

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 08S-290G

2008 OCT -1 PM 12: 26

RE: INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY AQUILA, INC. D/B/A AQUILA NETWORKS-PNG WITH ADVICE LETTER NO. 528 WITH BLACK HILLS/COLORADO GAS UTILITY COMPANY, LP SUBSTITUTED FOR AQUILA, INC. EFFECTIVE JULY 14, 2008

UNOPPOSED AMENDED MOTION OF BLACK HILLS/COLORADO GAS UTILITY COMPANY, LP FOR PROTECTIVE ORDER AFFORDING EXTRAORDINARY PROTECTION TO HIGHLY CONFIDENTIAL INFORMATION

Black Hills/Colorado Gas Utility Company, LP (“Black Hills Gas”), by and through its undersigned counsel, pursuant to Rule 723-1-1100(a)(III) of the Colorado Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure relating to Confidentiality, 4 *Colo. Code Regs. 723-1*, hereby respectfully requests that the Commission grant extraordinary protection to certain highly confidential information that has been requested of Black Hills Gas through data requests, audit requests, or discovery, or that may be later filed in testimony and exhibits in this docket. Black Hills requests that access to and review of such highly confidential information shall be limited to the Commissioners and the Commission Administrative Law Judges (“ALJs”), as well as to members of the Commission’s Staff, employees of the Colorado Office of Consumer Counsel (“OCC”), and their respective attorneys from the Colorado Attorney General’s Office, who are assigned to this docket. As grounds for the relief sought herein, Black Hills states as follows:

1. Black Hills Gas is a natural gas utility operating in Colorado pursuant to certificates and authority issued by the Commission within its authorized service area in the State

of Colorado. Black Hills Gas is regulated by the Commission with respect to its public utility rates, services, facilities, and service territory.

2. On June 30, 2008, Aquila Inc., d/b/a Aquila Networks-PNG (“Aquila”) filed Advice Letter No. 528 seeking to increase its annual revenue requirement by \$2,696,005. On July 14, 2008, the gas utility assets and operations in Colorado of Aquila, Inc., doing business as Aquila Networks-PNG, were transferred to a subsidiary of Aquila, Inc. named Aquila Colorado Gas Opco, LP (“Gas Opco”) followed by the immediate transfer of the general and limited partnership interests in Gas Opco to subsidiaries of Black Hills Utility Holdings, Inc. and the change of the name of Gas Opco to Black Hills/Colorado Gas Utility Company, LP. Subsequently, Black Hills Gas filed a Notice of Substitution in this docket, pursuant to Rule 1208(a), 4 *Colo. Code Regs.* 723-1 (2008). Decision No. R08-1004-I allowed the substitution of Black Hills Gas for Aquila.

3. The purpose of this Amended Motion is to seek an order from the Commission affording extraordinary confidential protection to documents and information requested by the Office of Consumer Counsel (“OCC”) and the Trial Staff in the following discovery requests and data requests:

- OCC 2-5 Requesting an itemization (including a description of which individuals or entities performed/will perform what work) of the \$735,000 for estimated rate case expenses
- CPUC 2-18 Requesting Aquila’s Income Tax Returns for 2004 – 2007
- CPUC 2-25 Requesting detailed invoices for all work performed by consultants for Black Hills during the test year
- CPUC 2-30 Requesting all work papers, invoices and any other support documentation for Black Hills’ estimation of rate case expenses
- CPUC 2-33 Requesting payroll data referenced in regard to individual employee name, job description, base and fully loaded salary, and any other associated

payroll data for both full and part-time employees in Colorado; identification of employees that were on the books during the test year versus those who were not.¹

CPUC 4-15 Follow-up to Data Request very similar to CPUC 2-30, seeking invoices for all rate case expenses that have been incurred from the end of the test period to date, a break out by type of service (i.e. consulting, legal, etc.), and including “the date of the work performed, a description of the work, time duration, charges assessed, billing rate, and the FERC account the charges were assessed to.”

4. Rule 723-1-1100(a)(III) of the Confidentiality Rules provides as follows:

To the extent there may be information which a party believes requires extraordinary protection beyond that provided for in these rules 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 and shall state the grounds for seeking the relief, the specific relief requested, and advise all other parties of the request and the subject matter of the material at issue. The motion shall also be accompanied by the specific form of nondisclosure agreement requested by the party. Notwithstanding anything to the contrary in subparagraphs (c)(II) and (III) of this rule, the party shall file only an original and one copy of the description and/or representative sample of the information for which extraordinary protection is sought. The Commission will evaluate the motion and the description and/or representative sample *in camera*.

4 *Colo. Code Regs. 723-1-1100(a)(III) (2008); see also Public Service of Colorado v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316 (Colo. 1999) (upholding a Colorado Public Utilities’ Commission decision granting Public Service Company’s motion for extraordinary protection.)

¹ Trial Staff’s data request 2-33 seeks employee payroll details, however, Aquila did not, and Black Hills does not, provide the names of individual employees when providing this sort of payroll expense information. This position is a matter of protecting these individual employees’ constitutional rights to privacy. Instead, when this information will be provided under the protective order issued by the Commission, employee identification codes instead of names will be provided.

5. Extraordinary confidential protection is warranted for the types of documents and information requested in the discovery and data requests listed above, because such requests all relate to income tax returns, professional fees, salaries or compensation paid to consultants, or employees (the “highly confidential information”). These documents and information are all highly confidential, trade secret, commercially sensitive and competitively sensitive and deserve extraordinary confidentiality protection. Disclosure of Aquila’s income tax returns must be protected as highly confidential because Great Plains Energy, which now owns Aquila’s Missouri operations and the Aquila income tax return documents, will only release those documents to Black Hills Gas if the tax returns are treated as highly confidential with very limited disclosure. Under Section 6103(a) of the Internal Revenue Code, the Aquila federal income tax returns are deemed “confidential” and may not be disclosed “in any manner” except as permitted in Section 6103. 26 IRC § 6103(a). The term “disclosure” as used in § 6103 “means the making known to *any person in any manner whatever* a return or return information.” 26 IRC § 6103(b)(8) [Emphasis added]. Black Hills Gas believes that federal “confidentiality” of income tax returns under § 6103 appears to be similar, in terms of extraordinary protection, to this Commission’s treatment of “highly confidential” information. Moreover, disclosure of highly confidential information about professional fees, salaries or compensation paid to consultants, or employees would be harmful to Black Hills Gas, because such disclosure would adversely affect the ability of Black Hills Gas to negotiate salaries and compensation with other professionals and individuals in the future. Disclosure of such information may also infringe on the privacy rights of the individual persons involved.

6. The extraordinary confidential protective order sought in this Amended Motion should prohibit the production or disclosure of the designated highly confidential competitive

information to any Parties or entities other than the Commissioners, Commission ALJs, members of the Commission's Staff, employees of the OCC, and their respective attorneys from the Colorado Attorney General's Office. By signing an appropriate extraordinary confidential non-disclosure agreement, those persons who are entitled by the Commission's protective order would have access to the highly confidential documents and information. In accordance with Rule 723-1-1100(a)(III), the proposed form of appropriate non-disclosure agreement is attached to this Amended Motion as Attachment "B"

7. As part of the protective order, Black Hills Gas additionally seeks the following protections:

- a) That CDs containing electronic copies of the requested income tax returns will be hand-delivered to counsel for Trial Staff or OCC for review by Trial Staff members or OCC employees who have signed the extraordinary confidential non-disclosure agreement attached to the Amended Motion for Protective Order. Signatory Trial Staff members or OCC employees may print off and make copies of tax return documents, as long as such copies are accorded highly confidential treatment under terms of the Amended Motion for Protective Order or any protective order entered by the Commission that applies to the subject Aquila income tax returns. Upon conclusion of Trial Staff's or OCC's investigation in this docket, the subject CDs and all paper copies of any documents thereof, not introduced into evidence in the instant docket, must be promptly returned to counsel for Black Hills Gas.

- b) That the Staff and the OCC be relieved from having to provide the highly confidential information in response to any discovery conducted by any other intervenors in this docket.
- c) That, in the unlikely event the highly confidential information is provided by Black Hills Gas in electronic format, representatives of the Staff and OCC and their respective attorneys shall be prohibited from transmitting the highly confidential information by any electronic media, including e-mail, nor shall additional electronic copies of the highly confidential information be made by a party other than Black Hills Gas or its attorneys.
- d) That the highly confidential information shall not be used except as necessary for the conduct of this proceeding and cannot be used in any other docket.
- e) That all persons who obtain copies of the highly confidential information must return the copies to Black Hills Gas within ten calendar days of the final Commission order in this docket or any docket with which this docket is consolidated.
- e) That any computer files of any parties, other than Black Hills Gas and its attorneys, which store electronic copies of the highly confidential information, must be destroyed within ten calendar days of the final Commission order in this docket or any docket with which this docket is consolidated, and that an affidavit of destruction shall be provided to Black Hills Gas, upon request.

8. The extraordinary confidential protections that Black Hills Gas requests in this Amended Motion strike the appropriate balance between: 1) the need for disclosure so that the Advice Letter and tariffs can be reviewed; and 2) the need to protect the interests of Black Hills

Gas and the persons about whom disclosure is sought. The Staff and the OCC are charged by law to assure that Black Hills Gas and other regulated utilities act in the public interest and that the interests of customers are protected. Giving access to members of the Staff, analysts of the OCC, and their respective attorneys would allow these objective parties to provide adequate review and comment to the Commission regarding this rate case filing.

9. By the foregoing discussion, Black Hills Gas has established in this Amended Motion that (a) the information in this docket for which extraordinary confidentiality is sought is highly confidential; (b) the protections afforded by the Commission's rule governing ordinary confidentiality provide insufficient protection for the information; and (c) if adopted, the extraordinary protections proposed by Black Hills Gas will afford sufficient protection for the highly confidential information.

10. Black Hills Gas' affidavit required by Rule 723-1-1100(a)(III) is attached to this Amended Motion as Attachment "A".

11. Therefore, Black Hills Gas has demonstrated good cause to grant this Amended Motion for protective order and requests that this Motion be granted.

12. The undersigned counsel for Black Hills Gas is authorized to represent that neither Trial Staff nor the Office of Consumer Counsel oppose this Amended Motion.

13. Since time is of the essence in the Commission's review and disposition of this Amended Motion under Rule 3655(c) and no party to this docket opposes this Amended Motion, Black Hills Gas requests further that the Commission waive response time to this Amended Motion.

14. Black Hills Gas has served a copy of this Amended Motion, which includes a description of the highly confidential nature of the information, on counsel for the parties in this

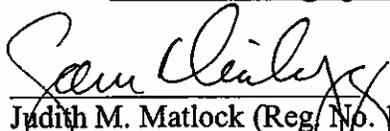
docket. Hence, the parties have this Amended Motion and notice of the relief requested, as contemplated by Rule 723-1-1100(a)(III).

WHEREFORE, Black Hills Gas respectfully requests that the Commission grant this request for extraordinary confidential protection and enter a protective order limiting disclosure of Highly Confidential Information filed under seal as described in this Amended Motion. Specifically, Black Hills Gas requests a protective order limiting disclosure and access to designated highly confidential competitive information to the Commissioners, Commission ALJs, members of the Commission's Staff, employees of the OCC, and their respective attorneys from the Colorado Attorney General's Office. As part of the protective order, Black Hills Gas also seeks the protections described in Paragraphs 6 and 7 of this Amended Motion.

Dated this 1st day of October, 2008.

Respectfully submitted,

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ATTORNEYS FOR BLACK HILLS/COLORADO GAS
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ATTACHMENT "A"

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 08S-290G

RE: INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY AQUILA, INC. D/B/A AQUILA NETWORKS-PNG WITH ADVICE LETTER NO. 528 WITH BLACK HILLS/COLORADO GAS UTILITY COMPANY, LP SUBSTITUTED FOR AQUILA, INC. EFFECTIVE JULY 14, 2008

AFFIDAVIT

Black Hills/Colorado Gas Utility Company, LP. ("Black Hills Gas"), by and through its undersigned counsel, hereby respectfully submits this Affidavit, pursuant to Rule 723-1-1100(a)(III) of the Colorado Public Utilities Commission's Rules of Practice and Procedure relating to Confidentiality, 4 *Colo. Code Regs.* 723-1, in support of its Unopposed Amended Motion for Protective Order Affording Extraordinary Protection to Highly Confidential Information in this docket ("Amended Motion").

Sam G. Niebrugge, being of proper age and first duly sworn, herewith deposes and states as follows:

1. I am an attorney in Davis Graham & Stubbs LLP, which is Colorado regulatory counsel for Black Hills Gas, the Respondent herein.
2. To the best of my knowledge as of the date of this Motion, other than Black Hills Gas' counsel, the following persons have had, or currently have, access to the highly confidential information, for which extraordinary confidential protection is sought in the foregoing Amended Motion:

Larry Headley, Black Hills/Colorado Gas Utility Company, LP;

Meg McGill, Black Hills/Colorado Gas Utility Company, LP;

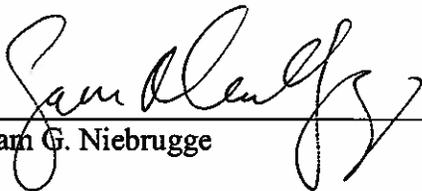
Richard Petersen, Black Hills/Colorado Gas Utility Company, LP;

Jeffrey Thomas, Black Hills/Colorado Gas Utility Company, LP; and

Ann Stichler, Black Hills/Colorado Gas Utility Company, LP.

3. The highly confidential information subject to this Amended Motion, if granted, should remain undisclosed while the instant docket, and any subsequent judicial review of decisions therein, are pending, and until the docket is closed. The highly confidential information should then be returned to counsel for Black Hills Gas.

Further Affiant sayeth not.

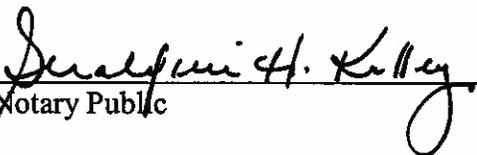


Sam G. Niebrugge

STATE OF COLORADO)
) ss.
CITY & COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me this 1st day of October 2008 by Sam G. Niebrugge.

WITNESS my hand and official seal.



Notary Public

[SEAL]

My commission expires: 10/25/08

ATTACHMENT "B"

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

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**NONDISCLOSURE AGREEMENT RELATING TO
HIGHLY CONFIDENTIAL INFORMATION**

I hereby state that I have read the protective provisions relating to confidential information contained in Rule 723-1-1100 and the Commission's Order granting extraordinary confidentiality protection to Highly Confidential Information, and I agree to be bound by the terms of all of those protective provisions with respect to all Confidential and Highly Confidential documents and information produced or arising in the course of this Docket.

Name

Title

Employer or Firm

Business Address

Party in Case

Date

Signature

Signature of Counsel

I attest I delivered to:

a copy of this signed Nondisclosure Agreement Relating to Highly Confidential Information, via First Class Mail and/or email, on _____, 2008.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2008, the original and four (4) copies of the foregoing **UNOPPOSED AMENDED MOTION OF BLACK HILLS/COLORADO GAS UTILITY COMPANY, LP FOR PROTECTIVE ORDER AFFORDING EXTRAORDINARY PROTECTION TO HIGHLY CONFIDENTIAL INFORMATION** were served by hand delivery on:

Doug Dean, Director
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, CO 80202

and a copy of the same pleading was served on the following persons by email, hand-delivery, or overnight delivery to the addresses noted below:

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