

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0369E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS 2020-2021 RENEWABLE ENERGY COMPLIANCE
PLAN.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING UNOPPOSED MOTION FOR
EXTRAORDINARY PROTECTION OF
HIGHLY CONFIDENTIAL INFORMATION**

Mailed Date: September 27, 2019

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I. STATEMENT

A. Summary

1. This Decision grants Public Service Company of Colorado's (Public Service or the Company) Unopposed Motion for Extraordinary Protection of Highly Confidential

Information and Waiver of Response Time (Motion). Only those relevant portions of the procedural history are included.

B. Background, Findings, and Conclusions.

2. On September 17, 2019, Public Service filed a Motion seeking the Commission to afford extraordinary protection for highly confidential information relevant to this proceeding per Rule 1101(b) of the Commission's Rules of Practice and Procedure. 4 *Code of Colorado Regulations* (CCR) 723-1. Motion at 1. The Motion indicates that Public Service conferred with all parties, and that they either do not oppose the Motion, do not object to the Motion, or do not take a position on the Motion. *Id.* at 2. Since no party objects to the Motion, Public Service also requests that the response time to it be waived. *Id.*

3. As an initial matter, the Administrative Law Judge (ALJ) finds that Public Service has established good cause to waive the response time to the Motion, particularly since no party objects to the Motion. The ALJ waives the remaining response time to the Motion, as permitted by Rule 1400(b). 4 CCR 723-1. The parties are encouraged, but not required, to file a proposed order in Word with any future motion seeking relief, particularly when the party seeks expedited relief, the motion is unopposed, or the party requests that the response time to the motion be waived.

4. The Motion seeks extraordinary protection for any documents which include or reference: unit level delivered fuel costs, hourly market price data, unit level heat rate curves, unit detailed maintenance schedules, bid information of any kind (both from Public Service and other entities) (collectively Strategist® output information), and Strategist® files subject to a Strategist® license. Motion at 4. Public Service seeks an order limiting access to Strategist® output information, and an order confirming that files subject a Strategist® license may only be

disclosed to those who have a Strategist® license and who have signed an appropriate nondisclosure agreement. *Id.* at 13-14.

5. In support of its Motion, the Company also includes Mr. Jack W. Ihle's Affidavit identifying persons within the Company with access to the information alleged to be highly confidential, and requesting that extraordinary protection for the records remain in place for two years. Attachment C to Motion. In addition, the Company submitted the proposed form nondisclosure agreements for counsel and experts. Attachments A and B to Motion. The Company does provide the documents alleged to be highly confidential as required by Rule 1101(b)(VII), but argues that this should not be required because the information is highly competitive and sensitive, and that at this point, the Company is not offering the information for admission, but is disclosing it in discovery (and thus, it is not necessary to file it with the Commission). *Id.* at 12, referencing Rule 1101(b)(VII), 4 CCR 723-1.

1. Strategist® Output Information.

6. The Motion indicates that Interveners Colorado Solar and Storage Association and the Solar Energy Industries Association issued discovery requests seeking that Public Service provide it with Strategist® output information and that Public Service anticipates receiving other discovery requests for this same information. *Id.* at 3.

7. Public service argues that the Strategist® output information is the Company's proprietary capacity expansion model used for portfolio modeling, bid analysis, and resource selection, is highly sensitive, and should not be provided to persons able to use it for competitive purposes *Id.* at 3 and 7. Public Service asserts that disclosure of the Strategist® output information, particularly bid information, may result in irreparable harm to the Company's trading operations and ability to solicit cost-effective resources, negotiate beneficial terms, and

obtain the best prices to acquire resources in the future. *Id.* at 8 and 10. In addition, Public Service argues that releasing the Strategist® output information could seriously harm the Company's traders who buy and sell energy in short-term markets to reduce energy costs. *Id.* at 8-9. The Company asserts disclosure may irreparably harm customers, who pay for the related services, and therefore, is not in the public interest. *Id.* at 8.

8. Public Service also argues that the Commission has determined that the same categories of information warrant extraordinary protection in at least two prior resource planning proceedings, including its ongoing 2016 Electric Resource Plan (ERP) proceeding (Proceeding No. 16A-0396E). *Id.* at 5, *citing* Decision Nos. C11-1391, ¶13 and C16-0663-I, ¶¶ 58-61.

9. Public Service seeks to implement the requirements for disclosure of highly confidential information in resource planning proceedings under Commission Rule 3614(b) for disclosure of the Strategist® output information in this proceeding. *Id.* at 6-7, and *see* Rule 3614(b) of the Commission's Rules Regulating Electric Utilities, 4 CCR 723-3. The Company argues that although Rule 3614(b) applies only to resource planning proceedings, it is appropriate to apply it in this proceeding. *Id.*

10. Public Service seeks to restrict disclosure of Strategist® output information to: the ALJ, Commission (including Commissioners, Advisory Staff, and counsel), Commission Trial Staff, and Office of Consumer Counsel employees assigned to this proceeding; and to a reasonable number of attorneys and subject matter experts representing intervening parties who have signed and filed a nondisclosure agreement in a form consistent with Rule 3614(b), 4 CCR 723-3. *Id.* at 7. Public Service requests that Interveners and third parties who: develop energy resources; are competitive power producers; are existing or potential wholesale customers of energy resource developers; and are or may become bidders responding to ongoing or future

competitive Public Service solicitations (competitive Interveners or competitive third parties), and be completely prohibited from accessing the Strategist® output information. *Id.*

11. Any party claiming that information is highly confidential must file a motion demonstrating: that the relevant information is highly confidential; that Commission rules governing confidential information are insufficient to protect the highly confidential information; and that if the proposed extraordinary protections are adopted, they will afford appropriate protection. Rule 1101(b)(IV), 4 CCR 723-3. The motion must also: provide a detailed description of the information sought to be protected; state the specific relief sought; advise all other parties of the request and subject of the information at issue; include an affidavit identifying the people with access to the information and timeframe for extraordinary protection; include the form nondisclosure agreement sought to be executed; and include an exhibit with the highly confidential information or show why doing so is overly burdensome, impractical, or is too sensitive to file. *Id.* at (b)(I), (II), (III), (V), (VI), and (VII).

12. The ALJ finds that Public Service has met its burden to show that the Strategist® output information is highly confidential and should be afforded extraordinary protection, as required by Rule 1101(b), 4 CCR 723-1. Disclosure without additional protection beyond that provided for confidential information under Rule 1100 may have a negative cascading impact on Public Service and its customers. For example, disclosure without extraordinary protection may limit the Company's ability to solicit cost-effective resources, negotiate beneficial terms, and obtain the best prices to acquire resources in the future; all of this may result in potentially higher costs which customers ultimately may shoulder. In addition, the ALJ finds persuasive that the Commission has afforded Public Service extraordinary protection for the same type of

information in other proceedings. *See e.g.*, C16-0663-I in Proceeding No. 16A-0396E and Decision No. C11-1391 in Proceeding No. 11A-869E.

13. Based on the above, the ALJ concludes that it is in the public interest to afford extraordinary protection for the Strategist® output information, consistent with Public Service's request. The ALJ also finds that Public Service has met Rule 1101(b)'s remaining requirements, discussed in ¶ 11 above for extraordinary protection of the Strategist® output information, and will order that it be so treated.

14. In addition, while Rule 3614(b) applies to resource planning proceedings, given the overlap with the type of information at issue or potentially at issue in this proceeding, it is reasonable to employ processes and requirements outlined in that Rule for protecting and disclosing the Strategist® output information here. *See* 4 CCR 723-3.

15. The ALJ notes that although Public Service requests that competitive Interveners be completely prohibited from accessing the Strategist® output information, it does not identify any Intervener in this proceeding who falls into this category. The record lacks information for the ALJ to identify the Interveners falling into this category at this time; the ALJ will enter appropriate orders to ensure a timely resolution should a dispute on this issue arise.

2. Strategist® Files Subject to Strategist® License.

16. The Company seeks to ensure that Strategist® files subject to a Strategist® license only be disclosed to those with a current Strategist® license, and who sign a nondisclosure agreement. Motion at 11. This includes Strategist® Fortran databases that comprise the Strategist® simulation referenced in the 2011 and 2016 resource planning proceedings. Strategist® files subject to its license are subject to the Strategist® license. Motion at fn.3. Public Service argues that the Commission has consistently protected such information as

highly confidential, pointing to the same two resource planning proceedings mentioned above. *Id.* at 11, *citing*, Decision Nos. C11-1391, ¶ 27 and C16-0663-I, ¶¶ 61 and 63.

17. The ALJ finds persuasive that the Commission has afforded Public Service extraordinary protection for the same type of information in two of the Company's ERP proceedings. *See e.g.*, C16-0663-I in Proceeding No. 16A-0396E and Decision No. C11-1391 in Proceeding No. 11A-869E. And, in the context of resource planning rulemaking, the Commission has specifically acknowledged that disclosure of proprietary software information under Rule 3614 is only required if consistent with the relevant license terms. Decision No. C11-0934, at 7 in Proceeding No. 11R-416E.¹ The ALJ finds the Commission's prior decisions affording extraordinary protection for the Company's licensed materials persuasive that they should be protected here. Likewise, the Commission's comments in the referenced rulemaking proceeding also support protecting licensed materials to avoid violating the Company's license. *Id.*

18. For the foregoing reasons and authorities, the ALJ finds that Public Service has met its burden to show that Strategist® files subject to a Strategist® license should be afforded extraordinary protection.

II. CONCLUSION

19. Consistent with the above discussion, the ALJ concludes that Public Service has met its burden under Rule 1101(b), 4 CCR 723-3, for all identified categories of highly

¹ In that same rulemaking proceeding, the Commission also noted that where "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 may understand and critique the inputs and assumptions relied upon in the utility's case." Decision No. C11-0934, at 7 in Proceeding No. 11R-416E. These comments provide helpful direction should similar issues arise here, but the ALJ will not preemptively issue an order on that issue.

confidential information to receive the extraordinary protection it seeks, and will grant the Company's Motion. The ALJ will enter additional appropriate orders.

III. ORDER

A. It Is Ordered That:

1. The remaining response time to Public Service Company of Colorado's (Public Service or the Company) Unopposed Motion for Extraordinary Protection of Highly Confidential Information and Waiver of Response Time (Motion) filed on September 17, 2019 is waived.

2. Consistent with the above discussion, the Motion is granted. Information in the below identified categories are deemed highly confidential and will be afforded extraordinary protection for a period of two years, or such lesser or greater time as the Commission deems appropriate.

3. Access to unit level delivered fuel costs; hourly market price data; unit level heat rate curves; unit detailed maintenance schedules; and bid information of any sort (from the Company and other entities), is limited as follows:

(a) to the Administration Law Judge, Commissioners, Commission Advisory Staff and counsel, Commission Trial Staff, and Office of Consumer Counsel employees assigned to this proceeding;

(b) to a reasonable number of attorneys and subject matter experts representing intervening parties that do not fall into category (c) below, and who have executed highly confidential nondisclosure agreements in the form provided in Attachments A and B to the Motion; such persons, and their related entities, may not disclose the highly confidential information to anyone in category (c) below, including organizations' or trade associations' members who may fall into category (c) (*e.g.*, by becoming a competitive power producer); and

(c) against disclosure to Interveners and third parties who: develop energy resources; are competitive power producers; are existing or potential wholesale customers of energy resource developers; and are or may become bidders responding to ongoing or future competitive Public Service solicitations in Colorado.

4. Access to the Strategist® files subject to a Strategist® license is limited to persons who have a current licensed version of Strategist® and sign nondisclosure agreements.

5. The above protections and restrictions for access to the referenced highly confidential information apply to any documents referencing the information, including testimony, discovery requests, and responses. Should the information be discussed during the evidentiary hearing on this matter, access to the hearing will be restricted consistent with the above protections.

6. The parties must comply with the procedural and filing requirements for highly confidential records in Rule 1101(a), 4 *Code of Colorado Regulations* 723-1, to the extent that those requirements do not conflict with Decision No. R19-0749-I issued in this Proceeding on September 12, 2019. If a conflict exists between the two, the parties must comply with Decision No. R19-0749-I.

7. To avoid confusion during the evidentiary hearing and in the evidentiary record, to the extent practicable, parties sponsoring exhibits or attachments including highly confidential or confidential information must ensure that the page numbers and the line numbers in the exhibit or attachment's public version align with the confidential or highly confidential version of the document.

8. If a dispute concerning disclosure of highly confidential information arises, including whether an intervener or third party falls in to category (3)(c) above, the parties must consult and confer with each other in good faith to resolve the dispute. If the parties are unable to resolve their dispute, they may file a motion seeking relief. If the conflict rests on factual disputes, the motion must be accompanied by an affidavit.

9. 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

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director