

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20AL-0049G

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

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
ACKNOWLEDGING INTERVENTION
AS OF RIGHT AND GRANTING MOTION
FOR A PROTECTIVE ORDER AFFORDING
EXTRAORDINARY PROTECTION FOR
HIGHLY CONFIDENTIAL INFORMATION**

Mailed Date: March 17, 2020

TABLE OF CONTENTS

| | |
|--|---|
| I. STATEMENT..... | 1 |
| A. Procedural History..... | 1 |
| B. Interventions as of Right. | 2 |
| C. Motion for a Protective Order Affording Extraordinary Protection..... | 3 |
| II. FINDINGS AND CONCLUSIONS..... | 6 |
| III. ORDER..... | 9 |
| A. It Is Ordered That: | 9 |

I. STATEMENT.

A. Procedural History.

1. On February 5, 2020, Public Service Company of Colorado (Public Service) filed with the Colorado Public Utilities Commission (Commission) Advice Letter No. 961-Gas,

accompanying tariff sheets, and supporting direct testimony and attachments. This filing is a combined Phase I and Phase II natural gas rate proceeding (2020 Gas Rate Case).

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

3. By Decision No. C20-0112 (mailed on February 20, 2020) (Suspension Decision), and pursuant to § 40-6-111(1), C.R.S. (2019), and Rule 1305(c) of the Rules of Practice and Procedure. 4 *Code of Colorado Regulations* (CCR) 723-1, the Commission set for hearing the tariffs filed with Advice Letter No. 961-Gas and thereby suspended their effective date for 120 days from the proposed effective date, or until July 5, 2020. Decision No. C20-0112 established an intervention deadline for 30 days after its mailed date, or no later than March 23, 2020.¹ The Suspension Decision also referred the matter to an Administrative Law Judge (ALJ) to set hearing dates, to rule on interventions, and to establish other procedures by separate decisions. Subsequently, the undersigned ALJ was assigned to preside over this Proceeding.

4. Pursuant to § 40-6-111(1)(b), C.R.S. (2019), Decision No. R20-0145-I (mailed on March 5, 2020), the ALJ suspended the effective date of the tariff sheets filed with Advice Letter No. 961-Gas for an additional 130 days, or for a total of 250 days until November 12, 2020.

B. Interventions as of Right.

5. On February 28, 2020, Trial Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention as of Right by Staff, Entry of Appearance, Notice Pursuant

¹ Since the 30-day deadline for filing interventions, ordered in Decision No. C20-0112, fell on Saturday, March 21, 2020, the deadline was extended by operation of law until the next business day, or until Monday, March 23, 2020. Section 40-6-121, C.R.S.

to Rule 1007(a) and Rule 1401 and Request for Hearing (Staff's Intervention).² Decision No. R20-0145-I acknowledged Staff's Intervention as of right.

6. On March 9, 2020, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention of Right, Entries of Appearance, and Request for Hearings (OCC's Intervention). OCC's Intervention is of right and summarizes its concerns regarding numerous issues it may address in this Proceeding.

7. OCC's Intervention of right is acknowledged. OCC is a Party to this Proceeding.

8. As of the mailed date of this Decision, the Parties to this Proceeding are Public Service, Staff, and OCC.

C. Motion for a Protective Order Affording Extraordinary Protection.

9. On March 10, 2020, Public Service filed a Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Individual Employee Salary and other Compensation-related Information (Motion for Protective Order). After conferral pursuant to Rule 1400(a) of the Rules of Practice and Procedure, 4 CCR 723-1, counsel for Public Service reports that the OCC does not object to the relief requested, while Staff takes no position on the motion.³ Therefore, the Motion for Protective Order is unopposed by the Parties.

10. In the Motion for Protective Order, Public Service seeks extraordinary protection to safeguard the disclosure of highly confidential employee information that would appear in a

² See Rule 1305(d) of the Rules of Practice and Procedure. 4 CCR 723-1; after the Commission issues a suspension decision, "Any person wishing to participate as a party in any hearing the Commission may hold on a suspended tariff ... must file a notice of intervention as of right or motion to permissively intervene as provided in rule 1401." Rule 1401(a), 4 CCR 723-1, states in part: "Except [for Staff] ..., 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 administrative or adjudicatory proceeding, unless the Commission's notice or a specific rule or statute provides otherwise."

³ Motion for Protective Order, at page 1.

pending response to an OCC discovery request. Specifically, Public Service seeks extraordinary protection for highly confidential cash and non-cash compensation for seven employees of Public Service and its affiliate Xcel Energy Services Inc. Because Public Service is in the process of responding to the OCC discovery request, and may receive additional data/discovery requests seeking disclosure of similar employee specific information, Public Service also requests permission to designate any such information as highly confidential (collectively, the Highly Confidential Employee Information), and to limit disclosure of such information, as requested in the Motion for Protective Order. Public Service asserts that all such employee information warrants extraordinary protection from disclosure.⁴

11. Public Service asserts that disclosure of the Highly Confidential Employee Information would expose to public view material non-public information that contains employee-specific salary, bonus, stock awards, and other cash and non-cash compensation-related information. According to Public Service, this employee information is extremely sensitive and has been closely held and maintained within Public Service and its affiliates as highly confidential. Public Service asserts that the Highly Confidential Employee Information is protected by our employees' rights to privacy and deserves extraordinary confidentiality protection.⁵

12. Public Service requests that access to the Highly Confidential Employee Information be limited to the Commissioners, the ALJ presiding over this Proceeding; the Commission's Advisory Staff and advisory attorneys; the Commission's Trial Staff and

⁴ *Id.*, ¶¶ 9 and 10 at page 5. Public Service does not seek extraordinary protection for the compensation information of five employees that has been disclosed in Xcel Energy Inc.'s proxy statement in accordance with Securities and Exchange Commission requirements. *Id.*, Fn. 1 at page 1.

⁵ Motion for Protective Order, ¶¶ 3, 6, and 9 at pages 3 – 5.

attorneys for Trial Staff; and the OCC personnel and attorneys for the OCC assigned to work on this Proceeding.⁶

13. Public Service claims that the Commission rules governing confidential information would provide insufficient protection for the Highly Confidential Employee Information. By protecting the Highly Confidential Employee Information from disclosure as requested in the Motion for Protective Order, Public Service hopes the Commission will prohibit public dissemination of this sensitive employee salary and other compensation-related information that Public Service has always held to be highly confidential.⁷

14. Rule 1101(b) of the Rules of Practice and Procedure, 4 CCR 723-1, regarding confidentiality, sets forth the requirements for motions for protective orders seeking extraordinary protection for highly confidential information.⁸ As required by Rule 1101(b)(VI), attached to the Motion for Protective Order (as Attachment C) is the affidavit of Brooke A. Trammell, which attests to the Highly Confidential Employee Information for which extraordinary protection is being sought and provides a list of the groups of employees who have access to the Highly Confidential Employee Information. Ms. Trammell's affidavit confirms that within these groups, access to the Highly Confidential Employee Information is limited to only those employees who have a compelling need to know the Highly Confidential Employee Information.

15. Rule 1101(b)(VII) requires that Public Service file the Highly Confidential Employee Information as an exhibit prepared in a form that comports with Rule 1101(a), unless

⁶ *Id.*, ¶ 12 at pages 5 and 6.

⁷ *Id.*, ¶ 11 at page 5.

⁸ Public Service accurately summarizes those requirements in ¶¶ 14-17 on pages 6 and 7 of the Motion for Protective Order.

the subject information would be overly burdensome, impractical, or too sensitive for disclosure. However, Rule 1101(e) provides that “[i]nformation which is subject to highly confidential protection and that is provided in response to discovery or in response to Commission staff audit shall not be filed with the Commission.” Since the Highly Confidential Employee Information would be provided in response to a discovery request, Public Service did not provide it with the filing of the Motion for Protective Order.

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

II. FINDINGS AND CONCLUSIONS.

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

18. The right to privacy, alternatively referred to as the “right to confidentiality,” protects “the individual interest in avoiding disclosure of personal matters,” and as well encompasses the “power to control what we shall reveal about our intimate selves, to whom, and for what purpose.”⁹ When the right to privacy or confidentiality is invoked to prevent the discovery of an individual’s confidential personal materials, financial information, personnel files, or tax returns, the Colorado Supreme Court has adopted the following balancing test: the

⁹ *Corbetta v. Albertson’s, Inc.*, 975 P.2d 718, 720-721 (Colo. 1999); *Stone v. State Farm Mutual Auto. Ins. Co.*, 185 P.3d 150, 155-157 (Colo. 2008). (Internal Citations Omitted)

court (or ALJ in administrative litigation) must find that the confidential information sought is relevant to the subject action and that there is a compelling need for the confidential information because the information sought is not otherwise readily obtainable.¹⁰ The Highly Confidential Employee Information sought by the OCC in discovery, and which may be sought by other parties in the future, is entitled to the same protections of privacy and confidentiality. While the Colorado case law has focused on discovery disputes over the disclosure of individual confidential information, the principles and balancing test adopted by the Colorado Supreme Court are worthy of application to the protection of highly confidential information that is subject to a Motion for Protective Order.

19. For purposes of deciding the Motion for Protective Order, the ALJ has considered the Highly Confidential Employee Information for which Public Service seeks extraordinary protection and has considered the principles adopted by the Colorado Supreme Court for protecting individual private and confidential information. It is not necessary, in deciding the Motion for Protective Order, for the ALJ to determine (and appear to prejudge) whether OCC's (or other) discovery requests for specific Highly Confidential Employee Information is relevant to this rate case and that there is a compelling need for such individual employee information that is not otherwise readily obtainable. Those determinations await if there are future disputes over discovery of any Highly Confidential Employee Information

¹⁰ *Stone v. State Farm Mutual Auto. Ins. Co.*, 185 P.3d at 159. The burden lies on the party seeking discovery to show relevancy and to demonstrate a compelling need for the specific information contained within the discovery request. In responding, the party opposing discovery can point to other available sources from which the information can readily be obtained. If the court determines that a compelling need for the confidential information exists, the court should focus on the specific information that the requesting party is actually seeking and should limit the permitted discovery to the necessary materials, as opposed to ordering blanket discovery of documents. Disclosure should be at most no broader than what the requesting party seeks. *Id.*

20. The ALJ will grant Public Service's Motion for Protective Order. The relief requested in the Motion for Protective Order strikes a reasonable balance between the need for disclosure of information in this Proceeding and the need to protect the interests of Public Service and its employees. The information of Public Service and its affiliates described as the Highly Confidential Employee Information in the Motion for Protective Order is extremely sensitive and is highly confidential. The Highly Confidential Employee Information is protected by Public Service's employees' rights to privacy and deserves extraordinary confidentiality protection.

21. The ALJ finds that the following is deemed to be Highly Confidential Employee Information in this Proceeding: (1) documents or information containing employee-specific salary, bonus, stock awards, and other cash and non-cash compensation-related information sought by any pending discovery request; and (2) documents or information containing such employee-specific information sought by any other discovery request or otherwise obtained or used during the course of this Proceeding.

22. Therefore, access to and the disclosure of the information deemed to be Highly Confidential Employee Information by this Decision will be limited to the following persons: the Commissioners, the ALJ presiding over this proceeding, the Commission's Advisory Staff and advisory attorneys, Staff and its attorneys, and OCC personnel and its attorneys. Each of the Parties, with the exception of the ALJ and the Commissioners, shall contact Public Service as to the method that person chooses to dispose of the information upon the conclusion of this Proceeding, as provided by Rule 1100(1)(I), 4 CCR 723-1.

23. Pursuant to Rule 1100(h), 4 CCR 732-1, the Commissioners, ALJs, Commission Staff, and Commission and Staff counsel are not required to sign NDAs in order to gain access to

confidential and highly confidential information. Each Commissioner, ALJ, Commission counsel, and Commission Staff member signs an annual NDA that includes the requirement to “maintain and to treat information to which the Commission has granted highly confidential protection pursuant to paragraph 1101(b) in accordance with the decision granting highly confidential protection.”

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

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

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

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

III. ORDER

A. It Is Ordered That:

1. The Notice of Intervention of Right, Entry of Appearance, and Request for Hearings filed by the Colorado Office of Consumer Counsel on March 9, 2020, is acknowledged.

2. The unopposed Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Individual Employee Salary and other Compensation-related Information (Motion for Protective Order) filed by Public Service on March 10, 2020 is granted, consistent with the discussion, findings, and conclusions in this Interim Decision.

3. Since the Motion for Protective Order is unopposed by the existing Parties to this Proceeding, response time shall be waived.

4. The following items are deemed to be Highly Confidential Employee Information in this Proceeding: (1) documents or information containing employee-specific salary, bonus, stock awards, and other cash and non-cash compensation-related information sought by any pending discovery request; and (2) documents or information containing such employee-specific information sought by any other discovery request or otherwise obtained or used during the course of this Proceeding.

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

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

7. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director