

Decision No. C11-1391-E

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11A-869E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS 2011 ELECTRIC RESOURCE PLAN.

ERRATA NOTICE

**ORDER ADDRESSING INTERVENTIONS AND
MOTION FOR PROTECTIVE ORDER**

The original service to parties on December 27, 2011 of this
Decision No. C11-1391, failed within the Commission's E-Filing
System, necessitating this decision be reissued by errata notice,
and without changes. Mailed Date: January 3, 2012
Adopted Date: December 21, 2011

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

1. This matter comes before the Commission for consideration of notices of intervention by right or requests for intervention in this proceeding. It also comes before the Commission for consideration of a Motion for Extraordinary Protection and Waiver of Commission Rules (Extraordinary Protection Motion) filed by Public Service Company of Colorado (Public Service or the Company) on October 31, 2011.

2. Public Service filed an Application for Approval of its 2011 Electric Resource Plan (ERP) on October 31, 2011. Pursuant to paragraph 3603(b) of the Commission's ERP Rules, 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*, Public Service filed the Extraordinary Protection Motion on the same day that it filed its 2011 ERP.

3. The Commission issued a Notice of Application Filed in this proceeding on November 2, 2011. In accordance with that notice, requests for intervention were due on or before December 2, 2011.¹ No responses to requests for intervention were filed.

4. Notices of intervention by right were filed by: Staff of the Colorado Public Utilities Commission (Staff), the Governor's Energy Office (GEO), and the Colorado Office of Consumer Counsel (OCC).

5. Requests for intervention were timely filed by the following:

- Blanca Ranch Holdings, LLC and Trinchera Ranch Holdings, LLC
- Interwest Energy Alliance (Interwest)
- EnCana Oil & Gas (USA) and Noble Energy, Inc. (collectively, Gas Producers)
- City of Boulder
- Colorado Renewable Energy Society
- Colorado Solar Energy Industry Association
- Holy Cross Electric Association, Inc.

¹ Staff of the Commission was allowed until December 12, 2011 to file a notice of intervention by right.

- Intermountain Rural Electric Association
- Colorado Mining Association
- American Coalition for Clean Coal Electricity
- Climax Molybdenum Company and CF&I Steel, LP
- Ratepayers United of Colorado (RUC)
- Colorado Energy Consumers (CEC)
- Ms. Leslie Glustrom
- Colorado Independent Energy Association (CIEA)
- C12 Energy, Inc.
- Vote Solar Initiative
- SolarReserve, LLC
- Coal Mine Methane Coalition
- Thermo Power & Electric LLC (Thermo)
- Southwest Generation Operating Company, LLC
- TradeWind Energy, LLC
- Western Resource Advocates

6. By Decision No. C11-1339, issued December 13, 2011, responses to the Extraordinary Protection Motion were due December 19, 2011. Responses were submitted by: WRA; CIEA, CEC, Thermo, jointly; the Gas Producers; and Interwest. In addition, Public Service filed a Clarification of Motion for Extraordinary Protection regarding the proposed treatment of Strategist files on December 19, 2011.

B. Discussion and Findings

1. Requests for Interventions

7. We acknowledge the interventions by right of Staff, GEO, and the OCC.

8. With respect to the petition for intervention filed by RUC, we require additional information before we reach a final determination on its request. RUC explains that it is a non-partisan, non-profit organization which is committed to advocating, on behalf of residential and small commercial ratepayers, utility rates and policies that are both equitable and environmentally sound in the long-term. Although RUC claims that its interests will not be adequately represented in this proceeding by any other party, its stated interests appear to be,

in the main, identical to those of the OCC. Before deciding whether to grant RUC's petition for intervention, we require additional information explaining why its specific interests will not be sufficiently represented in this proceeding by the OCC given the OCC's statutorily-mandated obligations under § 40-6.5-104, C.R.S. We therefore direct RUC to file this additional information on or before January 4, 2012.

9. Similarly, with respect to the request for intervention filed by Ms. Leslie Glustrom, we require additional information before reaching a determination on her intervention as a *pro se* participant in this proceeding. Ms. Glustrom claims that her interests cannot be adequately represented by the OCC, Staff, or any other party for a variety of reasons including her unique expertise on the issues of coal costs and coal supply. Ms. Glustrom continues that she has followed coal cost and supply issues closely since 2004 and has an extensive record of data, analyses, and discovery responses that relate to past, present, and future coal costs and coal supply on the local, national, and international levels. Ms. Glustrom lists the past Commission proceedings in which she has participated. She further states she is a scientist by training. Although Ms. Glustrom claims to have extensive knowledge related to Public Service's coal costs, she does not explain her specific background and professional expertise. We therefore direct Ms. Glustrom to file additional information regarding her background and professional expertise, aside from her participation in past Commission proceedings, related to coal prices and coal supply on or before January 4, 2012.

10. With the exception of RUC and Ms. Glustrom, we find good cause to grant the requests for intervention filed by the other interested parties.

11. The Commission has scheduled a pre-hearing conference in this matter on January 18, 2012. At that time, we expect to take up any modified discovery processes that are appropriate for the adopted procedural schedule. Until we modify discovery procedures by separate order, the discovery conducted by the intervening parties shall be governed by Rule 1405 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

12. We further refer all discovery disputes in this matter to an Administrative Law Judge.

2. Extraordinary Protection Motion

13. Public Service seeks a protective order for certain items it claims are highly confidential, including the following:

- Unit level delivered fuel costs
- Hourly market price data
- Unit level heat rate curves
- Unit detailed maintenance schedules
- Bid information of any sort (from the Company and from other entities)
- Any information protected by confidentiality clause of a purchased power agreement (PPA)
- Strategist files

14. With respect to the first five items (*i.e.*, unit level delivered fuel costs, hourly market price data, unit level heat rate curves, unit detailed maintenance schedules, and bid information), Public Service appears to want a standard protective order such that access to this highly confidential data would be accomplished in accordance with Rule 3614 of the Commission's ERP Rules.

15. Public Service explains that if information on unit level delivered fuel costs, hourly market price data, unit-level heat rate curves, and unit detailed maintenance schedules were released, such disclosure could seriously harm its traders who buy and sell energy in short term markets. Likewise, Public Service explains that inappropriately disclosed information on proprietary and sensitive plant and system operations can be used by other trading organizations to raise the cost of power sold to Public Service to the detriment of ratepayers.

16. Public Service states that certain data used to evaluate bids and proposals will be made publicly available when the different costs of various resource portfolios are reported. However, the actual bids themselves contain proprietary, commercially sensitive information. Public Service states that bidders generally have significant investment in acquiring their sites, equipment, financing, and other project contracts and do not want their competitors to know their trade secrets.

17. CIEA/CEC/Thermo, Interwest, and the Gas Producers argue in their responses that there are certain contradictions in Public Service's pleadings regarding its requested relief. For example, the attachment to the Extraordinary Protection Motion and the ERP filing itself indicate that only the Commission, its Staff, the OCC, and the Independent Evaluator would be given access to the five items if we were to grant the motion and waive Rule 3614.

18. We find good cause to issue a protective order for the unit level delivered fuel costs, hourly market price data, unit level heat rate curves, unit detailed maintenance schedules, and bid information. This information shall be deemed to be highly confidential. However, access to this information shall not be restricted to only the Commission, its Staff, the OCC, and the Independent Evaluator. Access to this highly confidential information shall instead be governed in accordance with Rule 3614.

19. Public Service explains that it has entered into a few PPAs where either the counterparty has insisted on the confidentiality of certain terms and conditions or the Company has committed to the power producer to keep certain data confidential. Public Service explains it is bound to maintain such confidentiality, absent orders from this Commission to the contrary. Therefore, to respect those contractual commitments, Public Service seeks a waiver from Rule 3614 to limit access to these PPA provisions to the Commission, its Staff, the OCC, and the Independent Evaluator.

20. WRA objects to Public Service's request for a waiver and suggests the Commission apply the provisions of Rule 3614 to these PPAs as well. WRA argues that Public Service has made no showing why it specifically should be precluded from accessing these terms under Rule 3614. The Gas Producers agree that Public Service has not met the burden of proof to demonstrate why it should be entitled to proceed without complying with the Commission's rules.

21. We grant Public Service's request to enter a protective order regarding these PPAs and waive Rule 3614 to restrict access to this information to the Commission, its Staff, the OCC, and the Independent Evaluator. At this point in the proceeding, it appears that Public Service is not requesting our approval to modify any existing PPAs. Therefore the relevance in this proceeding of the data at issue is unclear. Should circumstances change, however, parties may petition for a reversal of these restrictions for good cause shown.

22. Finally, Public Service states that its Strategist files constitute a proprietary software product that the Company cannot provide to anyone who does not hold a Strategist license. Public Service therefore asks for a protective order and a waiver of Rule 3614 to keep this proprietary software from inappropriate disclosure. In addition, Public Service requests that the Commission direct the parties to ask specific questions about Strategist inputs and outputs, rather than burdening the Company with global discovery requests for “everything” related to the Strategist model. Public Service provides a long list of Strategist model data that it indicates will be made available pursuant to discovery requests either as public information or as confidential information.

23. In the clarification filed on December 19, 2011, Public Service explains that a protective order will prevent the Company from having to disclose the individual Strategist Fortran databases that comprise each individual Strategist simulation referenced in the ERP. The Company states its Strategist license prohibits it from sharing these files with non-licensed parties and that these files cannot be opened by any person who does not have a Strategist license and a current version of Strategist installed on a computer. Public Service states that parties will have access to information on the inputs to and outputs from Strategist “in accord with the classification given to each form of data when the Commission rules on the Company's [Extraordinary Protection] Motion.” Clarification at 2. With respect to Staff’s access to the Strategist files, the Company explains that while it cannot provide Staff with the Strategist model, it will “provide Staff with sufficient access to Company personnel to conduct whatever investigation of the Company's books and records and our Strategist analyses that Staff deems appropriate.” *Id.* Footnote 1.

24. CIEA/CEC/Thermo, Interwest, and the Gas Producers again point out certain contractions in Public Service filings. On one hand, it appears that Public Service is willing to provide the Strategist files to a limited number of persons in accordance with Rule 3614 as long as these persons have a current licensed version of Strategist. On the other hand, Public Service signals that possibly no one may have access to the Strategist files, particularly if the Commission approves the Company's request to prohibit discovery requests beyond those that specifically relate to its listing of Strategist input and output information. In its December 19, 2011 clarification, the Company also states: "If a Strategist report includes Highly Confidential Information listed on the Company's Motion, that report would be available only to the Commission Staff, the OCC and the Independent Evaluator." *Id.* Footnote 2.

25. Interwest and CIEA/CEC/Thermo further argue that it is premature to restrict discovery requests concerning Strategist along the lines suggested by Public Service. Interwest states that the parties will try to resolve discovery disputes. Not until after such efforts fail should the Commission make any determinations regarding Strategist inputs and outputs, and even then those findings should be made on a case-by-case basis. CIEA/CEC/Thermo argue that the Company's fears of burdensome discovery is based on unfounded speculation, is not yet ripe, and need not be resolved in the abstract.

26. The Commission fully considered the issues surrounding proprietary software when promulgating the confidentiality provisions in the ERP Rules. We stated by Decision No. C11-0934 in Docket No. 11R-416E issued August 29, 2011 that, with respect to proprietary software, Rule 3614:

applies only to the extent that the utility is permitted to provide information in accordance with the terms of its license. However, if the utility proposes to use any licensed software and associated information in the resource plan proceeding, the utility must provide reasonable information to parties so that they can understand and critique the inputs and assumptions relied upon in the utility's case. It may be possible for parties to obtain a license for such software, or the utility may need to provide the information in a different format to avoid licensing restrictions.

Decision No. C11-0934, ¶ 19.

27. Consistent with Decision No. C11-0934, we will grant Public Service's request to protect the Strategist files as highly confidential information. We will also restrict access to these files only to eligible persons who sign the appropriate non-disclosure agreements established by Rule 3614 and who have a current licensed version of Strategist.

28. We further agree with Interwest and CIEA/CEC/Thermo that it is too early and unnecessary for the Commission to grant the Company's request to order intervenors to ask specific questions about Strategist assumptions or to determine whether Strategist-related discovery requests are burdensome. The discovery process in this proceeding will be allowed to move forward unhindered by such restrictions. Solutions to problems caused by Strategist licensing restrictions may be creatively resolved through the cooperation of parties consistent with the Commission's directives in Decision No. C11-0934. In the event of unresolved problems, the Commission will address these disputes on a case-by-case basis as is our standard practice.

II. ORDER

A. The Commission Orders That:

1. The Notice of Intervention by Right filed on November 21, 2011 by the Governor's Energy Office is acknowledged.

2. The Notice of Intervention by Right filed on November 22, 2011 by the Staff of the Colorado Public Utilities Commission is acknowledged.

3. The Petition to Intervene filed on November 28, 2011 by Blanca Ranch Holdings, LLC and Trinchera Ranch Holdings, LLC is granted.

4. The Petition to Intervene filed on November 29, 2011 by Interwest Energy Alliance is granted.

5. The Motions to Intervene filed on November 30, 2011 by EnCana Oil & Gas (USA) and Noble Energy, Inc. and Holy Cross Electric Association, Inc. are granted.

6. The Petitions to Intervene filed on November 30, 2011 by the City of Boulder, Colorado Renewable Energy Society, and Colorado Solar Energy Industry Association are granted.

7. The Notice of Intervention by Right filed on December 1, 2011 by the Colorado Office of Consumer Counsel is acknowledged.

8. The Petitions to Intervene filed on December 1, 2011 by Intermountain Rural Electric Association and Southwest Generation Operating Company, LLC are granted.

9. The Petitions to Intervene filed on December 2, 2011 by the Colorado Mining Association; American Coalition for Clean Coal Electricity; Climax Molybdenum Company and CF&I Steel, LP; and Western Resource Advocates are granted.

10. The Motions to Intervene filed on December 2, 2011 by Colorado Energy Consumers; Colorado Independent Energy Association; C12 Energy, Inc; Coal Mine Methane Coalition; SolarReserve, LLC; Thermo Power & Electric LLC; TradeWind Energy, LLC; and The Vote Solar Initiative are granted.

11. Ratepayers United of Colorado and Ms. Leslie Glustrom shall supplement their requests for intervention by filing additional information on or before January 4, 2012, consistent with the discussion above.

12. The Motion for Extraordinary Protection and Waiver of Commission Rules filed by Public Service Company of Colorado on October 31, 2011 is granted, in part, consistent with the discussion above.

13. Procedures for discovery shall be governed by the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, unless otherwise modified by further order.

14. Discovery disputes in this matter are referred to an Administrative Law Judge.

15. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 21, 2011.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

MATT BAKER

Commissioners

COMMISSIONER JAMES K. TARPEY
ABSENT.