

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0409E

IN THE MATTER OF APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE ACQUISITION OF, AND APPROVAL OF COST RECOVERY FOR, THE MANCHIEF GENERATION FACILITY AND VALMONT 7 & 8.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING MOTION FOR
EXTRAORDINARY PROTECTION**

Mailed Date: October 17, 2019

I. BY THE COMMISSION

A. Statement

1. On July 23, 2019, Public Service Company of Colorado (Public Service or the Company) filed with the Colorado Public Utilities Commission (Commission) a Verified Application (Application) for Certificates of Public Convenience and Necessity (CPCNs) for the acquisition of: (1) the 301 MW Manchief generation facility (Manchief); and (2) the 82 MW Valmont generation facility (Valmont). Public Service also seeks approval of the Company's cost recovery proposal relating to these two facilities. Along with the Application, Public Service filed the supporting testimony and attachments of three witnesses. This filing commenced the above-styled proceeding.

2. In Phase II of Public Service's 2016 Electric Resource Plan (ERP), the Commission approved the Company's Preferred Colorado Energy Plan Portfolio, which included *inter alia* 383 MW of existing gas generation assets. The Manchief and Valmont

facilities, for which Public Service seeks approval to acquire, are the 383 MW of existing gas generation assets approved in Phase II of the ERP and are the subject of this Application.¹

3. On July 23, 2019, Public Service also filed a Motion for Extraordinary Protection of Highly Confidential Information (Motion for Extraordinary Protection), which is the subject of this Interim Decision.

4. During the Commission's weekly meeting on September 4, 2019, the Application was deemed complete for purposes of § 40-6-109.5, C.R.S., and was referred to an Administrative Law Judge (ALJ) for disposition. The undersigned ALJ was subsequently assigned to preside over this Proceeding.

5. The procedural history of this Proceeding is set forth in detail in Decisions previously issued herein and is repeated here as necessary to put this Decision into context.

6. Decision No. R19-0801-I (mailed on September 27, 2019) acknowledged the interventions as of right filed by the Colorado Office of Consumer Counsel (OCC) on August 20, 2019, and filed by Trial Staff of the Colorado Public Utilities Commission (Staff) on August 29, 2019. Decision No. R19-0801-I also granted the motions for permissive intervention filed on August 26, 2019 by Southwest Generation Operating Company, LLC (SW Generation) and filed on the same date by Western Resource Advocates (WRA).

7. The Parties to this Proceeding are Public Service, Staff, OCC, SW Generation, and WRA.

¹ Application at pages 1-2. *See* Decision No. C18-0761 (mailed September 10, 2018). ¶¶ 103 – 108 and 119 – 121 at pages 31 – 33 and 36, in Proceeding No. 16A-0396E (Phase II ERP Decision). The Commission required Public Service to file a CPCN application to acquire the natural gas-fired resources and to address cost recovery requests for those resources in the required CPCN application filing. *Id.*, ¶¶ 119 – 121 at page 36 and Ordering Paragraph No. 4 at page 42.

8. Decision No. R19-0801-I scheduled a prehearing conference in this Proceeding for October 11, 2019, at 10:00 a.m. The Decision also directed the Parties to consult prior to the prehearing conference and encouraged them to present, if possible, a consensus procedural schedule and hearing date(s) that are acceptable to all Parties. The ALJ ordered Public Service to coordinate these discussions. The ALJ encouraged Public Service to make a filing no later than October 7, 2019, if any agreements on a consensus procedural schedule, hearing date(s), and other procedural matters were reached.

9. On October 7, 2019, Public Service filed a Consensus Procedural Schedule, which was agreed to by all the Parties. Decision No. R19-0827-I (mailed on October 8, 2019) adopted the negotiated procedural schedule and hearing dates and vacated the prehearing conference.

10. No responses opposing the Motion for Extraordinary Protection have been filed by any Party to this Proceeding. Therefore, the Motion for Extraordinary Protection is unopposed.

B. Motion for Extraordinary Protection

11. In its Motion for Extraordinary Protection, Public Service seeks highly confidential protection for certain competitively sensitive and highly confidential information contained in two Purchase and Sale Agreements concerning the proposed acquisition of Manchief and Valmont – namely: (1) the Purchase and Sale Agreement by and between Public Service, as Purchaser, and Manchief Holding LLC, as Seller dated as of May 24, 2019; and (2) the Purchase and Sale Agreement by and between Public Service, as Purchaser, and SW Generation, as Seller dated as of May 24, 2019 (collectively, the Highly Confidential PSAs).²

² Motion for Extraordinary Protection, pp. 1, 4.

12. Public Service further seeks extraordinary protection for “any information that is considered highly confidential information pursuant to protective orders in Proceeding No. 16A-0396E and Proceeding No. 17A-0797E (collectively, ‘Highly Confidential Information’).”³ The Highly Confidential Information specifically includes: (1) “[a]ny pricing information (including indicative pricing estimates) derived from the Highly Confidential PSAs, or other information that could be used to derive cost figures in those documents, to the extent incorporated in any other documents, including testimony and attachments[;]” (2) “[a]ny information that is considered highly confidential pursuant to a protective order in other proceedings, specifically Proceeding No. 16A-0396E and Proceeding No. 17A-0797E, which are interrelated with this proceeding[;]” and (3) “[a]ny discovery responses, including responsive documents, containing any of this Highly Confidential Information.”⁴

13. Public Service states that any disclosure of the terms and conditions of the Highly Confidential PSAs “would cause substantial injury to their competitive interests by limiting their ability to negotiate future transactions with other parties.”⁵ The Company also states that because “other power supply developers who stand to intervene in this proceeding could be customers of these same vendors,” disclosure of this information to such developers “could in turn harm any of these vendors.”⁶

14. Public Service states further that if any of the Highly Confidential Information is publicly disclosed, “it would negatively impact the Company’s ability to solicit resources,

³ Motion for Extraordinary Protection, pp. 1-2.

⁴ Motion for Extraordinary Protection, p. 5.

⁵ Motion for Extraordinary Protection, p. 6.

⁶ Motion for Extraordinary Protection, p. 6.

negotiate beneficial terms, and obtain the best possible prices to acquire resources in the future.”⁷ The Company states that disclosure of this information “would also negatively impact other vendors involved with the acquisition of Valmont and Manchief by disclosing the terms and conditions of contracts deemed confidential and proprietary.”⁸

15. Public Service asserts correctly that extraordinary protection has been granted consistently by the Commission for “commercially valuable and competitively sensitive documents containing pricing information[,]” such as the information at issue here.⁹

16. Public Service requests that access to the Highly Confidential PSAs and the Highly Confidential Information identified above be limited as follows:

- 1) The Commission, its Advisory Staff, Commission Administrative Law Judges, members of Trial Staff, employees of the OCC assigned to this proceeding, and the Assistant Attorneys General representing the Commission, Staff and the OCC in this proceeding will have access to the Highly Confidential Information;
- 2) Intervenors that do not fall into category (3) below will have access to the Highly Confidential Information, restricted, however, to counsel and subject matter experts for such intervenors who provide executed highly confidential non-disclosure agreements in the form of Attachment A or Attachment B; and
- 3) Intervenors that are developers of energy resources, competitive power producers, existing or potential wholesale customers of developers of energy resources, or entities that might otherwise bid into a future Public Service resource solicitation will not have access to the Highly Confidential Information.¹⁰

17. Rule 1101 of the Commission’s Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, provides the procedures and requirements for filing

⁷ Motion for Extraordinary Protection, p. 6.

⁸ Motion for Extraordinary Protection, p. 6.

⁹ Motion for Extraordinary Protection, p. 7.

¹⁰ Motion for Extraordinary Protection, p. 10.

confidential information in a docketed proceeding and for seeking extraordinary protection for documents and information claimed to be highly confidential. Rule 1101(c) governs the filing of motions for extraordinary protection requesting the entry of protective orders prohibiting or limiting the disclosure of highly confidential records and information, in accordance with Rule 1101(b). Rule 1100(d) specifies that the party requesting a highly confidential protective order carries the burden of proof to establish the need for the highly confidential protection requested.

18. Under Rule 1101(b), 4 CCR 723-1, a motion seeking highly confidential protection:

- (I) shall include a detailed description and/or representative sample of the information for which highly confidential protection is sought;
- (II) shall state the specific relief requested and the grounds for seeking the relief;
- (III) shall advise all other parties of the request and the subject matter of the information at issue;
- (IV) shall include a showing that the information for which highly confidential protection is sought is highly confidential; that the protection afforded by the Commission's rules for furnishing confidential information provides insufficient protection for the highly confidential information; and that, if adopted, the highly confidential protections proposed by the movant will afford sufficient protection for the highly confidential information;
- (V) shall be accompanied by a specific form of nondisclosure agreement requested;
- (VI) shall be accompanied by an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain subject to highly confidential protection, if known; and
- (VII) shall include an exhibit, filed in accordance with the procedures established in paragraph (a), containing the information for which highly confidential protection is requested. Alternatively, the movant may show

why providing the subject information would be overly burdensome, impractical, or too sensitive for disclosure.¹¹

19. As summarized above, in its Motion for Extraordinary Protection Public Service provided a detailed description of the information for which it seeks extraordinary protection and a showing that such information warrants highly confidential protection. The Motion for Extraordinary Protection also includes proposed forms of nondisclosure agreement legal counsel and subject matter experts for Parties to this Proceeding, as well as an affidavit identifying the individuals with access to the information and the period of time for which the information must be protected. The Company further explains that because it has already filed Highly Confidential and Public versions of Attachments JWI-1 and JWI-2 to the Direct Testimony of Mr. Jack W. Ihle, it would be impractical to provide these documents as an exhibit to the Motion for Extraordinary Protection. Finally, as noted above, no Party opposes the Motion for Extraordinary Protection.

20. Public Service has satisfied each of the requirements of Rule 1101(b) and has shown good cause for highly confidential protection of the identified Highly Confidential Information and the limitations on access to the Highly Confidential Information. Accordingly, the Company's Motion for Extraordinary Protection will be granted.

21. Persons required by this Interim Decision and by Rule 1100 to sign and to file Highly Confidential Nondisclosure Agreements (HC NDAs) will be ordered to use the form HC NDAs attached to the Motion for Extraordinary Protection as Attachments A and B, after inserting the correct proceeding number and other information in the blanks in the forms.

¹¹ Rule 1101(b), 4 CCR 723-1.

II. ORDER

A. It Is Ordered That:

1. The Motion for Extraordinary Protection of Highly Confidential Information (Motion for Extraordinary Protection), filed by Public Service Company of Colorado on July 23, 2019, is granted consistent with the discussion and findings in this Interim Decision.

2. Persons required by this Interim Decision and by Rule 1100 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, to sign and to file Highly Confidential Nondisclosure Agreements (HC NDAs) shall use the form HC NDAs attached to the Motion for Extraordinary Protection as Attachments A and B, after inserting the correct proceeding number and other information in the blanks in the forms.

3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director