

Decision No. C06-0852

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06S-234EG

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY PUBLIC SERVICE COMPANY OF COLORADO FOR ADVICE LETTER NO. 1454 - ELECTRIC AND ADVICE LETTER NO. 671-GAS.

**ORDER GRANTING, IN PART AND DENYING, IN PART
MOTIONS FOR EXTRAORDINARY PROTECTION; AND
REQUIREMENT TO SUPPLEMENT MOTION**

Mailed Date: July 21, 2006
Adopted Date: June 28, 2006

I. BY THE COMMISSION

A. Statement

1. On May 10, 2006, Public Service Company of Colorado (Public Service or the Company) filed a Motion for Extraordinary Protection for any documents which contain the Company's hourly marginal cost information or the Company's monthly average avoided production costs (Cost Motion). Public Service states that Staff of the Commission (Staff) has submitted audit requests for workpapers from Public Service witnesses which contains the hourly marginal costs information and the monthly average avoided production costs. Specifically, the workpapers of Company witness Mr. Ahrens, pages 440 to 515, and the workpapers of Company witness Mr. Imbler, page 1498. Public Service requests that the Commission enter an order affording extraordinary protection to all documents that may be requested in this docket which contains either the hourly marginal costs information or the monthly average avoided production costs. The Company requests that access to this information be limited to the Commission, its Staff, the Office of Consumer Counsel (OCC), and their respective attorneys.

2. On June 8, 2006, Western Resource Advocates (WRA) filed a motion to late-file by one day its response to the Cost Motion. WRA contends that it did not receive a copy of the Cost Motion at the pre-hearing conference because Public Service did not have a sufficient number of copies. WRA asserts that Public Service provided a copy of the Cost Motion electronically on May 24, 2006. Based on that receipt date, WRA believed it had until June 7, 2006 to file a response.

3. WRA opposes the granting of the Cost Motion. WRA states that in the Company's last rate case, its expert witness received access to Public Service's marginal cost and avoided cost data under confidential seal, and there is no evidence that this limited disclosure compromised the commercially sensitive nature of this data. According to WRA, by allowing its expert to access this information, WRA was able to provide a detailed critique of Public Service's Windsource pricing structure, which ultimately led to a stipulation on price on this issue. WRA states that granting the Cost Motion would severely hamper its ability to review and independently validate the Company's testimony in this docket concerning proposed changes to the pricing structure of Windsource.

4. At the pre-hearing conference, Public Service provided copies of a second motion for extraordinary protection for information relating to the Comanche Project (Comanche Motion) to the parties following the Commission's granting of interventions. In Decision No. C06-0656, we allowed the parties 14 days from the date of the pre-hearing conference to file responses to both motions.

5. The Comanche Motion seeks extraordinary protection to Highly Confidential bid and financial information relating to the Comanche Project. Specifically the Company's responses to Staff Discovery Requests: 3-1, 3-3.A1, 3-3.A2, 3-4, 3-5, 3-93-10.A1 through 3-

10.A9, 3-11 (as it relates to 3-10), 3-13.A1, 3-10A.2, 3-14 (as it relates to 3-1), 3-15, and 3-16 (as it relates to 3-1). The Company requests that access to this information be limited to the Commission, its Staff, and the OCC. Public Service further requests that all persons who review this Highly Confidential Information, other than Commissioners, be required to execute non-disclosure agreements. According to the Company, this information is the same type of information it files in the Semi-Annual Progress Reports for the Comanche Project (Docket No. 05M-511E), which the Commission has already granted extraordinary protection. Public Service requests that the Commission enter a similar protective order in this docket.

6. Public Service states that the type of information it is seeking to protect falls into one of the following categories: the information sets forth the number of bids received; why the winning bid was selected and the difference between the bid amount and the budgeted amount, the information reveals actual contract language; or the information contains disaggregated budget and capital expenditure information. The Company contends that it could suffer significant adverse commercial harm if this information was leaked to its contractors or potential contractors.

7. On June 12, 2006, Ratepayers United filed a motion to late-file by 25 hours its response to the Comanche Motion (Late-file Motion). Counsel for Ratepayers United stated that it may have been a miscalculation on her part, but she was under the impression that the Commission had extended the response time to the Cost Motion and the Comanche Motion until June 7, 2006. According to the Late-file Motion, Counsel for Ratepayers United claims that she faxed its response to the Commission at 4:59 p.m. on June 7, 2006, but received an error message. She immediately re-faxed the response, but the second transmission was received after

the 5:00 p.m. deadline. Counsel for Ratepayers United contends that the filing of the response was exacerbated by the celebration of her 50th birthday on June 7, 2006.

8. Ratepayers United asks the Commission to deny the Comanche Motion. It represents that they attempted to contact counsel for Public Service to resolve this issue by stipulation. Ratepayers United requests that its legal team (counsel and experts) be included in those parties that have access to the information it claims is central to guarding the interest of those it is representing. Ratepayers United asserts that costs associated with construction of Comanche 3 are central to this and future rate increases of Public Service.

9. According to Ratepayers United, Public Service has indicated that customers will be liable for costs associated with construction of Comanche 3, including cost overruns. Ratepayers United claims that, without access to this information, it will be unable to meaningfully participate in this docket. Ratepayers United contends that if Public Service intends for the order in the Semi-Annual Progress Reports for the Comanche Project docket be applicable in this proceeding, it would point out that this is a wholly separate action and the decision issued in Docket No. 05M-511E pertains to semi-annual reports and not discovery requests. Lastly, Ratepayers United affirms that it would honor the terms of the non-disclosure agreements; that it does not represent nor is affiliated in any way with individuals or groups with an interest in the construction of Comanche 3; and that it would not disseminate the information throughout its organization.

10. On June 8, 2006, Public Service filed another motion for extraordinary protection relating to a discovery response to Commission Staff regarding the ProSym model run used by Company witness Mr. Horneck to predict the total system cost and \$/mwh system cost for 2006 with and without the Windsource generation (ProSym Motion). According to Public Service, the

total cost differential was publicly provided in Mr. Horneck's testimony and is the only cost information from the ProSym model runs that is used in setting the Windsource rates in this case. The ProSym model runs also set forth the Company's predicted hourly production costs for 2006, including hourly detail on fuel prices, plant information (heat rate, forced outage rates, maintenance schedules, etc.), and purchase power costs.

11. The Company contends that this information is extremely sensitive because discovery of this information by any participant in the competitive wholesale marketplace could put Public Service at an extreme disadvantage in buying down its cost of energy or in making profitable off-system sales. Public Service believes that the issues which are likely to arise with respect to the Company's Windsource rate proposal are not related to the individual highly confidential details contained in the ProSym runs, but instead are more likely to be policy disputes. The Company contends that the ProSym information is even more sensitive than the hourly marginal cost information that is contained in the workpapers of Mr. Ahrens and Mr. Imbler.¹

12. Public Service does not believe that sufficient protection is afforded to this critical highly confidential commercially sensitive information by the signing by other parties of the non-disclosure agreement. The Company alleges that if this information was in the wrong hands, it could completely undermine its short-term electric trading operations. Finally, Public Service suggests that if a party claims to need access to the ProSym information, the Commission could require that party to explain why access is necessary because it may be possible to meet the

¹ That information involves historical hourly marginal production cost information for 2004 and the average monthly production costs for 2005.

requesting party's objective in a manner which requires less than full access to the ProSym information.

13. On June 12, 2006, Ratepayers United filed a response opposing the ProSym Motion. Ratepayers United requests that its legal team (counsel and experts) be included among those parties that have access to the information it claims is central to guarding the interest of those it is representing. Ratepayers United asserts that because the ProSym model runs set forth the production costs for 2006, and are used to set price guides for Public Service's short-term electricity traders to buy and sell electric energy, this information is relevant to the matter at issue and critical to Ratepayers United's meaningful participation in this docket. It contends that without access to this information it will be unable to meaningfully participate in this docket.

14. Ratepayers United affirms that it would honor the terms of the non-disclosure agreements; that it does not represent nor is affiliated in any way with individuals or groups that participate in the wholesale market; and that it would not disseminate the information throughout its organization. Lastly, Ratepayers United states that it appears that through the numerous motions for extraordinary protection, Public Service is attempting to withhold information necessary for all parties, aside from the OCC, from meaningfully participating in this proceeding.

15. On June 21, 2006, WRA filed a response to the ProSym Motion. It recommends that the Commission deny the motion. WRA states that good cause does not exist for granting extraordinary protection in this instance. It criticizes Public Service's assertion that the total cost differential provided in Mr. Horneck's testimony is the only cost information from the ProSym model runs that is used in setting the Windsource rates. This, according to WRA, demonstrates why it needs access to more of the cost data the Company used in developing the new Windsource rates. WRA contends that it would be impossible to evaluate the change in

Windsor rates without access to the other inputs, assumptions, and model outputs of the ProSym runs. WRA contends that Public Service's concern about disclosure of commercially sensitive information are speculative; that it is not a participant in the competitive wholesale marketplace; and that WRA relied upon cost information to critique Public Service's Windsor pricing proposal in the Company's last general rate case.

B. Findings and Conclusions

16. We find good cause to grant the motions to late-file responses of WRA and Ratepayers United because we find that the information contained within their responses will provide a more complete basis upon which to consider the motions for extraordinary protection.

1. Cost Motion

17. We find the fact that WRA had previously received access to the type of information in the last rate case a convincing reason to deny the Cost Motion. It appears that WRA treated the confidential nature of this type of information appropriately in the last rate case and we expect all parties to this docket to treat any confidential information appropriately.

2. Comanche Motion

18. Historically, when a utility constructs a major facility, the costs it incurs during the construction process are recorded in Construction Work In Progress (CWIP). CWIP is part of a utility's ratebase for Commission regulatory purposes. Once an item is placed into ratebase, the utility has the opportunity to earn on those investments. To offset the ratebase earnings of this "in-progress" facility (the concern is that ratepayers should not have to pay for an asset which is not used to currently provide them utility service), the Commission has required the utility to record an accounting entry to Allowance for Funds Used During Construction (AFUDC) to "net out" the ratebase earnings created by CWIP. Upon completion of the facility,

the AFUDC is added to the actual construction cost of facility and this entire amount is placed into the Plant in Service category of the utility's ratebase. During the rate case following the facility being placed into Plant in Service, parties have the ability to examine and challenge the prudence of the costs incurred in constructing the facility.

19. Under the Least-Cost Planning Settlement,² Public Service has the ability to place the Comanche Project³ costs incurred-to-date through the test year⁴ for CWIP expenditures into rate base without the AFUDC offset. It also has the ability to place into ratebase a *pro forma* adjustment for estimated expenditures for 12 months beyond the test year (calendar year 2006, for this case). Both of these conditions are dependent upon Public Service's senior unsecured debt rating on the first day of hearing or the settlement execution date.

20. The question associated with the regulatory situation created under the Least-Cost Planning Settlement is, when can a party examine and challenge the prudence of the Comanche Project expenditures used in this rate case? If we adopt the Commission's historical treatment (in the first rate case after the plant is operational) it could be sometime during 2010 before the Commission would have the fully operational Comanche 3 rate case. Assuming a party was successful at challenging, in 2010, a portion of a construction expenditure made back in 2005, there would need to be a means of returning to ratepayers the associated CWIP earnings on the imprudent construction expenditure and, presumably, interest on the refund, earned during the intervening four-year time period.

² See Decision No. C05-0049 in consolidated Docket Nos. 04A-214E, 04A-215E, and 04A-216E.

³ The Comanche Project includes the Comanche 3 power plant, the pollution control expenditure for Comanche 1, 2, and 3, and the associated transmission line from Comanche 3.

⁴ The test year in this case is calendar year 2005.

21. Under this historical treatment, an equity issue emerges. Because the timing of the collection would be from one set of ratepayers (today) as compared to the return of monies to another set of ratepayers (some five years later in our hypothetical), there may be some ratepayers that “win” and some that “lose” under a refund scenario.

22. If the Commission were to grant the motion, only the OCC and Staff could examine the detailed cost figures and supporting documentation. It appears that one of Ratepayers United’s central issues is the inclusion of Comanche 3 in CWIP and its associated costs. Thus, if the Commission were to grant the motion, we conclude that Ratepayers United would likely not be able to meaningfully participate on this issue.

23. We have made previous Least-Cost Planning related decisions regarding requests for extraordinary protection for bid information, particularly unsuccessful bid information.⁵ We have determined that only Staff and the OCC should have access to unsuccessful bid information in order to protect and keep vibrant the competitive acquisition process. We will continue this policy. Further, we expand this policy as it relates to this case, namely that pending contracts and preliminary contract development work should only be available to Staff and the OCC.

24. In balancing the competing needs of confidentiality to protect Public Service and its ratepayers from possible adverse financial impacts with the need for a party to timely examine and challenge the construction costs of the Comanche Project, we find the following resolution reasonable. A party should be able to conduct its prudence examination on any construction expenditures that Public Service has placed in its actually incurred (2005 test year-to-date) CWIP costs. However, only Staff and the OCC will have access to the confidential information used to

⁵ See Decision Nos. C06-0046 and C05-0886.

develop the out-of-period *pro forma* adjustment (2006 estimated expenditures). Under our decision, a party such as Ratepayers United would be able to challenge these *pro forma* expenditures in the next rate case after those costs have been moved into the actual CWIP expenditure account. We acknowledge that there is some timing inconsistency in our decision as it relates to inter-temporal ratepayers, but we believe a vibrant competitive acquisition process more than outweighs any concerns relating to the timing for challenging the prudence of construction costs.

3. ProSym Motion

25. We find that we do not have sufficient information to decide whether or not to grant the motion for extraordinary protection. As a result, Public Service shall file within ten days of the effective date of this Order, two versions of the ProSym model run in question. One version will show all of the information produced by the model run and the other version would remove any of the information which the Company contends is extremely sensitive.

26. In order to expedite the handling of the ProSym Motion, we will assign it to an administrative law judge (ALJ) for resolution. This supplemental filing will be provided to ALJ G. Harris Adams and Commission Advisor Frank Shafer only. If Public Service contends that producing a second copy for the Commission Advisors is burdensome due to the size of the printout, it can request to provide the model run outputs only to the ALJ at the time it submits the material.

II. ORDER

A. The Commission Orders That:

1. The motions to late-file responses by Western Resource Advocates and Ratepayers United on June 8, 2006 and June 12, 2006 respectively, are granted.

2. The Motion by Public Service Company of Colorado (Company) for Extraordinary Protection for any documents which contain the Company's hourly marginal cost information or the Company's monthly average avoided production costs filed on May 10, 2006 is denied.

3. The Motion of Extraordinary Protection for information relating to the Comanche Project filed by Public Service Company of Colorado on May 23, 2006 is granted, in part, and denied, in part consistent with the above discussion.

4. The Motion of Extraordinary Protection for information relating to the ProSym Model runs filed by the Company on June 8, 2006 is referred to Administrative Law Judge G. Harris Adams for resolution.

5. The Company shall, within ten days of the effective date of this Order, provide to Administrative Law Judge G. Harris Adams and Commission Advisor Frank Shafer a copy of the ProSym model run in question—one version showing all of the information produced by the model run; and the second version with the information which the Company contends is extremely sensitive redacted.

6. The Company shall file within ten days of the effective date of this Order its proposed Highly Confidential Non-Disclosure Agreement relating to the Comanche Motion for Extraordinary Protection.

7. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 28, 2006.**

(SEAL)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director