

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 MOTION FOR
EXTRAORDINARY PROTECTION
AND MOTION TO *APPEAR PRO HAC VICE***

Mailed Date: November 12, 2019

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I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Background

1. Only those relevant portions of the procedural history in this matter are included.
2. On October 16, 2019, attorneys Jacob Schlesinger and Melissa E. Birchard filed a “Out of State Counsel’s Verified Motion to Appear Pro Hac Vice as Counsel for the Colorado Solar and Storage Association” (Motion to Appear) with a supporting affidavit. The Motion to Appear seeks an order allowing out-of-state counsel, Ms. Birchard, to appear on behalf of

Colorado Solar and Storage and Solar Energy Industries Association in this proceeding. No party responded to the Motion to Appear. And, on October 18, 2019, Ms. Birchard filed a Proof of Pro Hac Vice Registration for Melissa Birchard (Proof of Registration).

3. October 22, 2019, Public Service Company of Colorado's (Public Service or the Company) filed "Unopposed Second Motion for Extraordinary Protection of Highly Confidential Information and Waiver of Response Time" (Second Motion) seeking an order providing extraordinary protection for information the Company believes to be highly confidential, per Rule 1101(b) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. The Second Motion indicates that Colorado Energy Consumers takes no position on the Second Motion and the remaining parties do not oppose it. No party filed a response to the Second Motion.

B. Motion to Appear.

4. Rule 1201(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, requires parties appearing before the Commission to be represented by an attorney in good standing before the Colorado Supreme Court or the highest tribunal of another state, as authorized in Rule 205.4 of the Colorado Rules of Civil Procedure. That rule authorizes hearing officers to allow out-of-state attorneys to appear in administrative hearings under the requirements set out in Colo. R. Civ. P. 205.3.

5. Colo. R. Civ. P. 205.3(2)(a) requires out-of-state attorneys to file a verified motion with the relevant tribunal seeking permission to appear. The verified motion must designate an associate attorney licensed in Colorado, including the attorney's name, address, and membership status. Colo. R. Civ. P. 205.3(2)(a) and (b). In addition, the verified motion must identify: all jurisdictions in which the attorney has been licensed; all other matters in Colorado in which the

attorney has sought *pro hac vice* admission in the preceding five years, including whether such admission was granted or denied; all jurisdictions in which the attorney has been publicly disciplined or placed on disability inactive status, in which *pro hac vice* admission was denied or revoked, or in which the attorney has any pending formal disciplinary or disability proceeding; and the party or parties represented. Colo. R. Civ. P. 205.3(2)(b). In addition, the motion must verify that the attorney has notified the party or parties represented of the motion requesting permission to appear and include a statement acknowledging that counsel is subject to the Colorado Rules of Professional Conduct, the Colorado Rules of Civil Procedure, and other court rules, and that the attorney will follow those rules throughout the *pro hac vice* admission, and that the verified motion complies with those rules. *Id.* The motion must be served on parties and counsel, and must be signed by the licensed Colorado associate attorney to verify that attorney's association on the matter. *Id.* In addition, counsel must file a copy of the motion with the Clerk of the Supreme Court Office of Attorney Registration, and pay the required fee. *Id.*

6. The Administrative Law Judge (ALJ) finds that the Motion to Appear and supporting affidavit, (Affidavit of Melissa E. Birchard), meets the requirements in C.R.C.P. 205.3, outlined above. In addition, the Proof of Registration establishes that counsel paid the \$300 filing fee, ensured the necessary documentation was filed with the Colorado Supreme Court, and shows that the Colorado Supreme Court issued *Pro Hac Vice* Registration Number 19PHV5980 to Ms. Birchard. *See* Proof of Registration. It also establishes that a disciplinary history obtained by the Office of Attorney Regulation revealed no adverse information on Ms. Birchard. *Id.*

7. Based on the foregoing, the ALJ finds that Ms. Birchard has met the requirements of Rule 1201(a) to appear *pro hac vice* for Colorado Solar and Solar Energy, and will grant the Motion to Appear.

C. Second Motion Seeking Extraordinary Protection of Highly Confidential Information.

8. The Second Motion seeks extraordinary protection for any documents which include customer-specific information that does not comport with Commission Rule 3033(b) of the Rules Regulating Electric Utilities 4 CCR 723-3, the “15/15 Rule.”

9. In support of its Second Motion, the Company includes an Affidavit of Jannell E. Marks, consistent with Commission Rule 1101(b)(VI), 4 CCR 723-1. Attachment B to Second Motion. The Affidavit identifies persons within the Company with access to the information alleged to be highly confidential, and requests extraordinary protection for the records remain in place for two years. *Id.* Public Service also submitted the proposed form nondisclosure agreements for counsel and experts. Attachments A to Second Motion. Public Service did not file the documents alleged to be highly confidential per Rule 1101(b)(VII), but argues that this should not be required because the information is highly sensitive customer-specific information subject to the Commission’s data privacy rules, and is only being produced pursuant to a discovery request (rather than for the evidentiary record).

10. In addition, the Second Motion indicates that Public Service contemporaneously provided parties with public versions of the documents asserted to be highly confidential, and only redacted the data sets that do not comply with the 15/15 Rule.

11. The Second Motion requests that all entities who receive the subject records destroy or return the highly confidential records to Public Service at the conclusion of this proceeding.

12. The Second Motion specifically seeks to protect as highly confidential, customer information that does not comply with Rule 3033(b)'s 15/15 Rule. Rule 3033(b), 4 CCR 723-3 places limits on disclosing customer data, including aggregated data. The 15/15 Rule is laid out in Rule 3033(b), 4 CCR 723-3, which provides that aggregation:

must contain at least fifteen customers; and, within any customer class no single customer's customer data or premise associated with a single customer's customer data may comprise 15 percent or more of the total customer data aggregated per customer class to generate the aggregated data report (the "15/15 Rule").

13. Public Service is providing customer data pursuant to a discovery request which does not comply with the 15/15 Rule; as a result, the Company seeks an order designating such information as highly confidential subject to extraordinary protection. The Company also seeks the same protection for any similar data produced in this proceeding (by any party) that does not comply with the 15/15 Rule. The Company argues that extraordinary protection is appropriate because disclosure would violate the letter and spirit of the Commission's data privacy rules, and is consistent with Rule 1105, 4 CCR 723-1, and Rule 3027, 4 CCR 723-3.

14. Public Service also argues that the Commission has consistently granted similar requests in other proceedings, including the Company's on-going 2019 Electric Rate Review (Proceeding No. 19AL-0268E).

15. 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 723-1. 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. Rule 1101(b)(I), (II), (III), (V), (VI), and (VII), 4 CCR 723-1.

16. The ALJ finds that Public Service has met its burden to show that the relevant customer information is highly confidential that should be afforded extraordinary protection, and has met all other requirements of Rule 1101(b) to obtain extraordinary protection for the relevant customer information. Disclosure without additional protection is inconsistent with Rule 3033, and is necessary to protect customer information. For the same reasons, the ALJ concludes that it is in the public interest to afford extraordinary protection for the referenced information, consistent with Public Service's request. The ALJ will grant the Second Motion.

II. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, the Out of State Counsel's Verified Motion to Appear Pro Hac Vice as Counsel for the Colorado Solar and Storage Association, and Public Service Company of Colorado's Unopposed Second Motion for Extraordinary Protection of Highly Confidential Information and Waiver of Response Time are granted.

2. Melissa E. Birchard is granted permission to appear *pro hac vice* as an attorney for Colorado Solar and Storage and Solar Energy Industries Association in this proceeding.

3. The protections and restrictions for access to the highly confidential information afforded by this Decision 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 protections afforded.

4. 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.

5. 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.

6. If a dispute concerning disclosure of highly confidential information arises, 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.

7. 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