Decision No. R07-0924

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 07R-325ALL

IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MANA L. JENNINGS-FADER ADOPTING RULES

Mailed Date: November 5, 2007

I. STATEMENT

1. On August 30, 2007, the Commission issued the Notice of Proposed Rulemaking which commenced this docket. Decision No. C07-0737. The Commission invited interested persons to participate in the rulemaking by submission of written comments, by presentation of oral comments, or by both means and scheduled the hearing on the proposed rule changes for October 5, 2007.

2. On the scheduled date and at the announced time and location, the undersigned Administrative Law Judge (ALJ) held hearings on the proposed rules. Written comments or oral comments, or both, were submitted by: AT&T Communications of the Mountain States, Inc., *et al.* (AT&T); the Board of County Commissioners of Boulder (Boulder); the Colorado Office of Consumer Counsel (OCC); Dr. Ronald Larson (Larson); Public Service Company of Colorado (Public Service); Qwest Corporation (Qwest); Ratepayers United of Colorado, LLC (RUC);

Western Resources Advocates (WRA);[1] and Mr. Terry Joseph Wood (Wood). At the conclusion of the rulemaking hearing, the ALJ took the matter under advisement.

3. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS AND DISCUSSION

4. Rulemaking is a quasi-legislative function. Rulemakings encompass a range of determinations, with one end of the continuum being regulations based purely on policy considerations and the other end of the continuum being regulations the need for which, or the language of which, turns upon proof of discrete facts. *Citizens for Free Enterprise v. Department of Revenue*, 649 P.2d 1054 (Colo. 1982). The procedural rules at issue in this rulemaking fall on the policy end of that continuum.

5. Sections 40-2-108, 40-3-102, 40-6-101(1), 40-6-108(2), and 40-6-109(5), C.R.S., are the statutory authority for the rules promulgated by this Decision.

6. This is the third rulemaking proceeding with respect to the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723 Part 1, in the past two years. *See* Docket No. 03R-528ALL (rules effective on April 1, 2006) and Docket No. 06R-488ALL (rules effective on August 1, 2007). The previous rulemakings addressed the rules at issue here, particularly the rule governing confidentiality (Rule 4 CCR 723-1-1100).

7. Changes have been made to the rules as noticed.[2] Not all changes are discussed in this Decision.

[1] RUC and WRA filed joint comments (WRA/RUC Comments).

[2] The language of each rule adopted by this Recommended Decision is shown in Attachment A in red-lined, legislative format and is shown in Attachment B without the red-lining (*i.e.*, as the rule will read when published in the *Colorado Register* and the *Code of Colorado Regulations*).

8. There are two distinct subject matters addressed by the proposed rule changes. Each is discussed separately.

A. Rules pertaining to extraordinary confidentiality and protection of data.

9. The Commission proposed changes to Rule 4 CCR 723-1-1100(a)(III) and to Rule 4 CCR 723-1-1100(c)(III). Decision No. C07-0737 at Attachment A. This decision amends Rule 4 CCR 723-1-1100(a)(III), Rule 4 CCR 723-1-1100(c)(III), and Rule 4 CCR 723-1-1100(g).

1. Rule 4 CCR 723-1-1100(a)(III) and Rule 4 CCR 723-1-1100(g).

10. Rule 4 CCR 723-1-1100 sets out the process by which a party in a formal docket before the Commission obtains, and by which the Commission reviews, confidential treatment for information claimed by the submitting party to be confidential or trade secret. The Commission recognizes two types of confidential data: those which require ordinary or standard protection[3] and those which require extraordinary protection.[4] Although Rule 4 CCR 723-1-1100(g) is intertwined with the proposed amendment to Rule 4 CCR 723-1-1100(a), Decision No. C07-0737 proposed no amendment to Rule 4 CCR 723-1-1100(g).

11. Ordinary confidentiality is addressed in, and is protected by the processes specified in, Rule 4 CCR 723-1-1100(a) as it exists at present. Ordinary confidentiality is not mentioned specifically in Decision No. C07-0737, and the proposed changes did not address this portion of Rule 4 CCR 723-1-1100(a). The Commission proposed changes to Rule 4 CCR 723-1-1100(a)(III) to address extraordinary confidentiality.

[3] For ease of reference, this Decision will refer to this type of confidentiality as ordinary confidentiality. This is the convention used during the rulemaking hearing.

[4] For ease of reference, this Decision will refer to this type of confidentiality as extraordinary confidentiality. This is the convention used during the rulemaking hearing. This Decision also uses highly confidential when referring to extraordinarily confidential.

12. Each Commission employee signs a nondisclosure agreement annually.[5] Rule 4 CCR 723-1-1100(g). After signing the annual nondisclosure agreement, a Commission employee may access any information protected by ordinary confidentiality.

13. To obtain access to highly confidential data, a Commission employee must sign the specific nondisclosure agreement which pertains to those data.[6] The nondisclosure agreement governing access to the specific highly confidential information is usually appended to the Order or Decision granting a motion for extraordinary protection. After signing the extraordinary protection nondisclosure agreement in a given docket, a Commission employee may access the highly confidential data in that docket.

14. Once a Commission employee signs a nondisclosure agreement (whether for ordinary confidentiality or for extraordinary confidentiality), the employee is bound by the terms of that agreement. As a matter of internal Commission procedure, both confidential data and highly confidential data are maintained in restricted areas and, within those restricted areas, are in locked rooms or locked file cabinets. Commission employees are knowledgeable about, and are sensitive to, the appropriate handling and storage of confidential information and of highly confidential information.

15. Every Commission employee receives, by electronic service, a copy of every Order and Decision issued by the Commission and its Administrative Law Judges. Thus, every Commission employee knows or should know the content of, and the restrictions imposed by, an Order or a Decision granting a motion for extraordinary confidentiality protection.

[5] These signed nondisclosure agreements are available for inspection at the Commission's offices.

[6] The Commission determines the specific language of the nondisclosure agreement governing access to highly confidential data at the time the Commission grants a motion for extraordinary protection.

16. With this background, the ALJ turns to the comments.

a. Ordinary confidentiality.

17. Written comments and oral presentations by WRA/RUC, to which Public Service and Qwest responded in writing and orally, suggested language changes to Rule 4 CCR 723-1-1100 with respect to *ordinary* confidentiality. The WRA/RUC proposals will not be adopted.

18. First, as argued by Public Service and Qwest, the notice of proposed rulemaking (*i.e.*, Decision No. C07-0737) did not state expressly that Rule 4 CCR 723-1-1100 in its entirety (*i.e.*, the portions pertaining to ordinary confidentiality) would be under review. WRA/RUC pointed out that the Order invited "[i]nterested persons ... to suggest changes that will make the subject rules more efficient, rational, or meaningful." Decision No. C07-0737 at ¶ 8. They argued that this statement is an invitation to offer revisions to any portion of Rule 4 CCR 723-1-1100, which is what they did. While the WRA/RUC position has merit, the ALJ finds that addressing the larger issue of the treatment of ordinary confidentiality should be done in a rulemaking commenced to address that broader issue, as the Commission did in 1997.[7] The instant rulemaking had a narrow initial focus, and the ALJ believes that it is better in this case (albeit not required by law) to keep this rulemaking narrowly focused.

19. Second, presentations during the rulemaking hearing made it clear that the principal concerns of WRA/RUC were focused on highly confidential information and that WRA and RUC had little, if any, experience with the procedures governing ordinary confidentiality. Neither could provide an example of a situation in which using the current rules governing ordinary confidentiality had created a problem.

[7] This was Docket No. 97R-259. This was a lengthy, somewhat contentious rulemaking proceeding.

20. Third, when asked by the ALJ to describe the process for challenging a claim of ordinary confidentiality which should be adopted, WRA and RUC each described a process remarkably similar to that contained in Rule 4 CCR 723-1-1100(b) as it now exists.

21. Thus, the ALJ finds no persuasive reason to use this rulemaking to modify the Rule governing ordinary confidentiality (other than changes for clarity). If a person believes that the Commission ought to address *in toto* the issue of treatment of data claimed to be confidential, then that person can petition the Commission to commence a rulemaking to address that issue.

22. The remainder of the discussion in this Decision concerns extraordinary confidentiality unless the context indicates otherwise.

b. Extraordinary confidentiality.

23. The Commission proposes to change Rule 4 CCR 723-1-1100(a)(III) as follows:

> To the extent there may be information which a party believes requires extraordinary protection beyond that provided for in these rules the party shall submit a motion seeking such extraordinary protection. The motion shall include a description and/or representative sample of the information for which extraordinary protection is sought and shall state the grounds for seeking the relief, the specific relief requested, and advise all other parties of the request and the subject matter of the material at issue. The motion shall also be accompanied by the specific form of nondisclosure agreement requested by the party. ~~Notwithstanding anything to the contrary in subparagraphs (c)(II) and (III) of this rule, the party shall file only an original and one copy of the description and/or representative sample of the information for which extraordinary protection is sought.~~ The party shall comply with rule 1204(a) in filing the motion. The Commission will evaluate the motion and the description and/or representative sample *in camera*. The Commission may enter an order either requiring additional information, or disposing of the motion and requiring the party to file a complete version and an appropriate number of copies of the information for which extraordinary protection is sought (the default number of copies is seven). In ordering the number of copies to be filed, the Commission will consider the needs of its commissioners, administrative law judges, and trial, advisory, and administrative staff. Unless otherwise ordered by the Commission, its staff shall have access to

all information filed under this subparagraph (III) by virtue of the annual nondisclosure agreement executed under paragraph (g) of this rule.

24. AT&T, Public Service, Qwest, Mr. Wood, and WRA/RUC commented on the proposed changes to Rule 4 CCR 723-1-1101(a).

25. Mr. Wood expressed his concern that adopting the proposed changes "would decrease significantly [the security protection around highly confidential information] from the level currently witnessed." Wood Comments. In his opinion, increasing the number of copies filed with the Commission, when combined with increasing the number of Commission employees with access to the highly confidential data, could result in costs (*i.e.*, disclosure) which outweigh the benefits and administrative convenience to be gained from amending the Rule as proposed. Mr. Wood states that the Commission should take steps to assure, first, that the documents and their contents are protected and, second, that Commission employees with access to confidential data of any type take adequate steps to protect those data.

26. While the Commission appreciates the concern expressed by Mr. Wood, the Rule will not be amended to address this issue. First, the specifics of the process by which Commission Staff may access highly confidential data are addressed more appropriately by internal Commission procedures. Second, as outlined above, the Commission has sufficient safeguards in place to assure that confidential data of all stripes is protected. Third, if the Commission-proposed change to Rule 4 CCR 723-1-1100(a) is adopted, only this modest change in current Commission practice will occur: Commission employees will no longer be required to sign each specific nondisclosure agreement to have access to extraordinarily confidential data. As each Commission employee receives every Decision and Order, each employee should be aware of the restrictions which apply to particular extraordinarily confidential information. There is no reason to believe that this modest change in procedure will result in the release of

highly confidential information. Fourth and finally, as recommended by Qwest and discussed below, Rule 4 CCR 723-1-1100(g) will be amended to assure that Commission employees are aware that, with respect to extraordinary confidentiality, they are bound by, and must comply with, the protections spelled out in an Order or Decision which grants a motion for extraordinary confidentiality protection.

27. Qwest suggested (a) a clarification of Rule 4 CCR 723-1-1100(a)(III) and (b) an addition to Rule 4 CCR 723-1-1100(g). Each is discussed separately.

28. With respect to Rule 4 CCR 723-1-1100(a)(III), Qwest recommended that the Commission clarify the circumstances under which a complete copy of the information for which extraordinary protection is sought must be filed with the Commission. Qwest suggested language to make it explicit that a complete copy of the document containing those data would *not* be filed with the Commission *unless* (a) the Commission orders the filing of a complete copy prior to ruling on a motion for extraordinary protection (*e.g.*, to review the document or information *in camera*) or (b) the Commission has granted a motion for extraordinary protection and a party seeks to rely on the highly confidential data as evidence in a proceeding.[8] Under either scenario, Qwest argues, the owner of the highly confidential data would have taken reasonable efforts to preserve the confidentiality of the information and, thus, would not be seen as having waived its claim of confidentiality.[9]

29. WRA/RUC opposed Qwest's suggestion. They took the position that the Commission should always review *in camera* each entire document containing the data for

[8] Persons who signed the case-specific nondisclosure agreement, and Staff who signed the annual nondisclosure agreement, would have access in discovery to highly confidential materials.

[9] *See generally* Trade Secrets Act, § 7-74-101, C.R.S., *et seq.*, and specifically § 7-74-102(4), C.R.S. (requiring owner of data claimed to be trade secret to take "measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes").

which extraordinary confidentiality is sought and that, as a result, a complete copy of the information (that is, a complete copy of the document in which the data are found) should always be filed with the Commission.

30. Qwest's recommendation will be adopted. Of necessity, decisions on motions for extraordinary protection are made on a case-by-case basis.[10] At present, the Commission has discretion to order a party to file a complete copy of the document containing the data should the Commission wish to review a complete copy. If the WRA/RUC approach were to be adopted, there would be no Commission discretion; and the moving party would be required to file a complete copy of the data at issue in every case. Because the Commission is in the best position to know what it needs to examine in order to decide a motion for extraordinary protection, the preferred approach, and the one adopted here, is to maintain the existing flexibility.

31. As to data which are subject to a Commission order granting extraordinary confidentiality, Qwest observed that these data are exchanged principally during discovery.[11] Qwest noted that Rule 4 CCR 723-1-1405(b) prohibits the filing of discovery requests and responses except as necessary to support a motion or as an exhibit at hearing. Qwest suggested that the language of Rule 4 CCR 723-1-1100(a)(III) should be consistent with that existing

[10] In adopting the present Rule 4 CCR 723-1-1100(a), the Commission stated that, where appropriate, it would "grant the relief for extraordinary protection requested or craft protection deemed appropriate under the circumstances" presented in each case. Decision No. C05-1093 at ¶ 33. (Although not the final Commission Decision in Docket No. 03R-528ALL, subsequent Decisions did not address Rule 4 CCR 723-1-1100(a) as promulgated in that docket. Decision No. C05-1093 is the final Decision with respect to Rule 4 CCR 723-1-1100(a).) Thus, the Commission makes decisions concerning (a) whether to grant extraordinary protection and (b) the type of extraordinary protection to be granted on a case-by-case basis. The fact that the Commission grants extraordinary protection on a case-by-case basis accords with the WRA/RUC principle that "the decision to afford extraordinary protection to information, and [to] withhold that information from interested parties, should never be routine." WRA/RUC Comments at 2. The Commission does not consider motions for extraordinary protection to be routine and does not treat such motions as routine.

[11] Staff often undertakes audit in a formal proceeding, and the responses to that Staff audit are not filed with the Commission. Thus, unless the context indicates otherwise, reference in this Decision to discovery encompasses discovery and Staff audit.

restriction. Qwest proposed language changes intended to achieve this result, and the other participants agreed with Qwest's proposed changes.

32. The ALJ agrees with Qwest that the language of the rules should be consistent and that Rule 4 CCR 723-1-1100(a)(III) should mirror the Rule 4 CCR 723-1-1405(b) prohibition against filing discovery requests and responses with the Commission. Consistency between and among procedural rules addressing the same subject matter is desirable. In addition, filing with the Commission all highly confidential information exchanged during discovery would impose an undue financial burden on the parties and would impose a large and undue administrative and financial burden on the Commission. It would be impractical, if not impossible, to implement. Finally and importantly, § 40-6-115(a), C.R.S., requires the Commission to certify to a reviewing court the Commission's record in a proceeding under court review. The Commission record includes all documents filed in the proceeding as well as evidence, orders, and decisions. Thus, filing highly confidential data exchanged during discovery would result in those discovery materials being certified to a reviewing court as part of the Commission record, albeit not as evidence used by the Commission in reaching its decision. Certifying such materials as part of the Commission record could create confusion during the judicial review process; this confusion will not arise if the highly confidential information exchanged during discovery are not filed.

33. As adopted by this Decision, Rule 4 CCR 723-1-1100(a)(III) states that a complete copy of data found by the Commission to be highly confidential information will be filed when the information is used to support a motion, is used as an exhibit to prefiled testimony, is prefiled as an exhibit to be offered at hearing, or is offered as an exhibit at hearing.[12] This is the general rule which applies in all proceedings. If a party in a specific proceeding

[12] This treatment is consistent with the treatment of ordinary confidential material.

believes that it is not necessary or is inappropriate to file a complete copy of the information as required by the Rule, then the party may file a motion in that specific proceeding seeking a variance of the rule.

34. Qwest suggested amending Rule 4 CCR 723-1-1100(g) to make it consistent with the changes to Rule 4 CCR 723-1-1100(a)(III). Specifically, Qwest recommended adding language to Rule 4 CCR 723-1-1100(g) to require the annual nondisclosure agreement signed by Commission Staff to state that, for all data for which the Commission orders extraordinary protections, a Commission employee who accesses those data will maintain them in accordance with the provisions of the applicable Decision or Order. No participant opposed this suggestion. The ALJ finds the proposal to be reasonable, finds that the proposal makes the rules internally consistent, and finds that adoption of the proposal is appropriate. Rule 4 CCR 723-1-1100(g) will be amended as suggested.

35. WRA/RUC took the position that extraordinary protection should be reserved for extraordinary circumstances. WRA/RUC also recommended that Rule 4 CCR 723-1-1100(a)(III) state that the party seeking extraordinary protection has the burden of proof to establish that material is highly confidential and that material requires extraordinary protection.

36. The ALJ agrees with WRA/RUC. Under existing practice, extraordinary protection is reserved for extraordinary circumstances because, in order to obtain the highly confidential designation and extraordinary protections, a party must convince the Commission that the information is highly confidential and that ordinary confidentiality is not sufficient. In addition, under existing practice, the burden to sustain a claim that extraordinary protection is needed rests on the party making the claim. *See, e.g.*, Rule 4 CCR 723-1-1500 ("the burden of proof and the burden of going forward on the party that is the proponent of the order").

37. To make these points clear, Rule 4 CCR 723-1-1100(as)(III) will be modified to include a requirement that the moving party establish the following: (a) the information for which extraordinary confidentiality is sought is highly confidential; (b) the protections afforded by the Commission's rule governing ordinary confidentiality provide insufficient protection for the information; and (c) the extraordinary protections proposed by the moving party will afford sufficient protection.

38. WRA/RUC argued that general and broad assertions of confidentiality should not suffice to sustain a claim that extraordinary confidentiality is needed. They recommended that, before affording highly confidential treatment,

> the Commission should require evidence and affidavits from affected persons that demonstrate that the need for ... extraordinary protection[] outweighs the public's need for open processes and the ability to evaluate the basis for agency decisions.

WRA/RUC Comments at 5-6. Public Service objected to this proposal, stating that whether information should be afforded extraordinary confidentiality is a legal question and, therefore, that evidence and affidavits are unnecessary.

39. The ALJ finds, and Public Service agreed during the hearing, that there may be instances in which the Commission may need evidence (*e.g.*, affidavits or live testimony) to decide a motion for extraordinary confidentiality. Thus, the ALJ is not persuaded that the question of extraordinary protection is always one of law for which no evidence is needed.

40. Adopting the WRA/RUC recommendation on this issue, however, would require an affidavit to be filed, or other evidence to be provided, with every motion for extraordinary confidentiality. The ALJ finds this approach to be overly prescriptive, finds that adopting the proposal could impose undue cost on the moving party and the Commission, and finds that a party opposing a motion for extraordinary protection may address the lack of sufficient

evidentiary support for factual assertions made in the motion when it responds to such a motion. The Commission needs to retain its flexibility to hear evidence when the Commission deems it necessary in order to decide a motion for extraordinary protection and to dispense with evidence when the Commission deems evidence to be unnecessary. If the Commission needs evidence, the Commission will ask the moving party to provide the requisite evidence.[13] The Rule will not be amended to incorporate the WRA/RUC recommendation that evidence must be presented in every instance.[14]

41. Finally, WRA/RUC proposed that Rule 4 CCR 723-1-1100(a) contain the standards to be used to determine whether to grant extraordinary confidentiality. They suggested these standards:

> 1) that the information has not otherwise been publicly released;
>
> 2) that release of the information would cause substantial, specific, economic harm;
>
> 3) the period of time for which the information must remain confidential to avoid exposure to economic harm;
>
> 4) in the case of rejected bid offers, why those particular offers are of significant commercial value in the marketplace; and that public disclosure of rejected bids would cause a less efficient market and higher prices rather than lower prices; and
>
> 5) if extraordinary protection is sought, why the ordinary confidentiality protections afforded by Commission rules would result in specific, significant, economic harm that outweighs the public's interest in being able to meaningfully participate in Commission proceedings affecting their interests and, if protection from disclosure to all parties other than Staff and the OCC is sought, why preventing disclosure to

[13] This does not conflict with the added requirement that a moving party establish (a) the information for which extraordinary confidentiality is sought is highly confidential; (b) the protections afforded by the Commission's rule governing ordinary confidentiality provide insufficient protection for the information; and (c) the proposed extraordinary protections will afford sufficient protections. In some circumstances, the ALJ believes it possible that one could establish these points without an affidavit or live testimony.

[14] Although an affidavit is not required to be filed, a moving party may choose to provide a supporting affidavit with the motion if, in the movant's opinion, providing an affidavit will assist in the resolution of the motion.

> parties without a commercial interest in the information is in the public interest.

WRA/RUC Comments at 6; *see also* attachment to WRA/RUC Comments (proposed changes to Rule 4 CCR 723-1-1100(a)). WRA/RUC proposed these standards based on current legal standards governing confidentiality.

42. Public Service opposed the WRA/RUC proposal. It argued that the proposed standards are not grounded in Colorado law and that the Commission can apply, and should apply, Colorado law without writing it into the Rule.

43. The ALJ agrees with Public Service that the standards should not be written into the Rule. First, if the standards are not set out in the Rule, the Commission can consider Colorado law as it evolves and changes over time.[15] Second, if the standards were set out in the Rule and if relevant Colorado law should change, then the Commission would need to conduct a rulemaking to conform the Rule to the law. If the standards are not stated in the Rule, then the Commission avoids this complication. Third, if the requested standards were adopted, then the Commission might be precluded from applying a standard or considering a factor other than, or in addition to, those contained in the Rule. This could unreasonably circumscribe the Commission's ability to consider all factors or standards relevant to a particular case. As a general matter, absent good reason demonstrated in the rulemaking record, a rule of procedure should not prevent or hamper full exploration of issues brought to the Commission for decision. The record of this rulemaking contains no persuasive reason which supports the addition of the WRA/RUC-suggested, potentially restrictive standards to Rule 4 CCR 723-1-1100(a). Fourth

[15] Applicable Colorado law may be drawn from a number of sources (*e.g.*, the Colorado Rules of Civil Procedure, the Colorado Open Records Act, the Trade Secrets Act, the Commission's enabling legislation). In addition, Commission decisions may provide guidance.

and finally, Rule 4 CCR 723-1-1100(a)(III) will be modified to require a moving party to establish (a) the information for which extraordinary confidentiality is sought is highly confidential; (b) the protections afforded by the Commission's rule governing ordinary confidentiality provide insufficient protection for the information; and (c) the extraordinary protections proposed by the movant will afford sufficient protection. This addition should satisfy, to some degree, the WRA/RUC request for explicit standards. For these reasons, the specific standards proposed by WRA/RUC will not be included in the Rule.[16]

2. Rule 4 CCR 723-1-1100(c)(III).

44. No one commented on the proposed change to Rule 4 CCR 723-1-1100(c)(III). This change is a simple clarification to conform the Rule's language with that of other subsections of Rule 4 CCR 723-1-1100(c). The Rule change will be adopted as proposed. In addition, there are changes to clarify that the Rule applies to all filings made with the Commission.

45. The language of Rule 4 CCR 723-1-1100(a)(III), of Rule 4 CCR 723-1-1100(c)(III), and of Rule 4 CCR 723-1-1100(g), as set out in Appendix A and Appendix B of this Decision, reflects this discussion.

B. Rule pertaining to intervention: Rule 4 CCR 723-1-1401(a).

46. The Commission proposed to add the following sentence at the end of Rule 4 CCR 723-1-1401(a):

> The Commission may consider any application or petition without a hearing if no notice of intervention as of right or motion to permissively intervene requests a hearing or contests or opposes the application or petition.

[16] The ALJ does not address, and takes no position on, the issue of whether the standards proposed by WRA/RUC are consistent with Colorado law.

Decision No. C07-0737 at Attachment A at 4.

47. The proposed language contains two preconditions, both of which must be met, for the Commission to consider an application or petition without a hearing: first, no intervention or request to intervene contains a request for a hearing; and, second, no intervention or request to intervene contests or opposes the application or petition. The principal purposes of the proposed amendment are: (a) inform one who intervenes and one who seeks to intervene of the need to include an explicit request for a hearing in the intervention filing; and (b) alert one who intervenes and one who seeks to intervene to the consequences of failing to include such a in the intervention filing.

48. If adopted, the proposed change will make the language of Rule 4 CCR 723-1-1401(a) consistent with, and parallel to, the language of existing Rule 4 CCR 723-1-1403, which provides in pertinent part:

> (a) The Commission may, without a hearing and without further notice, ... determine any application or petition which is uncontested or unopposed, *if a hearing is not requested or required by law* and the application or petition is accompanied by a sworn statement verifying sufficient facts and supported by attachments and/or exhibits that adequately support the filing. ...
>
> (b) A proceeding will not be considered to be contested or opposed, [sic] unless an intervention has been filed that contains a clear statement specifying the grounds therefore.

(Emphasis supplied.) This language has been unchanged since Rule 4 CCR 723-1-1403 became effective on April 1, 2006.

49. The requirement that an intervenor of right or a person seeking to intervene permissively in an uncontested and unopposed application or petition docket must request a hearing in order to have a hearing is not new. It has been in the Rules of Practice and Procedure since at least 1987. *See* Rule 4 CCR 723-1-24(a) (repealed effective April 1, 2007) ("For any

matter that is noncontested and unopposed under § 40-6-109(5), C.R.S., and [in which] a hearing is not requested, the matter may be determined by the Commission under its modified procedure as outlined in Rule [4 CCR 723-1-]4(b)(9) without a hearing and without further notice.").

50. Similarly, the requirement that an intervention specify its grounds or bases is not new. This too has been in the Rules of Practice and Procedure since at least 1987. *See* Rule 4 CCR 723-1-24(a)(1) (repealed effective April 1, 2007) ("An intervention will not be deemed to be a contest or opposition to a proceeding unless a statement specifying the grounds for the contest or opposition is included with the entry of appearance and notice of intervention or petition to intervene filed pursuant to Rule [4 CCR 723-1-]64.").

51. Rule 4 CCR 723-1-1403(a) and the proposed addition to Rule 4 CCR 723-1-1401(a) are based on, and are consistent with, § 40-6-109(5), C.R.S., which provides:

> The commission may by general rule or regulation provide for the taking of evidence in uncontested or unopposed proceedings by affidavit or otherwise, without the necessity of a formal oral hearing. Such shortened or informal proceedings shall otherwise be subject to all of the provisions of [title 40, C.R.S.] *Upon its own motion the commission may[,] and upon request of a party timely made the commission shall[,] assign any such uncontested or unopposed proceeding for hearing.*

Emphasis supplied.

52. With this background, the ALJ turns to the comments.

53. AT&T, Boulder, OCC, Public Service, Qwest, and WRA/RUC commented concerning the proposed change to Rule 4 CCR 723-1-1401(a).

54. WRA/RUC argue that intervenors should not be required

> to state their specific interest and specifically request a hearing. Often, the need for a hearing may not be established until some discovery is conducted. The presumption should be in favor of Commission hearings.

WRA/RUC Comments at 6. In Attachment A to their Comments, WRA/RUC propose language for Rule 4 CCR 723-1-1401(a) which is consistent with their position.

55. WRA/RUC's proposed language will not be adopted. First, WRA/RUC provide virtually no argument in support for their position. Second, as discussed above, these requirements are consistent with the statute and have been in the Rules of Practice and Procedure for at least 20 years. WRA/RUC neither provide instances in which they have been harmed by the requirements nor explain why the current practice, which appears to have worked well, is unsatisfactory and should be changed. Third, adopting the language change proposed by WRA/RUC for Rule 4 CCR 723-1-1401(a) would create a conflict between that Rule and Rule 4 CCR 723-1-1403(a). One aim of this rulemaking is to make the procedural rules consistent, not to create inconsistencies.

56. Boulder opposes the proposed change to Rule 4 CCR 723-1-1401(a) because "the public benefits derived from the presentation of a prima facie case before a magistrate outweigh any administrative convenience that may result from doing away with such hearings." Boulder Comments at ¶ 2.

57. The ALJ agrees -- and is of the opinion that the Commission agrees -- with Boulder that "public hearings themselves and the web casting of these hearings create a positive, open environment for decisions impacting rate payers, and should be continued." *Id.* Nonetheless, the ALJ will not adopt Boulder's suggestion that a hearing be held in every instance.

58. First, it appears that Boulder sees the proposal as a departure from the Commission's current practice. This is not the case. The proposal simply conforms Rule 4 CCR 723-1-1401(a) with Rule 4 CCR 723-1-1403 and provides information to intervenors of right and

to those who seek permission to intervene. The proposed language effects no change in the Commission's current practice.

59. Second, the ALJ agrees with AT&T and OCC that the proposed modification is consistent with, and implements, § 40-6-109(5), C.R.S. That statute provides that, if no party requests a hearing and if a hearing is not required by law, the Commission has the discretion to consider an unopposed and uncontested application or petition without a hearing. Adoption of Boulder's suggestion that the rule require a hearing in every application or petition docket would restrict the Commission's discretion inappropriately.

60. Third, the ALJ finds persuasive Qwest's argument that the Commission's public deliberations on each matter before it are sufficient to assure that the public debate advocated by Boulder will occur.

61. Fourth, the ALJ agrees with Public Service that practical considerations argue against adoption of Boulder's position. Holding a hearing on every uncontested, unopposed application or petition, even if no one requests a hearing and a hearing is not required by law, would impose a needless expense on, and would result in delay for, the applicant or petitioner and would be a wasteful and inefficient use of limited Commission resources.

62. Fifth and finally, the ALJ finds that adopting Boulder's suggested language would create an inconsistency between Rule 4 CCR 723-1-1403(a) and Rule 4 CCR 723-1-1401(a). The better approach is to continue the current practice: leave the matter to the Commission's discretion, as both the statute and Rule 4 CCR 723-1-1403(a) allow.

63. The OCC suggests two changes to Rule 4 CCR 723-1-1401(a): (a) clarify that the party requesting a hearing must do so in its intervention filing (whether a notice of intervention by right or a motion for leave to intervene) and (b) clarify that, if a party makes a request for a

hearing, the Commission must set the matter for hearing. OCC Comments at ¶ 5. OCC argues that these proposals are consistent with applicable law and are necessary to protect the due process rights of the parties.

64. No one disagrees with OCC's suggestion that the request for hearing must be made in the intervention filing. In the ALJ's experience, that is the current, albeit informal, practice before the Commission. Accordingly, Rule 4 CCR 723-1-1401(a) will be amended to clarify that a request for hearing must be made explicitly in the intervention filing.

65. Public Service opposes OCC's proposal that a hearing must be held if requested by a party. Relying on Rule 4 CCR 723-1-1403, Public Service argues that an intervenor must establish "that there is a real contested issue that requires an evidentiary hearing for resolution" (Public Service Comments at 2) as a precondition to the Commission's ordering a hearing. Even if the Commission orders a hearing, Public Service argues that the hearing need not be evidentiary and that the Commission may conduct the type of hearing which, in the Commission's exercise of its discretion, is appropriate for the issue or issues to be decided.

66. Rule 4 CCR 723-1-1401(a) addresses intervention. One may intervene in a manner which causes the application or petition to be contested or opposed. *See also* Rule 4 CCR 723-1-1403(b) (quoted *supra*). One may elect to intervene in a manner that leaves the application or petition uncontested and unopposed.[17] The proposed change to Rule 4 CCR 723-1-1401(a), if adopted, would apply only to unopposed and uncontested application or petition proceedings where a hearing is not required by law.

[17] For example, one may intervene to monitor a proceeding or may intervene but take no position on the application or petition.

67. Section 40-6-109(5), C.R.S., provides in relevant part: "Upon ... *request of a party* timely made *the commission shall assign any ... uncontested or unopposed proceeding for hearing*."[18] (Emphasis supplied.) Rule 4 CCR 723-1-1403(a) provides in pertinent part: "The Commission may, without a hearing and without further notice, ... [decide] any application or petition which is uncontested or unopposed, *if a hearing is not requested or required by law*[.]" (Emphasis supplied.) To make Rule 4 CCR 723-1-1401(a) fully consistent with the statute and with the other rules, OCC's suggestion that a hearing must be held if requested by a party will be adopted for uncontested and unopposed applications or petitions.

68. To say that the Commission will conduct a hearing is not to say that the Commission will hold a full-blown evidentiary hearing in every instance. The Commission has the discretion to determine, on a case-by-case basis, the form of hearing best suited to provide due process to the parties in the particular unopposed and uncontested application or petition proceeding pending before it. Decision No. C07-0809 at ¶¶ 12-19 and authorities cited there.

69. To the extent OCC seeks to amend Rule 4 CCR 723-1-1401(a) to require the Commission to hold a hearing in a *contested or opposed* application or petition if a party requests a hearing, the proposal will not be adopted. First, neither statute nor judicial decision nor Commission decision requires the Commission to hold a hearing in every contested or opposed application or petition.[19] Decision No. C07-0809 at ¶¶ 14-17. Second, Public Service's argument that the Commission must retain the flexibility and discretion necessary to determine, on a case-by-case basis, the process or procedure best suited to each contested or opposed matter is

[18] For uncontested and unopposed applications and petitions, this statutory language precludes adoption of Public Service's recommendation that a party must establish the existence of a contested issue before the Commission conduct hold a hearing.

[19] OCC offers no persuasive Colorado authority which supports its position.

persuasive. Mandating that the Commission hold an evidentiary hearing in every contested or opposed application or petition would restrict unreasonably the Commission's discretion. The ALJ finds that this would be an ill-advised policy and a counter-intuitive result. The better practice is to continue the Commission's current case-by-case approach with respect to deciding whether to hold a hearing in contested or opposed applications and petitions.[20]

70. The language of Rule 4 CCR 723-1-1401(a), as set out in Appendix A and Appendix B of this Decision, reflects this discussion.

C. General findings regarding the rules as adopted.

71. The Commission has the necessary and proper authority to issue the rules attached to this Decision as Appendix A and Appendix B.

72. The rules attached to this Decision as Appendix A and Appendix B are consistent with the subject matter of this proceeding as set out in the Notice of Proposed Rulemaking (*i.e.*, Decision No. C07-0737) which initiated this docket.

73. The rules attached to this Decision as Appendix A and Appendix B adopt the rules as noticed (*i.e.*, Decision No. C07-0737 at Attachment A) with changes based on comments, with changes made for consistency with existing rules, with grammatical changes, and with changes made for clarity.

74. The record of this rulemaking proceeding demonstrates the need for the rules attached to this Decision as Appendix A and Appendix B.

[20] If the Commission decides (either on its own motion or at the request of a party) to hold a hearing in a contested or opposed application or petition proceeding, then the Commission will determine the form of hearing (*e.g.*, full-blown evidentiary hearing, hearing only on specific issues, oral argument only, written submissions only) best suited to the particular case. The Commission will make these hearing-related determinations in accordance with due process. *See, e.g.*, Decision No. C07-0809 at ¶¶ 14-17 and authorities cited there (discussion of due process principles applicable in administrative proceedings).

75. The rules attached to this Decision as Appendix A and Appendix B are reasonable and will provide guidance to, and guidelines for, jurisdictional public utilities, customers of those utilities, and others who appear or who wish to appear in formal proceedings before the Commission.

76. The rules attached to this Decision as Appendix A and Appendix B are clearly and simply stated, and their meaning can be understood by any person required to comply with them.

77. The rules attached to this Decision as Appendix A and Appendix B do not conflict with any other provision of law and do not duplicate or overlap other rules.

III. CONCLUSIONS

78. The rules attached to this Decision as Appendix A and Appendix B are necessary.

79. The rules attached to this Decision as Appendix A and Appendix B meet the statutory requirements.

80. The rules attached to this Decision as Appendix A and Appendix B should be adopted in their entirety.

81. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. The Rules which are contained in Appendix A and Appendix B to this Order are adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

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COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 *CODE OF COLORADO REGULATIONS* (CCR) 723-1

PART 1
RULES OF PRACTICE AND PROCEDURE

BASIS, PURPOSE, AND STATUTORY AUTHORITY.

The basis and purpose of these rules is to advise the public, regulated entities, attorneys, and any other person of the Commission's rules of practice and procedure. These rules of practice and procedure are promulgated in order to properly administer and enforce the provisions of Title 40 of the Colorado Revised Statutes and in order to regulate proceedings before the Commission.

The statutory authority for these rules is found in §§ 40-2-108, 40-6-101(1), 40-6-108(2), 40-6-109(5), 40-6-109.5, and 40-6-114(1), C.R.S.

* * *

[signifies omission of unaffected rules]

STANDARDS OF CONDUCT

1100. Confidentiality

These rules apply to all persons filing information with, or seeking information from, the Commission. They also apply to the Commission, the Director, or a presiding officer to the extent they govern the Commission's responses to claims of confidentiality in a formal docket, requests to restrict public inspection of information outside of a formal docket, or requests for information under the Public Records Law.

(a) All documents, data, information, studies, computer programs, and other matters filed with the Commission in any form in a proceeding, or produced in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery, or produced in response to audit conducted by the Commission or its Staff, and all notes taken or copies made thereof, that are claimed to be a trade secret or confidential in nature (herein referred to as "confidential information") shall be furnished under the terms of this rule. All persons accorded access to such confidential information~~,~~ shall treat such information as constituting trade secret or confidential information and shall neither use nor disclose such information except for the purpose of the proceeding in which such information is obtained and in accordance with this rule.

(I) A claim of confidentiality constitutes a representation to the Commission that the claiming party has a reasonable and good faith belief that the subject document or information is, in fact, confidential under applicable law, including §§ 24-72-201 et~~.~~ seq., C.R.S. If a claim of confidentiality is made in violation of this subparagraph (I), the Commission may impose an appropriate sanction upon the claiming party, including an order to pay to other parties the amount of reasonable expenses incurred because of the claim of confidentiality, including ~~a~~ reasonable attorney's fee~~s~~.

(II) The Commission's acceptance of information pursuant to a claim of confidentiality is not, and shall not be construed to be, an agreement or a ruling by the Commission that the subject information is, in fact, confidential.

(III) ~~To the extent there may be information which~~If a party believes that information requires extraordinary protection beyond that provided for in these rules, then the party shall submit a motion seeking such extraordinary protection. The motion shall include a description and/or representative sample of the information for which extraordinary protection is sought, ~~and~~ shall state the specific relief requested and the grounds for seeking the relief~~, the specific relief requested~~, and shall advise all other parties of the request and the subject matter of the material at issue. The motion shall include a showing that the information for which extraordinary protection is sought is highly confidential; that the protection afforded by the Commission's rules governing confidentiality provide insufficient protection for the highly confidential information; and that, if adopted, the extraordinary protections proposed by the movant will afford sufficient protection for the highly confidential information. The motion shall ~~also~~ be accompanied by the specific form of nondisclosure agreement requested by the party. ~~Notwithstanding anything to the contrary in subparagraphs (c)(II) and (III) of this rule, the party shall file only an original and one copy of the description and/or representative sample of the information for which extraordinary protection is sought.~~ The party seeking extraordinary protection for information shall comply with rule 1204(a) in filing the motion. Prior to deciding the motion and as it deems necessary, the Commission may enter an order requiring the filing of additional information, including the filing of a complete version of the information for which extraordinary protection is sought. The party seeking extraordinary protection for information shall bear the burden of proof to establish the need for extraordinary protection. The Commission will consider *in camera* ~~The Commission will evaluate~~ the motion and, as applicable, the description of the information, the ~~and/or~~ representative sample of the information, or the complete information ~~*in camera*~~. After considering the motion and the circumstances, ~~The~~the Commission may enter an order granting the motion and ordering the extraordinary protection which the Commission, in the exercise of its discretion, deems appropriate; may enter an order denying the motion; or may enter any other appropriate order. Information which is subject to extraordinary protection and which is provided in response to discovery or in response to Staff audit shall not be filed with the Commission. Unless the Commission orders otherwise, a complete version of the document which contains the information which is subject to extraordinary protection shall be filed with the Commission as soon as any one of the following conditions applies: (A) the information is used to support a motion, (B) the information is filed as an exhibit to prefiled testimony, (C) the information is prefiled as an exhibit to be offered at hearing, or (D) the information is offered as an exhibit at hearing. Unless the Commission orders otherwise, an original and~~either requiring additional information, or disposing of the motion and requiring the party to file a complete version and an appropriate number of copies of the information~~

~~for which extraordinary protection is sought (the default number of copies is~~ seven~~)~~ copies of the complete version of the document which contains the information which is subject to extraordinary protection shall be filed. The information shall be filed in accordance with the procedures established in paragraph (c) of this rule. ~~In ordering the number of copies to be filed, the Commission will consider the needs of its commissioners, administrative law judges, and trial, advisory, and administrative staff.~~ Unless otherwise ordered by the Commission, its ~~s~~Staff shall have access to all information filed under this subparagraph (III) by virtue of the annual nondisclosure agreement executed under paragraph (g) of this rule.

* * *

[signifies omission of unaffected rules]

(c) Procedure for filing.

(I) A party submitting to the Commission information claimed to be confidential ~~to the Commission~~ shall file, as part of the public record (*i.e.*, not under seal), the required number of copies of its ~~testimony and/or exhibits~~filing, according to the Commission's Rules of Practice and Procedure and without including the information claimed to be confidential. The first page of each of these copies shall be ~~stamped~~ labeled: "NOTICE ~~of~~OF CONFIDENTIALITY: A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL." ~~A~~The cover page ~~on~~ of each copy of the document filed in the public record shall ~~include a~~ list ~~of the~~each document~~s~~ filed under seal, shall list each page number of each document on which confidential material is found, and shall indicate the nature of the documents which are filed under seal~~, so that if the documents are separated from the envelope it will still be clear that they are claimed to be confidential~~. ~~Otherwise, p~~Parties shall make only general references to information claimed to be confidential in their testimony and exhibits, in other filings, and in oral presentations.

(II) In addition to the copies available for public inspection, the filing party shall file under seal an original and seven copies of the information claimed to be confidential. All pages and copies of the information claimed to be confidential shall be clearly marked as "confidential" and shall be filed on microfilmable paper (*i.e.*, pastel or white~~,~~ and not ~~on~~ dark colored paper such as goldenrod). The documents containing information claimed to be confidential shall be clearly marked so that, should the documents be separated from the envelope, it is clear that the documents are claimed to be confidential.

(III) The ~~eight~~ original and seven copies filed under seal shall be submitted in separate, sealed envelopes numbered serially. Unless the Commission orders otherwise, the envelopes shall be no smaller than 9" by 12"~~,~~ and no larger than 10" by 13". The following information shall be written on the outside of each sealed envelope:

(A) the caption and docket number of the associated proceeding and the notation "CONFIDENTIAL -- SUBMITTED IN DOCKET NO. _____"

(B) the name of the filing party;

(C) the date of filing;

(D) a description of the information (*e.g.*, testimony or exhibits of _____ (name of witness), statement of position, motion);

(E) the filing party's statement as to whether it prefers to retrieve the information following conclusion of Commission proceedings and any related court actions, or it prefers to have whether the Commission should destroy the information by shredding following conclusion of Commission proceedings and any related court actions; and

(F) if the party chooses to retrieve the information, in accordance with the statement contained in subparagraph (III)(E), the name and phone number of the person who will retrieve such information.

* * *

[signifies omission of unaffected rules]

(g) No access to information under seal shall be allowed until the person, who is either a party or an authorized agent of a party, and who is seeking such access, signs a nondisclosure agreement on a form approved by the Commission. The Nnondisclosure Aagreement form shall require the persons to whom disclosure is to be made (the signatory) to certify in writing that theythe signatory hasve read the protective provisions contained in rules 1100 - 1102 and agrees to be bound by the terms of suchthose provisions. The agreement shall contain (1) a listing of the caption and associated docket number of the associated docket; (2) the signatory's full name, title, employer or firm, and business address; (3) the name of the party with whom the signatory is associated; (4) athe signatory's signature and the date of execution of the nondisclosure agreement; and (5) with the exception of Staff, the signature of the associated party's counsel. The agreement shall be delivered to counsel for the filing party and shall be filed withto the Commission at or before the time of review of the documents. Notwithstanding anything in this rule to the contrary, each member of Commission sStaff need only sign one nondisclosure agreement annually. The annual nondisclosure agreement which each Staff member executes shall include a provision which requires Staff to maintain and to treat information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule in accordance with the order granting extraordinary protection. Signing such an annual nondisclosure agreement shall permit sa Staff member to have access to all confidential material filed with or provided to the Commission and to have access to all information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule. The Commission shall maintain in its files the annual nondisclosure agreements signed by sStaff and shall make such agreements available for public inspection. All persons, including Staff, who are afforded access to any information under seal shall take all reasonable precautions to keep the confidential information secure in accordance with the purpose and intent of this rule. All persons, including Staff, who are afforded access to information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule shall maintain and shall treat that information in accordance with the protections specified in the order.

* * *

[signifies omission of unaffected rules]

PRE-HEARING PROCEDURE

* * *

[signifies omission of unaffected rules]

1401. Intervention.

(a) Except as provided by paragraph (d) of this rule, any person may file a notice of intervention as of right or a motion to ~~permissively~~ intervene by permission within 30 days of notice of any docketed proceeding, unless the Commission's notice or a specific rule or statute provides otherwise. The Commission shall not enter a final decision in any docketed proceeding before the intervention period has expired. The Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements. The Commission may consider any application or petition without a hearing if these three conditions are met: (1) no notice of intervention as of right ~~or~~and no motion to ~~permissively~~ intervene by permission requests a hearing; ~~or~~ (2) no notice of intervention as of right and no motion to intervene by permission contests or opposes the application or petition; and (3) a hearing is not required by law. To be effective, the request for hearing must be stated explicitly in the body of the notice of intervention as of right or in the body of the motion to intervene by permission.

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[signifies omission of unaffected rules]

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COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 *CODE OF COLORADO REGULATIONS* (CCR) 723-1

PART 1
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The statutory authority for these rules is found in §§ 40-2-108, 40-6-101(1), 40-6-108(2), 40-6-109(5), 40-6-109.5, and 40-6-114(1), C.R.S.

* * *

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(a) All documents, data, information, studies, computer programs, and other matters filed with the Commission in any form in a proceeding, or produced in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery, or produced in response to audit conducted by the Commission or its Staff, and all notes taken or copies made thereof, that are claimed to be a trade secret or confidential in nature (herein referred to as "confidential information") shall be furnished under the terms of this rule. All persons accorded access to such confidential information shall treat such information as constituting trade secret or confidential information and shall neither use nor disclose such information except for the purpose of the proceeding in which such information is obtained and in accordance with this rule.

(I) A claim of confidentiality constitutes a representation to the Commission that the claiming party has a reasonable and good faith belief that the subject document or information is, in fact, confidential under applicable law, including §§ 24-72-201 et seq., C.R.S. If a claim of confidentiality is made in violation of this subparagraph (I), the Commission may impose an appropriate sanction upon the claiming party, including an order to pay to other parties the amount of reasonable expenses incurred because of the claim of confidentiality, including reasonable attorney's fees.

(II) The Commission's acceptance of information pursuant to a claim of confidentiality is not, and shall not be construed to be, an agreement or a ruling by the Commission that the subject information is, in fact, confidential.

(III) If a party believes that information requires extraordinary protection beyond that provided for in these rules, then the party shall submit a motion seeking such extraordinary protection. The motion shall include a description and/or representative sample of the information for which extraordinary protection is sought, shall state the specific relief requested and the grounds for seeking the relief, and shall advise all other parties of the request and the subject matter of the material at issue. The motion shall include a showing that the information for which extraordinary protection is sought is highly confidential; that the protection afforded by the Commission's rules governing confidentiality provide insufficient protection for the highly confidential information; and that, if adopted, the extraordinary protections proposed by the movant will afford sufficient protection for the highly confidential information. The motion shall be accompanied by the specific form of nondisclosure agreement requested by the party. The party seeking extraordinary protection for information shall comply with rule 1204(a) in filing the motion. Prior to deciding the motion and as it deems necessary, the Commission may enter an order requiring the filing of additional information, including the filing of a complete version of the information for which extraordinary protection is sought. The party seeking extraordinary protection for information shall bear the burden of proof to establish the need for extraordinary protection. The Commission will consider *in camera* the motion and, as applicable, the description of the information, the representative sample of the information, or the complete information. After considering the motion and the circumstances, the Commission may enter an order granting the motion and ordering the extraordinary protection which the Commission, in the exercise of its discretion, deems appropriate; may enter an order denying the motion; or may enter any other appropriate order. Information which is subject to extraordinary protection and which is provided in response to discovery or in response to Staff audit shall not be filed with the Commission. Unless the Commission orders otherwise, a complete version of the document which contains the information which is subject to extraordinary protection shall be filed with the Commission as soon as any one of the following conditions applies: (A) the information is used to support a motion, (B) the information is filed as an exhibit to prefiled testimony, (C) the information is prefiled as an exhibit to be offered at hearing, or (D) the information is offered as an exhibit at hearing. Unless the Commission orders otherwise, an original and seven copies of the complete version of the document which contains the information which is subject to extraordinary protection shall be filed. The information shall be filed in accordance with the procedures established in paragraph (c) of this rule. Unless otherwise ordered by the Commission, its Staff shall have access to all information filed under this subparagraph (III) by virtue of the annual nondisclosure agreement executed under paragraph (g) of this rule.

* * *

[signifies omission of unaffected rules]

(c) Procedure for filing.

(I) A party submitting to the Commission information claimed to be confidential shall file, as part of the public record (*i.e.*, not under seal), the required number of copies of its filing, according to the Commission's Rules of Practice and Procedure and without including the information claimed to be confidential. The first page of each of these copies shall be labeled: "NOTICE OF CONFIDENTIALITY: A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL." The cover page of each copy of the document filed in the public record shall list each document filed under seal, shall list each page number of each document on which confidential material is found, and shall indicate the nature of the documents which are filed under seal. Parties shall make only general references to information claimed to be confidential in their testimony and exhibits, in other filings, and in oral presentations.

(II) In addition to the copies available for public inspection, the filing party shall file under seal an original and seven copies of the information claimed to be confidential. All pages and copies of the information claimed to be confidential shall be clearly marked as "confidential" and shall be filed on microfilmable paper (*i.e.*, pastel or white and not dark colored paper such as goldenrod). The documents containing information claimed to be confidential shall be clearly marked so that, should the documents be separated from the envelope, it is clear that the documents are claimed to be confidential.

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(C) the date of filing;

(D) a description of the information (*e.g.*, testimony or exhibits of _____ (name of witness), statement of position, motion);

(E) the filing party's statement as to whether it prefers to retrieve the information following conclusion of Commission proceedings and any related court actions or it prefers to have the Commission destroy the information by shredding following conclusion of Commission proceedings and any related court actions; and

(F) if the party chooses to retrieve the information in accordance with the statement contained in subparagraph (III)(E), the name and phone number of the person who will retrieve such information.

* * *

[signifies omission of unaffected rules]

(g) No access to information under seal shall be allowed until the person, who is either a party or an authorized agent of a party and who is seeking such access, signs a nondisclosure agreement on a form approved by the Commission. The nondisclosure agreement form shall require the person to whom disclosure is to be made (the signatory) to certify in writing that the signatory has read the protective provisions contained in rules 1100 - 1102 and agrees to be bound by the terms of those provisions. The agreement shall contain (1) the caption and docket number of the associated docket; (2) the signatory's full name, title, employer or firm, and business address; (3) the name of the party with whom the signatory is associated; (4) the signatory's signature and the date of execution of the nondisclosure agreement; and (5) with the exception of Staff, the signature of the associated party's counsel. The agreement shall be delivered to counsel for the filing party and shall be filed with the Commission at or before the time of review of the documents. Notwithstanding anything in this rule to the contrary, each member of Commission Staff need only sign one nondisclosure agreement annually. The annual nondisclosure agreement which each Staff member executes shall include a provision which requires Staff to maintain and to treat information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule in accordance with the order granting extraordinary protection. Signing such an annual nondisclosure agreement shall permit a Staff member to have access to all confidential material filed with or provided to the Commission and to have access to all information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule. The Commission shall maintain in its files the annual nondisclosure agreements signed by Staff and shall make such agreements available for public inspection. All persons, including Staff, who are afforded access to any information under seal shall take all reasonable precautions to keep the confidential information secure in accordance with the purpose and intent of this rule. All persons, including Staff, who are afforded access to information to which the Commission has granted extraordinary protection pursuant to subparagraph (a)(III) of this rule shall maintain and shall treat that information in accordance with the protections specified in the order.

* * *

[signifies omission of unaffected rules]

PRE-HEARING PROCEDURE

* * *

[signifies omission of unaffected rules]

1401. Intervention.

(a) Except as provided by paragraph (d) of this rule, any person may file a notice of intervention as of right or a motion to intervene by permission within 30 days of notice of any docketed proceeding, unless the Commission's notice or a specific rule or statute provides otherwise. The Commission shall not enter a final decision in any docketed proceeding before the intervention period has expired. The Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements. The Commission may consider any application or petition without a hearing if these three conditions are met: (1) no notice of intervention as of right and no motion to intervene by permission requests a hearing; (2) no notice of intervention as of right and no motion to intervene by permission contests or opposes the application or petition; and (3) a hearing is not required by law. To be effective, the request for hearing must be stated explicitly in the body of the notice of intervention as of right or in the body of the motion to intervene by permission.

* * *

[signifies omission of unaffected rules]