

Decision No. C04-1235

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04A-214E

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF  
COLORADO FOR APPROVAL OF ITS 2003 LEAST-COST RESOURCE PLAN.

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DOCKET NO. 04A-215E

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF  
COLORADO FOR AN ORDER APPROVING A REGULATORY PLAN TO SUPPORT  
THE COMPANY'S 2003 LEAST-COST RESOURCE PLAN.

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DOCKET NO. 04A-216E

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF  
COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY  
FOR THE COMANCHE UNIT 3 GENERATION FACILITY.

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**ORDER ON MOTIONS FOR  
EXTRAORDINARY PROTECTION**

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Mailed Date: October 20, 2004  
Adopted Date: October 20, 2004

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of separate motions for extraordinary protection pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-16-3.2 filed by Public Service Company of Colorado (Public Service) and the Colorado Independent Energy Association (CIEA). Both parties filed their separate motions on October 18, 2004.

2. In its motion, Public Service seeks extraordinary confidential protection of Confidential Exhibit SH-6, attached to the rebuttal testimony of Mr. Hjernstad; Confidential Exhibit KJH-1, attached to the rebuttal testimony of Mr. Haeger; Confidential Exhibits MPM 1-7 attached to the rebuttal testimony of Mark McGree; and Confidential Exhibits KTH-1 through KTH-5 attached to the rebuttal testimony of Karen Hyde, as well as confidential versions of Mr. McGree's and Ms. Hyde's Rebuttal Testimony.

3. Public Service indicates that it has filed the exhibits and testimony for which it seeks extraordinary protection with the Commission under seal. Public Service seeks a protective order from the Commission that would restrict access to the above mentioned exhibits and testimony to members of Commission Trial Staff and the Office of Consumer Counsel (OCC), who have executed non-disclosure agreements in this docket. With respect to party-specific proprietary information, Public Service requests that both the party and its counsel have access to the party's own information.

4. Finding that Public Service has stated good cause, we will grant its motion for extraordinary protection of the exhibits and testimony enumerated above, and will waive response time to the motion.

5. CIEA seeks extraordinary confidentiality to its conditionally filed Confidential and Proprietary Cross-Answer Testimony of Black Hills Corporation (Confidential Black Hills Testimony) in this matter. CIEA states that the Confidential Black Hills Testimony was filed with the Commission under seal on October 18, 2004.

6. According to CIEA, the Black Hills Testimony responds to certain answer testimony of Staff witness Podein in this matter which challenges potential bidders to provide Staff with assurances that the denial of Public Service's request for waiver of Rule 4 CCR 723-3-

3610(b) would not prejudice ratepayers, and that third-party developers could compete with Public Service's plan to self-build the proposed Comanche 3 power plant.

7. CIEA argues that, until the Commission rules on Public Service's waiver request, third-party developers do not know whether bidding for the Comanche 3 project will occur. CIEA goes on to argue that Staff is essentially asking developers to cooperate in a "pre-bid beauty pageant." CIEA posits that if developers provide the information Staff requests, they may lose the opportunity to receive equal and fair treatment in a later bid process, if an actual later bid occurs. CIEA argues that developers risk being pre-judged by Public Service, other developers, Staff, and OCC by providing critical information at this point.

8. As a result, CIEA seeks extraordinary protection of its Confidential Black Hills testimony. Therefore, CIEA requests that no party have access to the Confidential Black Hills testimony other than Staff and OCC. This preclusion would include Public Service, as well as all intervenors and their legal counsel. CIEA also seeks utilization of an enhanced non-disclosure agreement that includes the following language:

In addition, with respect to the confidential cross-answer testimony filed by Black Hills Corporation on behalf of the Colorado Independent Energy Association in this docket no October 18, 2004 (hereafter, "Confidential Black Hills Testimony"), or any information provided or developed as a result of discovery or cross-examination with respect to the Confidential Black Hills Testimony (hereafter, collectively, "Confidential Black Hills Information"), I hereby affirm that I am presently employed either by the Colorado Public Utilities Commission ("Commission") or the Colorado Office of Consumer Counsel ("OCC"), or by the Colorado Department of Law ("OAG") as counsel for the Commission or the OCC; that I currently have no intention of leaving the employ of the Commission, the OCC or the OAG to work in a capacity in which I would be involved with marketing, development or strategic planning of electric power for a utility, power marketer or independent power developer that potentially competes with Black Hills Corporation or any of its affiliates or subsidiaries; and that if I do leave the employ of the Commission, the OCC or the OAG to work in a capacity in which I would be involved with marketing, development or strategic planning of electric power for a utility, power marketer or independent power developer that potentially competes with Black Hills Corporation, I will not in

such capacity disclose to any person any aspect of the Confidential Black Hills Information.

9. CIEA also seeks limits on discovery and cross-examination in which a Public Service employee would be provided information from the Confidential Black Hills Testimony, in order to elicit from the Public Service employee, a “more explicit, more direct and more refined comparison of the merits of the Black Hills and Public Service proposals.”

10. CIEA also represents that it reserves the right to withdraw the Confidential Black Hills Testimony if the relief it seeks in its motion is not granted.

11. In its response to CIEA’s motion, Staff requests that the Commission rule expeditiously on the matter since neither Staff nor its counsel has been provided with the Confidential Black Hills Testimony. Staff does indicate its concern that the proposed enhanced non-disclosure agreement does not allow for Staff, OCC, or Commission counsel to review such information.

12. Staff also indicates that it opposes the request of CIEA that Staff and its counsel be required to execute the proposed enhanced non-disclosure agreement prior to being given access to the information. Staff finds the representations made in the enhanced non-disclosure agreement redundant and unnecessary because it asks for many of the same representations that have already been made by those Staff members that have already executed a non-disclosure agreement. Staff also finds that the enhanced version sought by CIEA goes beyond the duty to protect information from disclosure and requires inappropriate personal representations regarding individuals’ intentions. Staff states that it does not oppose the request in the CIEA motion regarding limits on discovery and cross-examination.

13. In its Preliminary Response to CIEA's Motion, Public Service indicates that it strongly opposes the motion. Public Service, as the party with the burden of proof in this matter, finds it "unconscionable" for CIEA to suggest that Commission decisions in this docket should be made on the strength of sealed evidence that is not available to any representative of Public Service.

14. Public Service seeks a request that it be given until Friday, October 22, 2004 to respond to the CIEA motion.

### **B. Analysis**

15. Because time is of the essence here, we will bifurcate our decision on CIEA's motion. First, we find that Staff's arguments regarding the necessity to have access to the information as soon as possible compelling. Because the hearings in this matter start in less than two weeks, we will grant, in part, CIEA's motion as it applies to Staff and OCC. Therefore, we will grant extraordinary protection to the Confidential Black Hills Testimony to provide access to Staff and OCC.

16. We will also grant CIEA's motion for enhanced non-disclosure language to be incorporated into the non-disclosure agreements required for access to the Confidential Black Hills Testimony. We find that the proposed language does provide for review of the confidential material by legal counsel for OCC and Staff.

17. We are cognizant that the language of the enhanced non-disclosure agreement goes beyond the standard agreement required. We are also cognizant of the concerns raised by Staff. However, we interpret the proposed language to merely provide in more detail, the requirements for confidentiality for access to the information. Although Staff expresses concerns

that the forms require representations regarding individuals' intentions, we do not find anything in the requirements that prejudice any party.

18. With regard to the concerns raised by Public Service, we find that Public Service states good cause to provide adequate time to address CIEA's motion. To best achieve that end, we will shorten response time to CIEA's motion to close of business on Friday, October 22, 2004. This will allow all parties to this matter to respond, should they choose to do so. This will also provide Public Service with the time it requests to file a full response.

19. This matter will be discussed at our Weekly Meeting on October 27, 2004. However, should Public Service, or any other party, prefer we address this matter at a Special Open Meeting, we encourage them to make such a request in its response filing. We also note that such a meeting time would be limited to Monday afternoon, October 25, 2004. Because time is of the essence, we also highly encourage any party filing a response to do so as early as possible prior to the October 22, 2004 deadline.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The motion of Public Service Company of Colorado for extraordinary protection is granted as discussed above.

2. Response time to Public Service Company of Colorado's motion is waived.

3. The motion of Colorado Independent Energy Association for extraordinary protection is granted in part to allow access to the Confidential Black Hills Testimony to Commission Staff, and its legal counsel, and to the Colorado Office of Consumer Counsel and its legal counsel.

4. The request of Colorado Independent Energy Association for enhanced language to the non-disclosure agreement, as indicated above, is granted.

5. Response time to the motion of Colorado Independent Energy Association for extraordinary protection is shortened to October 22, 2004.

6. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

7. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
October 20, 2004.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners

COMMISSIONER POLLY PAGE  
ABSENT.