

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0225E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR APPROVAL OF ITS COMMUNITY RESILIENCY INITIATIVE
PURSUANT TO § 40-2-203(4), C.R.S.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING UNOPPOSED MOTION
FOR A PROTECTIVE ORDER AFFORDING
EXTRAORDINARY PROTECTION FOR
HIGHLY CONFIDENTIAL INFORMATION**

Mailed Date: April 8, 2020

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I. STATEMENT.

1. This Interim Decision grants the Unopposed Motion Requesting Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time (Motion for Protective Order), filed by Public Service Company of Colorado (Public Service or Company) on April 1, 2020. This Interim Decision is a Highly Confidential Protective Order,

granting extraordinary protection for competitively sensitive and highly confidential information associated with the Company's 2016 Electric Resource Plan (2016 ERP), and with the Company's Application for an Amendment to Public Service's 2016 Electric Resource Plan (Amended ERP). The Motion for Protective Order is unopposed and, therefore, response time will be waived.

A. Procedural History.

2. On May 1, 2019, Public Service filed with the Colorado Public Utilities Commission (Commission), a Verified Application (Application) for Approval of its Community Resiliency Initiative (Initiative). Public Service stated that the Initiative is designed to provide up to 15 megawatts of Company-owned energy storage systems to enhance the safety and security of designated community resiliency centers and select infrastructure. Along with the Application, Public Service filed the supporting testimony and attachments of three witnesses. Public Service also sought approval of a proposed schedule by which it would file Supplemental Direct Testimony in support of the Application. Public Service explained that the Application was filed in accordance with Colorado's Energy Storage Procurement Act (House Bill 18-1270). This filing commenced the above-styled proceeding.¹

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

4. By Decision No. C19-0426-I (mailed on May 16, 2019), the Commission acknowledged Public Service's waiver of the statutory deadline, pursuant to §40-6-109.5(3), C.R.S.

¹ Application at pages 1-7. HB 18-1270 is codified at § 40-2-203(4), C.R.S. (2019).

5. On December 16, 2019, pursuant to Decision No. C19-0499-I (mailed on June 12, 2019), Public Service filed the Supplemental Direct Testimony of two witnesses, Jack W. Ihle and Charles A. Gouin. Mr. Gouin's Corrected Supplemental Direct Testimony was filed by Public Service on December 19, 2019.

6. On December 18, 2019, the Commission issued a Notice of Application Filed establishing deadlines for the filing of intervention pleadings, no later than January 17, 2020.

7. Decision No. R20-0081-I (mailed on February 6, 2020) acknowledged the interventions as of right filed by the Colorado Office of Consumer Counsel (OCC) on January 17, 2020 and by Trial Staff of the Colorado Public Utilities Commission (Trial Staff) on January 23, 2020. Decision No. R20-0081-I granted motions for permissive intervention filed by Western Resource Advocates (WRA) on January 15, 2020; and filed by the Rocky Mountain Environmental Labor Coalition and the Colorado Building and Construction Trades Council, AFL-CIO (together, RMELC/CBCTC) on January 16, 2020. Only OCC requested a hearing on the Application.

8. The Parties to this Proceeding are Public Service, OCC, Trial Staff, WRA, and RMELC/CBCTC.

9. Decision No. R20-0081-I also scheduled a prehearing conference for February 18, 2020 at 10:00 a.m.

10. Pursuant to Decision No. R20-0081-I, the Parties consulted regarding a consensus procedural schedule and acceptable hearing dates. On February 12, 2020, Public Service filed a Consensus Procedural Schedule, including hearing dates, that were agreed to by all the Parties.

11. Decision No. R20-0100-I (mailed on February 13, 2020) adopted the consensus procedural schedule filed by Public Service and set the evidentiary hearing in this Proceeding for June 23, 24, and 25, 2020, commencing at 9:00 a.m. The prehearing conference was vacated.

B. Motion for a Protective Order Affording Extraordinary Protection.

12. In its Motion for Protective Order, Public Service states that it has received a discovery request for “the investment cost per MW for storage only projects provided in [Public Service’s] 2017 Solicitation in its [Electric Resource Plan], Proceeding No. 16A-0396E.” Public Service notes that the Commission has granted extraordinary protection to this information in previous proceedings.²

13. In this Proceeding, Public Service seeks issuance of the same protective orders that issued in Proceeding No. 16A-0396E and Proceeding No. 19A-0530E, respectively. The documents and categories of information (Highly Confidential Information) for which Public Service requests extraordinary protection are as follows:³

- 1) Unit level delivered fuel costs;
- 2) Hourly market price data;
- 3) Unit level heat rate curves;
- 4) Unit detailed maintenance schedules;
- 5) Bid information of any sort (from the Company and/or from other entities);
- 6) Any information protected by a confidential clause of a Purchase Power Agreement (“PPA”); and

² Motion for Protective Order, ¶ 3 at pages 2 and 3. *See* Decision No. C11-1391 (mailed January 3, 2012) in Proceeding No. 11A-869E; Decision No. C16-0663-I (mailed July 15, 2016) in Proceeding No. 16A-0396E; Decision No. R19-1043-I (mailed December 30, 2019) in Proceeding No. 19A-0530E.

³ The Company’s request includes, and the Protective Order issued herein includes, any documents referencing any of the indicated Highly Confidential Information, including testimony, discovery requests, and discovery responses (including attachments).

7) Strategist files.⁴

14. As for bid information specifically, Public Service requests that any bid information be similarly treated as Highly Confidential Information, and subject to limited disclosure to only a reasonable number of attorneys and a reasonable number of subject matter experts for each party, as per Rule 3614(b) of the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3. "Bid Information" includes, but is not limited to, "bid prices, other bid details, information concerning a new resource that the utility proposes to build and own as a rate base investment, other modeling inputs and assumptions, and the results of bid evaluation and selection," as described in Rule 3604(j), 4 CCR 723-3.⁵

15. Public Service seeks a highly confidential protective order limiting party access to the first five above-listed categories of Highly Confidential Information to a "reasonable number of attorneys" and a "reasonable number of subject matter experts" representing a party to this Proceeding, consistent with Rule 3614(b) of the Rules Regulating Electric Utilities, 4 CCR 723-3. For the sixth category (any information protected by the confidentiality clause of a PPA), Public Service requests to limit access to the Commissioners, Administrative Law Judges, Advisory Staff, Advisory counsel, Trial Staff, Trial Staff counsel, and personnel of the OCC and

⁴ Public Service states that it noted in 2011, 2016, and 2019 that the requested extraordinary protection for Strategist Files applies specifically to the individual Strategist Fortran databases (the .sav files) that comprise each individual Strategist simulation referenced in the Amended ERP. Public Service is prohibited by its license with Ventyx from sharing these files with non-licensed parties. Further, these files cannot be opened by any person who does not have a Strategist License and a current installed version of Strategist. Both "Input Information" and "Output Information" Strategist Model Data will generally be available both to parties as either public information or Confidential Information. It is this Input Information and Output Information that is pertinent to the issues that will be raised in this proceeding. See Motion for Protective Order, ¶ 4 and Footnote 3 at page 3. Parties will have access to that information in accordance with the classification given to each form of data in this Interim Decision granting the Motion for Protective Order.

⁵ *Id.*, ¶ 9 at page 5.

its counsel.⁶ For the seventh category (Strategist Files), Public Service seeks confirmation that it need not (and asserts that it cannot) provide Strategist Files information to any Party and/or person that does not hold a Strategist license.⁷

16. Due to the highly sensitive and confidential nature of the Highly Confidential Information, Public Service requests that the Commission afford extraordinary protection for the foregoing information, and order that it be treated as highly confidential, with access limited as described above. Public Service asserts that these are the same categories of Highly Confidential Information that the Commission previously determined warranted extraordinary protection and highly confidential treatment in the Company's 2011 and 2016 ERPs, and in the Company's efforts to amend the 2016 ERP. Moreover, Public Service asserts, the request to limit access as described in the Motion for Protective Order (and in Paragraph 14 *supra*) is identical to what the Commission ordered in those prior proceedings.⁸

17. Public Service maintains that this treatment is consistent with past Commission decisions from 2011, 2016, and 2019. Public Service commits to make publicly available, certain data used to evaluate bids and proposals when the different costs of various resource portfolios are reported. According to Public Service, however, the actual bids themselves contain a wealth of proprietary, commercially sensitive information, particularly for bids that are not selected, because those projects may be rebid to Public Service or another utility in a subsequent solicitation. Public Service notes that bidders generally have significant investment

⁶ Motion for Protective Order, ¶ 5 and Footnote 4 at pages 3-4. Public Service acknowledges that the Commissioners, Administrative Law Judges, Advisory Staff, Advisory counsel, and Trial Staff and its counsel, need not provide separate non-disclosure agreements to receive Highly Confidential Information. The OCC recipients would be required to execute a non-disclosure agreement to receive the Highly Confidential Information.

⁷ Motion for Protective Order, ¶ 5 at pages 3-4.

⁸ *Id.*, ¶ 7 at page 5; see Footnote 2 *supra* at page 3.

in acquiring their sites, equipment, financing, and other project contracts and do not want their competitors to know their trade secrets. Consistent with Rule 3613, Public Service requests that such information related to actual bids be treated as highly confidential until the completion of the resource acquisition process (*i.e.*, until the last contract for a resource that meets a portion of the 2016 ERP resource need is signed). Upon completion of the resource acquisition process, as so defined, Public Service agrees to post on its website, the bid information required by Rule 3613(k).⁹

18. Rule 1101(b) of the Rules of Practice and Procedure, 4 CCR 723-1, regarding confidentiality, sets forth the requirements for motions for protective orders seeking extraordinary protection for highly confidential information. As required by Rule 1101(b)(VI), attached to the Motion for Protective Order (as Attachment C) is the affidavit of Jack W. Ihle, which attests to the Highly Confidential Information for which extraordinary protection is being sought and provides a list of the groups of employees who have access to the Highly Confidential Information.

19. Rule 1101(b)(VII) requires that Public Service file the Highly Confidential Information as an exhibit prepared in a form that comports with Rule 1101(a), unless the subject information would be overly burdensome, impractical, or too sensitive for disclosure. Since the Highly Confidential Information here is highly competitive and highly sensitive, Public Service did not provide it with the Motion for Protective Order.¹⁰

⁹ *Id.*, ¶ 9 at page 5.

¹⁰ *Id.*, ¶ 12 at page 7.

20. Public Service attached to the Motion for Protective Order proposed highly confidential non-disclosure agreements (NDAs) as Attachments A (for counsel) and B (for subject matter experts).

21. Public Service requests that all entities destroy or return to Public Service the Highly Confidential Information, as described in this Decision, that is provided to them during this proceeding at its conclusion.¹¹

22. Finally, because it is unopposed, pursuant to Rule 1308(c) of the Rules of Practice and Procedure, Public Service requests that the Commission waive response time to the Motion for Protective Order.¹²

II. FINDINGS AND CONCLUSIONS.

23. The Administrative Law Judge (ALJ) finds that the Motion for Protective Order satisfies the requirements of Rule 1101(b) of the Rules of Practice and Procedure, 4 CCR 723-1. The ALJ finds that, under the circumstances discussed in the Motion for Protective Order, Rules 1101(b)(VII) and 1101(e) do not require that the Highly Confidential Employee Information must be filed as an exhibit to the motion.

24. Based upon information provided in the Motion for Protective Order, the ALJ finds and concludes that the Commission's rules governing ordinary confidential information will provide insufficient protection for the Highly Confidential Information identified in this Decision. By protecting the Highly Confidential Information from disclosure, as requested in the Motion for Protective Order, the Commission will prohibit public dissemination of this highly sensitive and trade secret Highly Confidential Information.

¹¹ *Id.*, ¶ 13 at page 7.

¹² *Id.*, ¶ 14 at page 7.

25. The ALJ will grant Public Service's Motion for Protective Order. The relief requested in the Motion for Protective Order strikes a reasonable balance between the need for disclosure of information in this Proceeding and the need to protect the interests of Public Service and bidders in the resource planning process. The information in the possession of Public Service, described as the Highly Confidential Information in this Decision, is extremely sensitive and is highly confidential. The Highly Confidential Information deserves extraordinary, highly confidential protection.

26. The ALJ finds that the following is deemed to be Highly Confidential Information in this Proceeding:

- 1) Unit level delivered fuel costs;
- 2) Hourly market price data;
- 3) Unit level heat rate curves;
- 4) Unit detailed maintenance schedules;
- 5) Bid information of any sort (from the Company and/or from other entities);
- 6) Any information protected by a confidential clause of a PPA; and
- 7) Strategist files.

27. Access to and the disclosure of the information deemed to be Highly Confidential Information by this Decision will be limited as follows:

- 1) With respect to the first five categories of Highly Confidential Information stated in Paragraph 26 *supra*, access by Parties will be limited to a "reasonable number of attorneys" and a "reasonable number of subject matter experts" representing a Party to this Proceeding, consistent with Rule 3614(b). Individuals accessing this information, with the exception of the Commissioners, Administrative Law Judges, Advisory Staff, Advisory counsel, Trial Staff, and Trial Staff counsel, will be required to execute the appropriate highly confidential nondisclosure agreement set forth in Commission Rule 3614(b), provided as Attachment A (counsel) and Attachment B (subject matter expert) to this Decision.
- 2) With respect to the sixth category of Highly Confidential Information stated in Paragraph 26 *supra*, access will be limited to the Commissioners, Administrative Law Judges, Advisory Staff, Advisory counsel, Trial Staff, Trial Staff counsel, OCC, and OCC counsel; Public Service is granted a partial waiver of Rule 3614(b), 4 CCR 723-3, to limit access as described herein.

3) With respect to the seventh category of Highly Confidential Information stated in Paragraph 26 *supra*, access will be limited to eligible persons who sign the appropriate non-disclosure agreements established by Rule 3614 and this Decision and who have a current licensed version of Strategist; Public Service is granted a partial waiver of Rule 3614(b), 4 CCR 723-3, to limit access as described herein.

4) These same protections and restrictions on access to all of the Highly Confidential Information shall apply to any documents referencing any of the indicated Highly Confidential Information, including but not limited to testimony, discovery requests, discovery responses (including attachments), and documents intended to be used for impeachment.

28. Each of the Parties who have obtained access to the Highly Confidential Information, with the exception of the ALJ and the Commissioners, shall contact Public Service as to the method that person chooses to dispose of the information upon the conclusion of this Proceeding, as provided by Rule 1100(1)(I), 4 CCR 723-1.

29. Appendices A and B to this Decision are Highly Confidential NDAs to be signed by any attorney or subject-matter expert, respectively, who is authorized by this Decision to have access to the Highly Confidential Information before such access should be provided by Public Service.

30. This Interim Decision will constitute a Highly Confidential Protective Order.

31. Any person found, after notice and hearing, to have violated the terms and requirements of this Highly Confidential Protective Order shall be subject to any and all sanctions and penalties allowed by Colorado law.

32. Other procedural matters may be addressed in subsequent Interim Decisions.

III. ORDER

A. It Is Ordered That:

1. The Unopposed Motion Requesting Extraordinary Protection of Highly Confidential Information and Request for Waiver of Response Time (Motion for Protective

Order), filed by Public Service Company of Colorado (Public Service) on April 1, 2020 is granted, consistent with the findings and conclusions in this Interim Decision.

2. Since the Motion for Protective Order is unopposed by the Parties to this Proceeding, response time shall be waived, pursuant to Rule 1308(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-3.

3. Consistent with the findings and conclusions in this Interim Decision, the following items are deemed to be Highly Confidential Information in this Proceeding:

- 1) Unit level delivered fuel costs;
- 2) Hourly market price data;
- 3) Unit level heat rate curves;
- 4) Unit detailed maintenance schedules;
- 5) Bid information of any sort (from Public Service and/or from other entities);
- 6) Any information protected by a confidential clause of a PPA; and
- 7) Strategist files.

4. Consistent with the findings and conclusions in this Interim Decision, access to and the disclosure of the information deemed to be Highly Confidential Information by this Interim Decision shall be limited as described in Paragraph 27 at pages 9 and 10 of this Decision.

5. Before any person required to sign a highly confidential Non-disclosure Agreement (NDA) can obtain access to the Highly Confidential Information, that person must sign, and file with the Commission, the appropriate highly confidential NDA in Appendix A or Appendix B to this Decision.

6. 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