 1100(a)(III) to add the following sentence:

The party seeking extraordinary protection shall submit an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain undisclosed, if known.

2. Interventions

17. Qwest argued in its Exceptions that the proposed modification at the end of Rule 1401(a) is unnecessary and confusing. Qwest states that this language is already contained in Rule 1403, which addresses uncontested and modified proceedings. *See* Qwest's Exceptions. In addition, according to Qwest, a person could erroneously interpret this language as establishing an automatic right to a hearing upon request if certain conditions do not apply. *Id.*

18. In its Response to Qwest's Exceptions, OCC states that without the proposed modifications a person wishing to have a hearing will not know that one must be requested along with the intervention. OCC argues that a person reviewing the Rules of Practice and Procedure for the steps necessary to intervene will not reasonably consider Rule 1403, titled "Uncontested (Modified) Proceedings," only Rule 1401 titled "Intervention." *See* OCC's Response to Qwest's Exceptions.

19. We agree with OCC that the proposed changes are necessary to inform a person wishing to have a hearing that he or she must request it along with the intervention. We also agree that a potential intervenor might not reasonably consult Rule 1403 for the steps necessary to intervene. We will, therefore, not strike the modifications proposed by the ALJ. On the other hand, we agree with Qwest that a person could erroneously read the proposed language as

establishing a right to hearing upon request if certain conditions do not apply. We therefore modify the language proposed by the ALJ in Rule 1401(a) (along with slight, non-substantive modifications in Rule 1403). We add the following sentence at the end of Rule 1401(a):

If a person wishes to intervene and to request a hearing, that person's intervention as of right or motion to intervene by permission must state that the application or petition is contested or opposed and must explicitly request a hearing. However, the Commission may consider any application or petition without a hearing and without further notice if a hearing is not required by law.

II. ORDER

A. The Commission Orders That:

1. The Exceptions of Western Resource Advocates to Recommended Decision No. R07-0924 are granted, in part, and denied, in part, consistent with the discussion above.
2. The Exceptions of Qwest Corporation to Recommended Decision No. R07-0924 are granted, in part, consistent with the discussion above.
3. The 20 day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.
4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
February 13, 2008**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RON BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-1

PART 1

RULES OF PRACTICE AND PROCEDURE

BASIS, PURPOSE, AND STATUTORY AUTHORITY.

The basis and purpose of these rules is to advise the public, regulated entities, attorneys, and any other person of the Commission's rules of practice and procedure. These rules of practice and procedure are promulgated in order to properly administer and enforce the provisions of Title 40 of the Colorado Revised Statutes and in order to regulate proceedings before the Commission.

The statutory authority for these rules is found in §§ 40-2-108, 40-6-101(1), 40-6-108(2), 40-6-109(5), 40-6-109.5, and 40-6-114(1), C.R.S.

* * *

[signifies omission of unaffected rules 1000 through 1099]

STANDARDS OF CONDUCT

1100. Confidentiality

These rules apply to all persons filing information with, or seeking information from, the Commission. They also apply to the Commission, the Director, or a presiding officer to the extent they govern the Commission's responses to claims of confidentiality in a formal docket, requests to restrict public inspection of information outside of a formal docket, or requests for information under the Public Records Law.

- (a) All documents, data, information, studies, computer programs, and other matters filed with the Commission in any form in a proceeding, or produced in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery, or produced in response to audit conducted by the Commission or its Staff, and all notes taken or copies made thereof, that are claimed to be a trade secret or confidential in nature (herein referred to as "confidential information") shall be furnished under the terms of this rule. All persons accorded access to such confidential information shall treat such information as constituting trade secret or confidential information and shall neither use nor disclose such information except for the purpose of the proceeding in which such information is obtained and in accordance with this rule.
- (l) A claim of confidentiality constitutes a representation to the Commission that the claiming party has a reasonable and good faith belief that the subject document or information is, in fact, confidential under applicable law, including §§ 24-72-201 et seq., C.R.S. If a claim of confidentiality is made in violation of this subparagraph (l), the Commission may

impose an appropriate sanction upon the claiming party, including an order to pay to other parties the amount of reasonable expenses incurred because of the claim of confidentiality, including reasonable attorney's fees.

- (II) The Commission's acceptance of information pursuant to a claim of confidentiality is not, and shall not be construed to be, an agreement or a ruling by the Commission that the subject information is, in fact, confidential.
- (III) If a party believes that information requires extraordinary protection beyond that provided for in these rules, then the party shall submit a motion seeking such extraordinary protection. The motion shall include a description and/or representative sample of the information for which extraordinary protection is sought, shall state the specific relief requested and the grounds for seeking the relief, and shall advise all other parties of the request and the subject matter of the material at issue. The motion shall include a showing that the information for which extraordinary protection is sought is highly confidential; that the protection afforded by the Commission's rules governing confidentiality provide insufficient protection for the highly confidential information; and that, if adopted, the extraordinary protections proposed by the movant will afford sufficient protection for the highly confidential information. The motion shall be accompanied by the specific form of nondisclosure agreement requested by the party. The party seeking extraordinary protection for information shall comply with rule 1204(a) in filing the motion. Prior to deciding the motion and as it deems necessary, the Commission may enter an order requiring the filing of additional information, including the filing of a complete version of the information for which extraordinary protection is sought. The party seeking extraordinary protection for information shall bear the burden of proof to establish the need for extraordinary protection. The Commission will consider *in camera* the motion and, as applicable, the description of the information, the representative sample of the information, or the complete information. After considering the motion and the circumstances, the Commission may enter an order granting the motion and ordering the extraordinary protection which the Commission, in the exercise of its discretion, deems appropriate; may enter an order denying the motion; or may enter any other appropriate order. Information which is subject to extraordinary protection and which is provided in response to discovery or in response to Staff audit shall not be filed with the Commission. Unless the Commission orders otherwise, a complete version of the document which contains the information which is subject to extraordinary protection shall be filed with the Commission as soon as any one of the following conditions applies: (A) the information is used to support a motion, (B) the information is filed as an exhibit to prefiled testimony, (C) the information is prefiled as an exhibit to be offered at hearing, or (D) the information is offered as an exhibit at hearing. Unless the Commission orders otherwise, an original and seven copies of the complete version of the document which contains the information which is subject to extraordinary protection shall be filed. The information shall be filed in accordance with the procedures established in paragraph (c) of this rule. Unless otherwise ordered by the Commission, its Staff shall have access to all information filed under this subparagraph (III) by virtue of the annual nondisclosure agreement executed under paragraph (g) of this rule. The party seeking extraordinary protection shall submit an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain undisclosed, if known.

* * *

[signifies omission of unaffected rule 1100(b)]

(c) Procedure for filing.

- (I) A party submitting to the Commission information claimed to be confidential shall file, as part of the public record (*i.e.*, not under seal), the required number of copies of its filing, according to the Commission's Rules of Practice and Procedure and without including the information claimed to be confidential. The first page of each of these copies shall be labeled: "NOTICE OF CONFIDENTIALITY: A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL." The cover page of each copy of the document filed in the public record shall list each document filed under seal, shall list each page number of each document on which confidential material is found, and shall indicate the nature of the documents which are filed under seal. Parties shall make only general references to information claimed to be confidential in their testimony and exhibits, in other filings, and in oral presentations.
- (II) In addition to the copies available for public inspection, the filing party shall file under seal an original and seven copies of the information claimed to be confidential. All pages and copies of the information claimed to be confidential shall be clearly marked as "confidential" and shall be filed on microfilmable paper (*i.e.*, pastel or white and not dark colored paper such as goldenrod). The documents containing information claimed to be confidential shall be clearly marked so that, should the documents be separated from the envelope, it is clear that the documents are claimed to be confidential.
- (III) The original and seven copies filed under seal shall be submitted in separate, sealed envelopes numbered serially. Unless the Commission orders otherwise, the envelopes shall be no smaller than 9" by 12" and no larger than 10" by 13". The following information shall be written on the outside of each sealed envelope:
 - (A) the caption and docket number of the associated proceeding and the notation "CONFIDENTIAL -- SUBMITTED IN DOCKET NO. _____"
 - (B) the name of the filing party;
 - (C) the date of filing;
 - (D) a description of the information (*e.g.*, testimony or exhibits of _____ (name of witness), statement of position, motion);
 - (E) the filing party's statement as to whether it prefers to retrieve the information following conclusion of Commission proceedings and any related court actions or it prefers to have the Commission destroy the information by shredding following conclusion of Commission proceedings and any related court actions; and
 - (F) if the party chooses to retrieve the information in accordance with the statement contained in subparagraph (III)(E), the name and phone number of the person who will retrieve such information.

* * *

[signifies omission of unaffected rules 1100(d) through (f)]

- (g) No access to information under seal shall be allowed until the person, who is either a party or an authorized agent of a party and who is seeking such access, signs a nondisclosure agreement on a form approved by the Commission. The nondisclosure agreement form shall require the person to whom disclosure is to be made (the signatory) to certify in writing that the signatory has read the protective provisions contained in rules 1100 - 1102 and agrees to be bound by the terms of those provisions. The agreement shall contain (1) the caption and docket number of the associated docket; (2) the signatory's full name, title, employer or firm, and business address; (3) the name of the party with whom the signatory is associated; (4) the signatory's signature and the date of execution of the nondisclosure agreement; and (5) with the exception of Staff, the signature of the associated party's counsel. The agreement shall be delivered to counsel for the filing party and shall be filed with the Commission at or before the time of review of the documents. Notwithstanding anything in this rule to the contrary, each member of Commission Staff need only sign one nondisclosure agreement annually. The annual nondisclosure agreement which each Staff member executes shall include a provision which requires Staff to maintain and to treat information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule in accordance with the order granting extraordinary protection. Signing such an annual nondisclosure agreement shall permit a Staff member to have access to all confidential material filed with or provided to the Commission and to have access to all information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule. The Commission shall maintain in its files the annual nondisclosure agreements signed by Staff and shall make such agreements available for public inspection. All persons, including Staff, who are afforded access to any information under seal shall take all reasonable precautions to keep the confidential information secure in accordance with the purpose and intent of this rule. All persons, including Staff, who are afforded access to information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule shall maintain and shall treat that information in accordance with the protections specified in the order.

* * *

[signifies omission of unaffected rules 1100(h) through 1399]

PRE-HEARING PROCEDURE

* * *

[signifies omission of unaffected rule 1400]

1401. Intervention.

- (a) Except as provided by paragraph (d) of this rule, any person may file a notice of intervention as of right or a motion to ~~permissively~~ intervene by permission within 30 days of notice of any docketed proceeding, unless the Commission's notice or a specific rule or statute provides otherwise. The Commission shall not enter a final decision in any docketed proceeding before the intervention period has expired. The Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements. If a person wishes to intervene and to request a hearing, that person's intervention as of right or motion to intervene by permission must state that the application or petition is contested or opposed and must explicitly request a hearing. However, the Commission may consider any application or petition without a hearing and without further notice if a hearing is not required by law.

* * *

[signifies omission of unaffected rules 1401(b) through 1402]

1403. Uncontested (Modified) Proceedings.

- (a) The Commission may determine any application or petition without a hearing and without further notice, upon either its own initiative or upon the motion of a party, ~~determine any application or petition which~~ if the application or petition is uncontested or unopposed, if a hearing is not requested or required by law, and if the application or petition is accompanied by a sworn statement verifying sufficient facts and supported by attachments and/or exhibits that adequately support the filing. A person having knowledge of the stated facts shall, under oath, sign a sworn statement attesting to the facts stated in the application or petition and any attachments and/or exhibits. The sworn statement need not be notarized, but it shall contain language indicating that the signatory is affirming that the statements are true and correct to the best of the signatory's knowledge and belief.
- (b) A proceeding will not be considered to be contested or opposed, unless an intervention has been filed that contains a clear statement specifying the grounds therefore~~e~~.
- (c) If all parties withdraw their interventions before completion of a hearing, the matter may be determined as an uncontested proceeding.

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[signifies omission of unaffected rules 1404 through 1999]