

Decision No. C04-1249

**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 DENYING MOTION FOR PROTECTIVE  
ORDER AND GRANTING MOTION  
TO SHORTEN RESPONSE TIME**

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Mailed Date: October 26, 2004  
Adopted Date: October 25, 2004

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of a motion filed by Colorado Independent Energy Association (CIEA) for a Protective Order Affording Extraordinary Protection to Certain Conditionally Filed Confidential and Proprietary Cross-Answer Testimony of Black Hills Corporation (Black Hills), filed on October 18, 2004.

Responses were filed to the motion by Commission Staff (Staff) and Public Service Company of Colorado (Public Service).

2. Generally, CIEA seeks extraordinary confidentiality to its conditionally filed confidential and proprietary cross-answer testimony of Black Hills in this matter, which responds to certain answer testimony of Staff witness Sharon Podein. CIEA argues that the cross-answer testimony of David Rhodes and Stephen J. Thome, that responds to Staff's request that developers provide it with information as to whether the developer would be competitive with what was presented by Public Service regarding construction of its proposed Comanche 3 power plant, could be pre-judged by Public Service and other parties in this docket in a manner that compromises Black Hills down the road. Therefore, CIEA takes the position that the information contained in its confidentially filed cross-answer testimony of Rhodes and Thome should be available only to Staff and the Colorado Office of Consumer Counsel (OCC).

3. Public Service argues that fairness and due process require that it have access to all testimony in order for it to maintain a meaningful opportunity for a hearing. Therefore, Public Service requests that CIEA's motion be denied and that Public Service have access to the confidentially filed testimony.

4. Concomitantly with its response to CIEA's motion, Public Service filed a Motion to Strike Cross-Answer Testimonies of Witnesses Thome, Rhodes, Thompson, Ruffatto, White, Schleimer, and Winer and Motion to Shorten Response Time.

5. Now, being duly advised in the matter, we deny CIEA's motion for the reasons stated below. We also grant Public Service's motion to shorten response time to its motion to strike cross-answer testimony to noon on Tuesday October 26, 2004.

**B. Background**

6. In its motion, CIEA indicated that its confidential Black Hills testimony responded to Staff answer testimony that requested that potential bidders to Public Service's proposed Comanche 3 power plant provide Staff with information on whether developers can compete with the regulatory treatment afforded a utility when financing a capital intensive project of the magnitude of Comanche 3.

7. Although CIEA responded to the request in the form of testimony of witnesses Rhodes and Thome, it filed certain portions of that testimony under seal. In its motion, CIEA asked that the testimony filed under seal be available only to Staff and OCC. It was CIEA's contention that providing this information to Public Service ran the risk that Public Service and other developers would pre-judge that information in a manner that compromised Black Hills at a later date. Additionally, CIEA asserted that should they not provide the requested data, it could be construed that developers are seeking to disguise the fact that they lack the qualifications and would not be able to meet Public Service's Comanche 3 plan.

8. The purpose of the extraordinary confidentiality, according to CIEA, was to provide Staff with the information they requested while minimizing the risk that confidential or proprietary information would be competitively compromised or somehow prejudged.

9. In its response, Staff indicated that it did not generally oppose the general request to treat the information at issue in a highly confidential manner and limit access as proposed by CIEA. However, Staff requested that the Commission rule on its access to the information in an expedited manner. Staff did oppose the language of the enhanced non-disclosure agreement proposed by CIEA.

10. Public Service takes exception to CIEA's proposal. In its response, Public Service indicates that accepting the confidential testimony in this case without giving it an opportunity to cross-examine and rebut that testimony would deny it due process. Public Service argues that it has the burden of proof in this docket to demonstrate that its filed Electric Least-Cost Resource Plan complies with its mandated obligation to provide reliable electric service at just and reasonable rates. As such, Public Service maintains that it would be fundamentally unfair to deprive it of the opportunity to address CIEA's confidentially filed testimony and of a meaningful opportunity for a hearing.

11. As an alternative, Public Service indicates that it will restrict access to the sealed information to four individuals who will maintain the confidentiality of the Black Hills information. Further, those four individuals will be "walled off" from any further development of Comanche 3, should the Commission deny its requested waiver of Commission rules. Those four individuals would be considered on the "evaluation" team, as opposed to a "proposal" team, in any separation policy that contemplated Public Service bidding Comanche 3.

12. CIEA responded to Public Service's filing. There, CIEA points out that the confidential testimony at issue reveals actual details of one or more coal resource bids that Black Hills (or one of its subsidiaries) is prepared to make should a competitive resource solicitation result from this proceeding. Therefore, it would be competitively damaged if other competitors in a competitive bid have access to this information.

13. CIEA posits that Public Service's motives for reviewing the confidential information is the motive of a competitor, since it wants to prove in the current litigation that third parties cannot reliably bid coal, so it can build Comanche 3 without competitive bidding. As such, it is CIEA's position that Public Service would attack, belittle, and impugn the

confidential testimony in order to discredit the Black Hills proposal(s). CIEA states that Public Service cannot be expected to be a fair or neutral evaluator of Black Hills proposal(s).

14. Nor does CIEA find comfort in Public Service's proposal to wall off those employees who do analyze the confidential information. According to CIEA, these Public Service employees will nonetheless remain involved in the bid evaluation process, where their participation will directly compromise the fairness and objectivity of the treatment Black Hills can expect as a bidder.

15. Neither does CIEA see any due process concerns by withholding the confidential testimony from Public Service. CIEA argues that no life, liberty, or property interests inure to Public Service's waiver request. According to CIEA, in the absence of an entitlement or substantive constitutional challenge, there is not entitlement to due process.

### **C. Analysis**

16. We addressed CIEA's motion for extraordinary protection with regard to Staff and OCC in Decision No. C04-1235 issued October 20, 2004. There, we granted CIEA's motion in part and allowed Staff and OCC immediate access to the confidential information, as long as the parties signed the enhanced non-disclosure agreement proposed by CIEA. We bifurcated these issues based on Staff's assertions that time was of the essence for it to review the testimony at issue. Here, we determine whether CIEA's motion should be granted as it applies to Public Service.

17. Although CIEA raises interesting points regarding the treatment of the confidential testimony, we are persuaded the denial of the information to Public Service would be unfair and would raise due process concerns. We find Public Service's argument that since it has the burden of proof in this docket, denying it the opportunity to address evidence would be

fundamentally unfair and would deny Public Service its meaningful opportunity for a hearing. Certainly one of the cornerstones of our procedural system is that a party be afforded the opportunity to confront and question evidence or testimony presented in its case. To deny Public Service all access to the confidential issue, in our estimation, raises fundamental due process concerns.

18. Although we are cognizant of the concerns raised by Black Hills, we nonetheless find the alternative plan put forth by Public Service, to create an internal wall, as a viable alternative to the situation. We have approved such a plan in the past in similar circumstances. Therefore, we deny CIEA's motion for extraordinary protection.

19. In its motion, and again in its Status Report filed with Commission on October 22, 2004, CIEA indicated that Black Hills is unwilling to have Public Service see the confidential testimony under any conditions. CIEA also indicated in its Status Report that it had received assurances from counsel for OCC and Staff that neither party would review the confidential testimony until the motion, as it relates to Public Service, is resolved. We are therefore confident that no party has reviewed the confidential testimony, so CIEA and Black Hills are not prejudiced in any way. CIEA has further indicated that, should we allow access to confidential testimony by Public Service by denying CIEA's motion, it will remove the confidential information from the Commission files.

## **II. ORDER**

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

1. The motion of Colorado Independent Energy Association for a Protective Order Affording Extraordinary Protection to Certain Conditionally Filed Confidential and Proprietary

Cross-Answer Testimony of Black Hills Corporation, as it relates to Public Service Company of Colorado, is denied.

2. Colorado Independent Energy Association is ordered to remove the confidentially filed testimony from Commission files as soon as it is practicable.

3. The motion of Public Service Company of Colorado for shortened response time to its motion to strike cross-answer testimonies of witnesses Thome, Rhodes, Thompson, Ruffatto, White, Schleimer, and Winer to noon on Tuesday October 26, 2004 is granted.

4. 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.

5. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING  
October 25, 2004.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners

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