

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20AL-0049G

IN THE MATTER OF ADVICE LETTER NO. 961 FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO INCREASE RATES FOR ALL NATURAL GAS SALES AND TRANSPORTATION SERVICES TO BECOME EFFECTIVE MARCH 7, 2020.

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

Mailed Date: April 28, 2020

TABLE OF CONTENTS

| | |
|--|----|
| I. STATEMENT..... | 1 |
| A. Procedural History..... | 1 |
| B. Second Motion for a Protective Order Affording Extraordinary Protection. | 3 |
| II. FINDINGS AND CONCLUSIONS..... | 7 |
| III. ORDER..... | 11 |
| A. It Is Ordered That: | 11 |

I. STATEMENT.

A. Procedural History.

1. On February 5, 2020, Public Service Company of Colorado (Public Service or the Company) filed with the Colorado Public Utilities Commission (Commission), Advice Letter

No. 961-Gas, accompanying tariff sheets, and supporting direct testimony and attachments. This filing is a combined Phase I and Phase II natural gas rate proceeding.

2. The effective date of the tariff sheets filed with Advice Letter No. 961-Gas have been suspended for a total of 250 days until November 12, 2020, pursuant to § 40-6-111(1)(b), C.R.S. (2019).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. Notices of interventions by right were acknowledged for Trial Staff of the Colorado Public Utilities Commission (Staff), filed on February 28, 2020 (by Decision No. R20-0145-I, mailed on March 5, 2020); the Colorado Office of Consumer Counsel (OCC), filed on March 9, 2020 (by Decision No. R20-0179-I, mailed on March 17, 2020); and the Colorado Energy Office (CEO), filed on March 23, 2020 (by Decision No. R20-0208-I, mailed on April 1, 2020).

5. Decision No. R20-0208-I granted motions for permissive intervention filed on March 6, 2020 by Atmos Energy Corporation (Atmos); on March 11, 2020 by the Federal Executive Agencies (FEA); on March 16, 2020 by Energy Outreach Colorado (EOC); on March 18, 2020 by Black Hills Colorado Gas, Inc., doing business as Black Hills Energy (BH Colorado Gas); on March 20, 2020 by WoodRiver Energy, LLC (WoodRiver); on March 23, 2020, by Colorado Natural Gas (CNG); and on March 23, 2020 by Climax Molybdenum Company (Climax).

¹ See Decision No. C20-0112 (mailed on February 20, 2020) and Decision No. R20-0145-I (mailed on March 5, 2020).

6. Decision No. R20-0208-I also denied the Petition for Leave to Intervene filed by AARP on March 12, 2020, and the Petition for Leave to Intervene filed on March 12, 2020 by the International Brotherhood of Electrical Workers, Local 111 (Local 111), on the grounds that each Petition failed to satisfy the requirements in Rule 1401(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, for permissive interventions.² AARP and Local 111 were, however, *each* granted leave to participate in this Proceeding as an *amicus curiae*, pursuant to Rule 1200(c) of the Rules of Practice and Procedure, 4 CCR 723-1.

7. Decision No. R20-0223-I (mailed on April 6, 2020) *inter alia* adopted a consensus procedural schedule by which Answer Testimony and attachments are due May 13, 2020 and Rebuttal and Cross-answer Testimony and attachments are due on June 8, 2020, set this rate case for hearing on July 7 through 10 and 13 through 17, 2020.

8. Decision No. R20-0278-I (mailed on April 22, 2020) granted in part and denied in part Motions to Set Aside or Modify Interim Decision No. R20-0208-I, filed by the Local 111 on April 3, 2020, and by AARP on April 6, 2020.

9. As of the mailed date of this Decision, the Parties to this Proceeding are Public Service, Staff, OCC, CEO, Atmos, EOC, FEA, BH Colorado Gas, WoodRiver, CNG, Climax, Local 111, and AARP.

B. Second Motion for a Protective Order Affording Extraordinary Protection.

10. On April 17, 2020, Public Service filed an Unopposed Second Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information (Second Motion for Protective Order). After conferral pursuant to Rule 1400(a) of the Rules of

² Rule 1401(c), 4 CCR 723-1, requires requests for permissive intervention to be by motion, not petition. The petitions for Leave to Intervene filed by AARP and Local 111 were construed by the ALJ as motions for permissive intervention.

Practice and Procedure, 4 CCR 723-1, counsel for Public Service reports it contacted counsel for all Parties (as of April 17, 2020) and that the Parties either take no position or do not oppose the motion.³ Therefore, the Second Motion for Protective Order is unopposed.

11. In the Second Motion for Protective Order, Public Service seeks extraordinary protection to safeguard the disclosure of three categories of information and documents described below (Highly Confidential Information). The request for extraordinary protection includes any documents discussing or identifying any of the indicated Highly Confidential Information, including testimony, discovery responses (including attachments), and any other associated documents. Public Service explains that it has received discovery requests seeking production of this Highly Confidential Information and anticipates receiving additional future requests addressing the same or similar information.

12. Specifically, Public Service seeks extraordinary protection for the following three categories of information and documents and provides reasons why each category should be given extraordinary protection:

- a) Detailed competitive bid information received by Public Service, and the Company's subsequent evaluation of bid results. Such data reflects project-specific pricing, strategy, and technical information by bidder and the vendor bid data evaluated by the Company in selecting a particular proposal.
- b) Company vendor proprietary pricing data included in vendor purchasing documents and other related agreements. More specifically, the Company seeks extraordinary protection of vendor proprietary information, such as unit pricing, labor rates, and material cost information provided in these agreements.
- c) Detailed proprietary information related to the Company's natural gas system infrastructure, including detailed system and location data that may create a security, safety, or other risk if disclosed publicly.⁴

³ Second Motion for Protective Order, at page 2. The ALJ prefers that such conferral reports state which parties did not oppose the motion and which took no position.

⁴ Second Motion for Protective Order, ¶¶ 4 through 10 at pages 3 through 5.

13. Public Service argues that the Commission rules governing ordinary confidential information would provide insufficient protection for the Highly Confidential Information and would allow access to the Highly Confidential Information by numerous individuals in this proceeding who sign ordinary confidential non-disclosure agreements. By protecting the Highly Confidential Information from disclosure as requested in the Second Motion for Protective Order, Public Service hopes the Commission will prohibit public dissemination of competitively-sensitive and commercially-sensitive bid details, Company vendor pricing data, and proprietary infrastructure information that Public Service has always held to be highly confidential.⁵

14. Due to the highly-sensitive and confidential nature of the Highly Confidential Information identified above, Public Service requests that access to the Highly Confidential Information be limited to the Commissioners, the Administrative Law Judge (ALJ) assigned to this matter, the Commission's Advisory Staff and Advisory Attorneys, Trial Staff and attorneys for Trial Staff, and the OCC and attorneys for the OCC.⁶

15. 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),

⁵ *Id.*, ¶ 11 at pages 5 and 6.

⁶ *Id.*, ¶ 12 at page 6.

attached to the Second Motion for Protective Order (as Attachment C) is the affidavit of Steven P. Berman, which attests to the Highly Confidential Information for which extraordinary protection has been sought and provides a list of the groups of employees who have access to the Highly Confidential Information. Mr. Berman's affidavit confirms that within these groups, access to the Highly Confidential Information is limited to only those employees who have a compelling need to know the Highly Confidential Information.

16. 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. However, Rule 1101(e) provides that "[i]nformation which is subject to highly confidential protection and that is provided in response to discovery or in response to Commission staff audit shall not be filed with the Commission." Since the Highly Confidential Information would be provided in response to discovery requests, Public Service did not provide it with the filing of the Second Motion for Protective Order.⁷

17. Public Service attached to the Second Motion for Protective Order proposed highly confidential non-disclosure agreements (NDAs) as Attachments A (for attorneys) and B (for subject matter experts). Public Service notes that the form of non-disclosure agreements attached to the Second Motion for Protective Order are the same in substance as those attached to its first motion for a protective order, and would not need to be re-executed by any authorized party who already has the appropriate non-disclosure agreement on file with the Commission.⁸

⁷ *Id.*, ¶ 18 at pages 7 and 8.

⁸ *Id.*, ¶ 14 at pages 6 and 7. *See* Decision No. R20-0179-I (mailed on March 17, 2020), which granted the First Motion for Protective Order and included NDAs as Attachments A (for attorneys) and B (for subject matter experts).

18. Public Service conferred with counsel for the Parties (as of April 17, 2020) and E-filed the Second Motion for Protective Order, which includes a description of the highly confidential nature of the information for which extraordinary protection is sought.⁹ Therefore, Public Service asserts, all parties to this Proceeding were advised of the subject matter of the information at issue, as contemplated in Rule 1101(b)(III).

II. FINDINGS AND CONCLUSIONS.

19. The ALJ finds that the Second 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 Second Motion for Protective Order, Rules 1101(b)(VII) and 1101(e) do not require that the Highly Confidential Information must be filed as an exhibit to the motion.

20. The Commission has recognized that competitive bid information contains commercially-valuable and competitively-sensitive information, and is therefore entitled to extraordinary protection.¹⁰ The ALJ finds that each bidder has a substantial proprietary interest in its proposed project. These bidders may wish to bid for the same or a similar project in response to another Public Service solicitation or the solicitation of another utility. To protect these bidders, their proposed project information should not be subject to public dissemination. In order to preserve the integrity of the bidding process, bidders cannot be privy to the bids of others. Price disclosure of bid information would only provide information to bidders that could

⁹ *Id.*, ¶ 17 at page 7.

¹⁰ *See, e.g.*, Decision No. C15-1067 (mailed on September 29, 2015 in Docket No. 13A-0836E) (“Bid information is one type of information that is generally eligible for extraordinary protection”) ¶ 15; Decision No. C13-0762-I (mailed on June 21, 2013) (commercially-sensitive bid information warrants extraordinary protection); Decision No. C09-0466 (mailed on May 1, 2009 in Docket No. 07A-447E) (“We agree with Public Service that it is necessary to protect the confidentiality of the bid process, encourage competitive bidding, and ensure the integrity of the bid process itself”) ¶ 4.

allow them to adjust bids upward for future projects. Any such disclosure that would negatively impact the competitive procurement process could harm Public Service and its customers.

21. The ALJ finds that vendor bid information and Company analyses of such bids, as described in detail in Paragraph 12(a) *supra* is Highly Confidential Information and deserves extraordinary protection.

22. The ALJ finds that the pricing data, described in detail in Paragraph 12(b) *supra*, is commercially and competitively sensitive. Public disclosure of such pricing data, or disclosure of such pricing data to other parties who may in the future seek to negotiate vendor pricing for similar tasks or projects, would be highly detrimental to Public Service. The pricing data and associated contractual terms are deemed proprietary by the parties to the specific purchase or other related agreements, and it would cause all parties significant competitive harm if this information became known to competitors, potential counterparties, or potential future customers for both Public Service and vendors. Public disclosure of this information would hinder Public Service's ability to negotiate the most competitive pricing in purchase or other related agreements in the future. The contracting party would suffer harm from disclosure of the highly confidential pricing data and terms of these agreements as it would undercut vendors' negotiating power.

23. The ALJ finds that Public Service vendor proprietary information pricing data, as described in detail in Paragraph 12(b) *supra* is Highly Confidential Information and deserves extraordinary protection.

24. The ALJ finds that Public Service's detailed natural gas system and location data, described in detail in Paragraph 12(c) *supra*, contains proprietary details about the Company's infrastructure. Public disclosure of such information would jeopardize Public Service's ability to

manage its system and to provide safe, reliable service to its natural gas customers. Public disclosure of such information is also a security risk that could compromise public safety, as well as the integrity of Public Service's natural gas system itself.

25. The ALJ finds that proprietary and sensitive Public Service infrastructure information, including detailed system and location data, as described in detail in Paragraph 12(c) *supra* is Highly Confidential Information and deserves extraordinary protection.

26. The ALJ concludes that Public Service has demonstrated good cause, and the ALJ will grant Public Service's Second Motion for Protective Order. The relief requested in the Second 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, its customers, and its vendors. The information of Public Service described as Highly Confidential Information in the Second Motion for Protective Order and in this Decision is competitively-sensitive, commercially-sensitive, and highly confidential. The Highly Confidential Information deserves extraordinary protection.

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

- a) Detailed competitive bid information received by Public Service, and the Company's subsequent evaluation of bid results. Such data reflects project-specific pricing, strategy, and technical information by bidder and the vendor bid data evaluated by the Company in selecting a particular proposal.
- b) Company vendor proprietary pricing data included in vendor purchasing documents and other related agreements. More specifically, the Company seeks extraordinary protection of vendor proprietary information, such as unit pricing, labor rates, and material cost information provided in these agreements.
- c) Detailed proprietary information related to the Company's natural gas system infrastructure, including detailed system and location data that may create a security, safety, or other risk if disclosed publicly.

28. Therefore, access to and the disclosure of the information deemed to be Highly Confidential Information by this Decision will be limited to the following persons: the Commissioners, the ALJ assigned to this matter, the Commission's Advisory Staff and Advisory Attorneys, Trial Staff and attorneys for Trial Staff, and the OCC and attorneys for the OCC. Each of the Parties, 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, in accordance with Rule 1100(1)(I), 4 CCR 723-1.

29. Pursuant to Rule 1100(h), 4 CCR 732-1, the Commissioners, ALJs, Commission Staff, and Commission counsel are not required to sign NDAs in order to gain access to confidential and highly confidential information in a proceeding. Each Commissioner, ALJ, Commission counsel, and Commission Staff member signs an annual NDA that includes the requirement to "maintain and to treat information to which the Commission has granted highly confidential protection pursuant to paragraph 1101(b) in accordance with the decision granting highly confidential protection."

30. 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 will be provided by Public Service. If an authorized person entitled to access to the Highly Confidential Information has already signed and filed an NDA attached to Decision No. R20-0179-I, he or she does not need to re-execute and file with the Commission an NDA attached to this Decision.

31. This Interim Decision shall constitute the Second Highly Confidential Protective Order in this Proceeding.

32. 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.

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

III. ORDER

A. It Is Ordered That:

1. The Unopposed Second Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information (Second Motion for Protective Order) filed by Public Service on April 17, 2020 is granted, consistent with the discussion, findings, and conclusions in this Interim Decision.

2. Since the Second Motion for Protective Order is unopposed by the Parties to this Proceeding (as of April 17, 2020), response time shall be waived.

3. The items listed in Paragraph 27 at page 9 of this Decision are deemed to be Highly Confidential Information in this Proceeding. Documents or information containing such Highly Confidential Information sought by any discovery request, or otherwise obtained or used during the course of this Proceeding, are also deemed to be Highly Confidential Information.

4. Access to and the disclosure of the information deemed to be Highly Confidential Information by this Interim Decision shall be limited to the following persons: the Commissioners, the Administrative Law Judge presiding over this Proceeding, the Commission's Advisory Staff and Advisory Attorneys, Trial Staff of the Colorado Public Utilities Commission and its attorneys, and personnel of the Colorado Office of Consumer Counsel and its attorneys.

5. Before any person required to sign a highly confidential Non-disclosure Agreement can obtain access to the Highly Confidential Information, that person must sign and

file the appropriate highly confidential NDA in Appendix A or Appendix B to this Decision, as appropriate, or must have already signed and filed a highly confidential Non-disclosure Agreement attached to Decision No. R20-0179-I.

6. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge