Decision No. C11-0810

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11R-416E

IN THE MATTER OF THE PROPOSED REVISIONS TO THE COMMISSION'S ELECTRIC RESOURCE PLANNING RULES 4 CCR 723-3-3600 THROUGH 3618.

ORDER ADOPTING RULES

Mailed Date: July 27, 2011
Adopted Date: July 13, 2011

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I. BY THE COMMISSION

A. Statement

1. On May 13, 2011, the Commission issued a Notice of Proposed Rulemaking (NOPR) to revise its current Electric Resource Planning (ERP) Rules contained in

4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*, in order to satisfy various requirements pursuant to the passage and signing of House Bill (HB) 11-1262. This new law amends

§ 40-6-107, C.R.S., and adds requirements related to the transparency and confidentiality of information associated with the planning and acquisition of electric generation resources. As explained in Decision No. C11-0521, we also issued the NOPR to revise the ERP Rules based on our experiences in recent dockets concerning the computer-based modeling of bids and other electric generation resources.

2. One main provision of HB 11-1262 specifically requires investor-owned electric utilities to provide computer-based modeling inputs and assumptions to the owners or developers of potential electric generation resources to ensure that the proper inputs and assumptions were used in the utility's evaluation of these bid facilities. The other main provision of the statute more generally addresses the designation and approval of highly confidential information in our electric resource planning-related proceedings.

3. We attached a copy of our proposed rule changes to the NOPR for comment from interested persons. We further set this matter for hearing before Commissioner James Tarpey, acting as the Hearing Commissioner. We also solicited two rounds of written comments on these proposed rule changes and scheduled a hearing on June 21, 2011.

4. Initial comments were received from Public Service Company of Colorado (Public Service); Black Hills/Colorado Electric Utility Company, L.P. (Black Hills); the Colorado Independent Energy Association (CIEA); Noble Energy, Inc., Chesapeake Energy Corporation, and EnCana Oil & Gas (USA) (collectively the Gas Intervenors);

Western Resource Advocates (WRA); Interwest Energy Alliance (Interwest); and the law firm of Dietze and Davis, P.C. (Dietze).

5. Reply comments were received from Public Service, CIEA, the Gas Intervenors, WRA, and Interwest.

6. Oral statements were made at the June 21, 2011 hearing before Hearing Commissioner Tarpey by representatives of Public Service, Black Hills, CIEA, the Gas Intervenors, Interwest, and Dietze.

7. Post-hearing statements of position were submitted by Public Service, Black Hills, CIEA, WRA, the Gas Intervenors, Interwest, and Dietze.

8. By Decision No. C11-0521, we found it was appropriate for us to issue an Initial Decision pursuant to the provisions of § 40-6-109(6), C.R.S., after the close of hearings and the receipt of statements of position. This Order is the expected Initial Decision and the rules we adopt are set forth in Attachment A.

B. Clarity in Utility Resource Evaluation and Selection

9. The treatment of highly confidential information in a resource planning context has been a topic of dispute at least since the initial implementation of the Commission's resource planning rules adopted in Docket No. 02R-137E. The determination of what information should be protected as highly confidential and who can gain access to this protected material has been debated in each of the subsequent resource planning rulemaking proceedings. The treatment of bids to competitive solicitations as well as the inputs and assumptions to computer-based modeling used to evaluate those bids have also been issues in nearly all of the resource-related adjudicated proceedings during the past five to six years. The Commission has therefore contemplated on numerous occasions whether our practices strike the right balance between the

competitive bidding process and the trade secrets of various industry stakeholders, all the while protecting the public interest.

10. Public Service is correct when it points out in its initial comments that the Commission has consistently limited access to actual bid documents and its resource planning computer models and databases to the Commissioners, the Independent Evaluator (IE), the Trial and Advisory Staff of the Commission, and the staff of Colorado Office of Consumer Counsel, as well as their respective attorneys. However, this consistency has masked the frustrations that parties to our generation resource-related proceedings have experienced. Their dissatisfaction with our procedures regarding the designation and approval of information as highly confidential appears to have come to the forefront with the passage of HB 11-1262.

11. We share the parties' concerns about the current practice of limiting access to highly confidential information to such a small group of individuals, as it is problematic for certain parties to adequately advocate their position without the full information that other parties can access. Further, Staff, OCC and the IE cannot be expected to advocate the specific interests of the diverse intervenors in a resource planning docket. Granting all parties (with the exception of *pro se* intervenors) reasonable access to highly confidential information should provide more transparency and higher quality evidentiary records in our generation-related proceedings. Finally, by adopting new rules to resolve confidentiality issues, we will allow parties to proceed quickly with an efficient investigation of the issues when time is critical.

12. The overall intent of HB 11-1262 requires the Commission to expand access to highly confidential information and computer-based modeling inputs and assumptions while keeping in mind the benefits of competitive bidding for the acquisition of potential resources. We therefore reject the notion that maintaining the status quo of our ERP Rules with respect to

the treatment of highly confidential information is an acceptable outcome from this Docket. Rather, our directive under HB 11-1262 is a non-discretionary duty to provide more transparency. This legislation requires the protection of the public interest through a rebalancing in the treatment of highly confidential information related to resource planning between the investor-owned electric utilities that develop, receive, or maintain such information; the independent bidders who participate in competitive bidding processes; the vendors who provide the computer-based models used for the evaluation of potential resources; and the parties who intervene to advocate their unique perspective.

C. Modeling Inputs and Assumptions Related to Potential Resources

1. Rule 3613. Bid Evaluation and Selection

13. In the NOPR, we proposed procedures for the utility to provide modeling information to the owner or developer of a bid, and for the resolution of any resulting disputes. We proposed a requirement for the utility to provide notice to the bidder stating whether its resource passed the initial screening process. We set procedures for the owner or bidder to access modeling inputs and assumptions. If the bidder and utility could not resolve a dispute regarding these modeling inputs and assumptions, the bidder could then raise the matter before the Commission by written pleading. Consistent with HB 11-1262 we proposed that the bidder needed to request modeling inputs and assumptions, but we requested comment on whether it would be more efficient for the utility to automatically provide the inputs and assumptions to the owner or developer of the bid.

14. Commenters generally responded favorably to our proposal or provided alternative suggestions. In its comments, Public Service recommends a shortened timeline, with fast-track procedures for the utility to provide information to bidders and for the bidder and

utility to resolve the dispute. If the dispute is not resolved, Public Service proposes a technical conference for the Commission to hear the issues. After an expedited Commission decision on the issue, the utility would then confirm that it has corrected the problem.

15. Black Hills asserts that bidders should only get information if they request such following the utility's initial assessment of bids. Black Hills proposes a longer timeline for the utility to review the bids and notify the owner or developer. Black Hills also advocates that the utility should charge the bidder requesting additional modeling results.

16. WRA responds to Public Service's proposal with the suggestion that the bidder, not the utility, should confirm that the modeling error or omission is corrected.

17. We agree with Public Service that the procedures for resolving modeling disputes must be expedited, as it becomes increasingly difficult for bidders to hold to their bid prices if the bid evaluation period becomes extended. We therefore adopt a modified schedule reflecting Public Service's proposal. Although the statute contemplates the owner or developer requesting the information as argued by Black Hills, we agree with Public Service that the expedited timing of the ERP process warrants the utility automatically providing the information to all owners or developers submitting bids into a generation resource selection process.

18. Public Service proposed an expedited technical conference before the Commission to address modeling disputes that cannot be resolved between the owner or developer and the utility. We agree that a technical conference provides a better forum than written pleadings for resolving potential disputes in an expedited manner. Given the difficulty of coordinating Commissioner schedules to accommodate a technical conference and then deliberations, an administrative law judge (ALJ) is in a better position to provide an expedited resolution. We therefore adopt rules referring the issue to an ALJ for an expedited ruling.

We also add a provision for an owner or developer to file a notice of intervention of right for the limited purpose of resolving the disputed modeling inputs and assumptions.

19. We also find it is necessary to clarify in paragraph 3613(a) that if the utility notifies the owner or developer that its bid is not advanced to computer-based modeling, then the utility must explain the reasons why the bid was not advanced, including all information that the utility used in its initial assessment of the bid. The reasons provided by the utility for not advancing a bid to computer-based modeling may include the same information as would be included if the bid were advanced, such as modeling inputs and assumption information, or the information may be different (*e.g.,* it is not feasible for the bidder to complete the facility by the required in-service date).

20. We agree with WRA that the owner or developer should have the opportunity to see that the utility corrected the modeling error, rather than the utility confirming that the error has been corrected as Public Service proposed. We therefore require the utility to provide corrected information to the owner or developer. We also require the utility to confirm in its 120-day report filed in Phase II that the potential resource is fairly and accurately modeled, by performing additional modeling as necessary, pursuant to the last sentence of § 40-6-107(2)(a), C.R.S.

21. In the NOPR, we specifically requested comment on whether the information provided to the owner or developer should include indirect parameters, such as the full modeling program with the heat rates and bid prices. We agree with commenters that HB 11-1262 requires only information that reasonably relates to the owner or developer's facility.

22. Finally, we disagree with Black Hills' proposal to require bidders to pay for additional modeling. These new rule provisions are intended to ensure that the facilities are

properly modeled, consistent with the requirements in HB 11-1262, and any costs are a part of the overall resource planning function.

2. Additional Rule Changes

23. **Rule 3602 – Definitions.** In the NOPR we proposed two new definitions, consistent with the directives contained in HB 11-1262. We proposed new definitions for "modeling error or omission" in paragraph 3602(i) and "potential resource" in paragraph 3602(l).

24. We adopt these two new definitions. For the definition of "modeling error or omission," Black Hills proposed language to clarify that the utility could use an agent to perform computer-based modeling. We find that such additional rule language is not necessary because the utility is the jurisdictional entity that oversees such contractors or agents.

25. **Paragraph 3615(b) - Applicability outside of an ERP proceeding.** For facility evaluations outside of an ERP proceeding, proposed paragraph 3615(b) requires the utility to disclose modeling inputs and assumptions consistent with paragraphs (a) and (b) of rule 3613.

26. Black Hills recommends referring to the entirety of Commission rules, 3600 through 3649. We disagree. We find that reference to paragraphs 3613(a) and (b) adequately addresses the requirements in HB 11-1262.

27. **Paragraphs 3616(d) and (f) – RFP Notification to Bidders.** In the NOPR, we included additional provisions requiring the utility to notify potential bidders about the new nondisclosure agreement procedures and public disclosure of confidential bid information. We find that this rule language should be expanded to make sure potential bidders are aware of the new procedures to resolve modeling errors or omissions.

D. Treatment of Highly Confidential Information

1. Rule 3614. Confidential Information Regarding Electric Generation Facilities

28. We proposed in the NOPR specific language for a standard Non-Disclosure Agreement (NDA), which allows attorneys and Subject Matter Experts (SMEs) access to all highly confidential information without an affirmative order from the Commission. The utility would file, as a part of its plan, motions to protect information as highly confidential, but attorneys and SMEs could automatically see any such information after signing the NDA.

29. Public Service proposes language to limit disclosure to Staff, OCC, and the IE, and require other parties to file motions to see such information. Public Service argues that the Commission has implemented such limitations in past resource planning proceedings and this provides the proper balance intended under HB 11- 1262. Black Hills opposes our proposed disclosure requirements, stating that disclosure of highly confidential information should not be automatic. Several commenters disagree with Public Service's and Black Hills' proposed limitations.

30. As discussed above, the overall intent of HB 11-1262 requires the Commission's ERP process to be more transparent. Our current procedures, based on time-consuming motions to allow parties other than Staff, OCC and the IE access to highly confidential information, are not adequate under the new statutory requirements, particularly in light of the expedited nature of the resource planning proceedings. Therefore our rules will be revised to provide reasonable and timely access to highly confidential information.

31. In the NOPR, we did not propose to limit the number of attorneys or SMEs that can sign such NDAs. Public Service had suggested limiting access to one attorney and one SME per party; however, in its Statement of Position, it recommends rule language limiting access to

"a reasonable number" of attorneys and SMEs. Black Hills also suggests the Commission consider rule language that reasonably limits the number of attorneys and SMEs that can access highly confidential information.

32. We find merit in Public Service's and Black Hills' arguments that the risk of inadvertent disclosure increases with the number of people accessing the information. Therefore we find it appropriate to add a restriction to paragraph 3614(b) that access to the highly confidential information is limited to a "reasonable" number of attorneys and SMEs, and we expect the parties to reach agreement on a case-by-case basis on the appropriate number of attorneys and SMEs who gain access to the protected material. . We also require SMEs to provide their curriculum vitae with the filed NDAs so that the utility and parties understand the experts' backgrounds.

33. We reject Public Service's request to include within subparagraph 3614(a)(I) part of existing paragraph 1100(f) of the Commission's Rules of Practice and Procedure. Paragraph 3614(a) explicitly states "rules 1100 through 1104 of the Commission's Rules of Practice and Procedure shall apply, in addition to this rule 3614" so it is not necessary to repeat the requirement in the ERP Rules.

34. Black Hills and Public Service also propose to add rule language to clarify that *pro se* intervenors are not allowed access to confidential or highly confidential information. We find this proposed language to be unnecessary. Rule 3614 requires an attorney to accompany a SME, so rule 3614 does not allow *pro se* intervenors access to confidential or highly confidential information.

35. The proposed NDA language in the NOPR included a "stay-out" requirement that prevents attorneys and SMEs from assisting in resource development for two years.

Numerous commenters oppose the stay-out requirement for attorneys and SMEs, advocating instead that both are held to a high standard of ethical conduct with respect to the treatment of confidential information and their licenses and/or careers are at stake for any misconduct. We agree with these comments and also find that the stay-out provisions could have a chilling effect on client representation. Therefore we remove the stay-out provision for both attorneys and SMEs.

36. Lastly, we find it appropriate to add language suggested by commenters to clarify that the person signing the NDA understands the information is to be used only in that proceeding and will not be disclosed to unauthorized persons.

2. Additional Rule Changes

37. **Filing confidentiality motions with application - Paragraphs 3603(b) and 3604(j).** In the NOPR, we proposed a requirement for the utility to file all motions for extraordinary protection of information listed as highly confidential when it makes its initial resource plan filing. We also proposed a requirement for the utility to provide a list of all confidential and highly confidential information and explain how it will treat such information throughout the proceeding. Public Service and Black Hills generally assert that the utility cannot anticipate all such requirements and propose to allow subsequent filings throughout the proceeding.

38. We disagree with the proposal to allow additional motions for extraordinary protection during the course of the proceeding. We expect the utility to anticipate with reasonable certainty the confidentiality provisions that will be required in the docket. To the degree that the utility could not have reasonably foreseen a need to classify certain information

as confidential, we modify paragraphs 3603(b) and 3604(j) to allow subsequent motions for good cause shown.

39. Among the provisions in paragraph 3603(b) is a requirement that the utility address the protections and non-disclosure requirements for modeling inputs and assumptions that relate to a resource being evaluated using computer-based modeling. We clarify that one purpose of this provision is to ensure the utility addresses any appropriate distinction between access to confidential and highly confidential bid information by the owner or developer of a particular potential resource and access to that same information by other bidders and parties to the resource plan proceeding.

40. In its comments, WRA recommends modifying paragraph 3613(e) to replace the requirement that "[t]he IE shall provide confidential versions of these reports to Staff of the Commission and the OCC" with a requirement to provide confidential reports to "all parties in the ERP proceeding which have signed highly confidential nondisclosure agreement[s] [*sic*]." We disagree with this proposed change, as paragraph 3604(j) requires the utility to propose specific treatment for all confidential information in the docket. It is at that stage where the parties can advocate the appropriate procedures to distribute such information. Therefore we deny WRA's request to modify paragraph 3613(e).

41. **Public disclosure of bids at conclusion – Paragraphs 3613(i, j, k), and 3616(f).** In the NOPR, we proposed a requirement for the utility to release all bid and utility build information as public at the conclusion of the bidding process, defined as 12 months after the utility receives the bids.

42. CIEA encourages the public disclosure of bids, but suggests withholding bidder names. It also recommends clarifying that the public disclosure applies to utility proposals.

CIEA prefers a 12-month time period, but states that 18 months would be acceptable. Public Service objects to disclosing bid information publicly or, in the alternative, suggests a longer period such as 12 months from the issuance of the Commission's Phase II decision. Black Hills opposes releasing the information as public and asserts that the language is vague and undefined.

43. Consistent with the disclosure requirements in HB 11-1262, we find it appropriate to allow bidders at the conclusion of the competitive procurement process to see how their proposed facility compared with other bid and utility-proposed facilities. While such access during the bidding process is inappropriate and protections are necessary at that stage, we find it will be beneficial to the competitive process, and beneficial to ratepayers, for bidders to understand how their bid compared in the market after contract negotiations are complete. While some bidders may elect not to put forth a proposal because of fears of their bids being disclosed at the conclusion of the proceeding, we conclude that bidder concerns about a fair marketplace outweigh concerns over disclosing bids at the end of the process. We further agree with CIEA that lack of transparency presents a significant discouragement for bidders to participate and "sunshine is probably the best disinfectant."[1]

44. Accordingly, paragraphs 3613(j) and 3613(k) will implement the release of confidential information as public at the end of the competitive acquisition process. Paragraph 3613(j) addresses the release of confidential and highly confidential information that was filed with the Commission in the resource planning docket, and paragraph 3613(k) requires the utility to publicly post on its website all bids and utility facility proposals.

[1] June 21, 2011 transcript, page 57, lines 1-10

45. With respect to paragraph 3613(j), we find it is necessary to set a procedure by which information filed with the Commission related to bids and utility proposals will be released to the public. Since this will require a detailed analysis of numerous redacted documents, we conclude that the utility is in the best position to propose the lifting of specific redactions. These procedures allow the utility and parties to propose for a Commission determination the disclosure or non-disclosure of certain items within filings in the resource plan proceeding. However, since the full disclosure of bid and utility proposals is established in paragraph 3613(k), the give-and-take in paragraph 3613(j) is intended to further enhance the transparency of the competitive acquisition process and not to undermine the firm requirements in paragraph 3613(k). Accordingly, we require the utility to put forth a proposal and allow parties to respond. Because the confidential information at issue largely belongs to the utility, we find that a utility reply to party responses is appropriate. The Commission will then issue an order specifying to the utility and parties the documents to be filed to unveil information that was previously protected as confidential and highly confidential.

46. Although we proposed in the NOPR a rule provision that requires the utility to file a report summarizing all bids and utility proposals, we find that the full disclosure of the bids and utility proposals is best accomplished in paragraph 3613(k) by the utility posting publicly on its website, without filing a separate report with the Commission, all bids and utility proposals. Parties and other interested persons can then access the information directly from the utility's website. Consistent with the discussion in section B of this Order, we also find it appropriate to require such full disclosure of bids and utility proposals after contract negotiations are completed rather than deferring to the resource plan proceeding the resolution of what information will be released. We therefore set paragraph 3613(k) as a firm requirement. While the Commission

can waive this or other rules pursuant to Rule 1003, rule waiver provisions set a high bar for a variance from the rule.

47. With regard to CIEA's suggestion to remove bidder names from the public disclosure, we feel it is important to list the bidder names with the bids to promote transparency. We therefore deny CIEA's request to keep the names confidential.

48. Finally, we find it necessary to specify when the competitive bidding process ends, after which the release of information related to bids and utility proposals will be required. We partially agree with Public Service's proposal to extend the deadline for completing the competitive bidding process, but we find the date should be set from the receipt of bids rather than the date of the Phase II decision as Public Service advocates. We conclude that it is beneficial for bidders to have the certainty of transparency based on the known bid date. Therefore we set the requirement at 18 months from the receipt of bids. We also add a provision for the utility to further extend this date for good cause shown, in case the utility encounters delays that are outside of its control. With regard to Black Hills' argument that the phrase "shall conclude the competitive acquisition process" in paragraph 3613(i) is vague and undefined, we modify the requirement to clarify that the execution of the contracts completes the competitive acquisition process.

49. **Other Rule Modifications and Comments.** We enact numerous minor rule changes to accommodate changes in rule numbering or other minor wording changes. We do not provide a discussion on each minor change. Further, this order addresses the major issues raised in comments. All recommendations raised in comments but not addressed by this Order are denied.

II. ORDER

A. The Commission Orders That:

1. The Commission adopts the rules attached to this Order as Attachment A, consistent with the above discussion.

2. The rules shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

3. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

4. A copy of the rules adopted by the Order shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

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

6. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATION MEETING July 13, 2011.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

MATT BAKER

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director

Decision No. C11-0934

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11R-416E

IN THE MATTER OF THE PROPOSED REVISIONS TO THE COMMISSION'S ELECTRIC RESOURCE PLANNING RULES 4 CCR 723-3-3600 THROUGH 3618.

ORDER ADDRESSING APPLICATIONS FOR REHEARING, REARGUMENT OR RECONSIDERATION

Mailed Date: August 29, 2011
Adopted Date: August 24, 2011

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I. BY THE COMMISSION

A. Statement

1. On July 27, 2011, the Commission issued Decision No. C11-0810 adopting revisions to its Electric Resource Planning (ERP) Rules contained in 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.*, in order to satisfy various requirements resulting from the passage of House Bill (HB) 11-1262. This new law amends § 40-6-107, C.R.S., by adding requirements related to the transparency and confidentiality of information associated with the planning and acquisition of electric generation resources.

2. Applications for Rehearing, Reargument, or Reconsideration (RRR) concerning Decision No. C11-0810 were filed on August 16, 2011 by Public Service Company of Colorado (Public Service), Black Hills/Colorado Electric Utility Company, L.P. (Black Hills), and the Colorado Independent Energy Association (CIEA).

3. On August 22, 2011, Black Hills filed a Motion for Leave to File Response to the Applications for RRR filed by Public Service and CIEA. Black Hills also filed such response on the same day. Noble Energy, Inc., Chesapeake Energy Corporation, and EnCana Oil & Gas (USA) (collectively called the Gas Intervenors) also filed a response to Black Hills' motion on August 22, 2011.

4. We find good cause to grant Black Hills' Motion for Leave to File Response to the Applications for RRR.

5. Now being duly advised in the matter, we adopt the revised rules as set forth in Attachment A, consistent with the discussion below. We grant the application for RRR filed by CIEA, and grant, in part, and deny, in part, the applications for RRR filed by Public Service and Black Hills.

B. Discussion.

1. Paragraph 3613(i). Complete Competitive Acquisition Within 18 Months

6. Public Service proposes to strike from paragraph 3613(i) the sentence: "The utility must execute final contracts for the potential resources prior to the completion of the competitive acquisition process to receive the presumption of prudence afforded by paragraph 3617(d)." Public Service argues that the provision is unnecessary and is unrelated to the purpose for which HB 11-1262 was adopted by the General Assembly.

7. We disagree. It is important that the utility complete contract negotiations within the 18-month time period and that there should be consequences if it fails to do so. Further, this rule explicitly provides for the filing of extensions to this 18-month deadline for good cause shown.

2. Paragraphs 3613(j) and (k) and 3616(f). Public Disclosure of Bid Information at the Conclusion of the Proceeding

8. Public Service and CIEA provide a joint proposal to modify paragraph 3613(k) as adopted in Decision No. C11-0810. Specifically, they request the adoption of the following language:

> (k) Upon completion of the competitive acquisition process under paragraph 3613(i), the utility shall post on its website the following information from all bids and utility proposals: bidder name; bid price and utility cost, stated in terms that allow reasonable comparison of the bids with utility proposals; generation technology type; size of facility; contract duration or expected useful life of facility for utility proposals; and whether the proposed power purchase contract includes an option for the utility to purchase the facility during or at the end of the contract term.

9. Black Hills advocates a different approach. Black Hills proposes to delete paragraphs 3613(j) and (k) as well as paragraph 3616(f) to the extent that these provisions require public disclosure of bid information. As discussed above, Black Hills also filed a motion

for leave to reply to the Public Service and CIEA applications for RRR. Black Hills opposes the language proposed by Public Service and CIEA and reiterates its request to delete the requirement to make the bid information public at the conclusion of the proceeding. Alternatively, Black Hills requests rehearing on this issue. Gas Intervenors similarly requests rehearing on this issue.

10. We disagree with Black Hills' argument that the requirement to release bid information as public, either through the requirements as adopted in Decision No. C11-0810 or through the Public Service and CIEA proposal, will chill bidding. As we stated in Decision No. C11-0810, we conclude that consumer protection and bidder concerns about a fair marketplace outweigh concerns over disclosing bids at the end of the process.

11. We further disagree with Black Hills' argument that it specifically should not be subject to this requirement to disclose bid information because Black Hills is a smaller utility than Public Service. We find that as a smaller utility, Black Hills should be concerned about bidder participation, making bid transparency all the more important for Black Hills. Further, since Black Hills itself and its affiliate each emerged as winners from the Company's last ERP and its approved resource solicitation, we are concerned that bidders may be reluctant to participate in Black Hills' future competitive bidding processes, due to the possibility that continued utility and affiliate participation could prevent contracts being awarded to independent power producers. Such concerns about bidder participation lead us to conclude that it is more important for bidders to know that they will see bid details at the end of the competitive bidding process and be able to confirm that the bidding process was indeed fair.

12. We grant Public Service's and CIEA's proposed revision to paragraph 3613(k) for the reasons they set forth. In addition, we modify paragraph 3616(f) regarding the utility's

request for proposals (RFPs) to conform with those changes to paragraph 3613(k). We also find no need to change paragraph 3613(j).

13. We also deny Black Hills' and Gas Intervenors' request for rehearing on this issue, since the proposal offered by Public Service and CIEA in their Applications for RRR represents a modification to the requirement adopted in Decision No. C11-0810 within the spectrum of positions advanced in comments and at hearing in this proceeding. Furthermore, interested persons have the right to raise concerns in a subsequent application for RRR in light of the proposed rule change we adopt by this Decision.

3. Rule 3614. Confidential Information

14. Public Service objects to the requirements in rule 3614 to disclose highly confidential information to any party, without regard to the party's interest or nature of the highly confidential information. Public Service instead recommends adding a provision for a Commission ruling at the beginning of the ERP proceeding to establish which parties or groups of parties are eligible to gain access to specific highly confidential information.

15. Public Service first asserts that the treatment of highly confidential information in paragraph 3614(b) does not have any meaningful difference from the treatment of confidential information established in rule 1100. We disagree. The requirements in the non-disclosure agreement (NDA) for subject matter experts (SMEs) in the new rule 3614 contains specific limitations to permit SMEs access to the information only if the SME did not and will not assist in any power supply proposal associated with that proceeding, and further will not disseminate the information to unauthorized third parties or use it for competitive purposes. This NDA language applies both to outside consultants hired by a party or to non-attorney technical or policy experts within a party's organization. The SME must also have

attorney oversight to assure that confidentiality protections are properly maintained. These NDA provisions are distinct from the Commission's standard requirements for protecting confidential information under rule 1100, and they are intended to accomplish Public Service's stated objective to "never include persons who expect to participate as a bidder, represents [sic] a bidder, or consults [sic] with a bidder in the competitive procurement portion of the proceeding in which the highly confidential information is produced."

16. The NDA requirements for attorneys in rule 3614 also contain provisions to protect highly confidential information. Although this NDA language could allow the attorney to assist bidders in developing proposals, such assistance is limited by the prohibitions on the dissemination of the information to unauthorized third parties and using the information for competitive purposes. Attorneys would place their license and career in jeopardy if they improperly divulged or used highly confidential information. Further, the NDA language requires the attorney to oversee the confidentiality protections used by the associated SME as well as the protections used by attorney's firm.

17. Next, Public Service asserts that it is improper to promulgate a *per se* rule that allows counsel and SMEs for *any* party to access highly confidential information. As we discussed in Decision No. C11-0810,[1] HB 11-1262 requires the Commission to expand access to highly confidential information and computer-based modeling inputs and assumptions while keeping in mind the benefits of competitive bidding for the acquisition of potential resources. Consistent with this intent, we continue to reject the notion that maintaining the status quo of our ERP Rules with respect to the treatment of highly confidential information is an acceptable outcome from this Docket. We find that the NDA language, as modified below,

[1] See paragraph 15.

adequately protects the highly confidential information, and we deny Public Service's request for a requirement for the Commission to establish as a part of the resource plan proceeding which individual parties or groups of parties are eligible to see specific highly confidential information. Specifically, we deny the proposed insertion of "entitled to have access to the highly confidential information" in two places in paragraph 3614(b).

18. We will, however, grant the other two language changes Public Service proposes for subparagraph 3614(b)(I). These changes replace "my client" with "that any subject matter expert to whom I have authorized access to highly confidential information," and replace "further" with "hereby." We find both of these changes to be reasonable.

19. With respect to Public Service's argument that rule 3614 would improperly require the release of software information to parties in violation of the utility's license for such software, we clarify that the rule applies only to the extent that the utility is permitted to provide information in accordance with the terms of its license. However, if the utility proposes to use any licensed software and associated information in the resource plan proceeding, the utility must provide reasonable information to parties so that they can understand and critique the inputs and assumptions relied upon in the utility's case. It may be possible for parties to obtain a license for such software, or the utility may need to provide the information in a different format to avoid licensing restrictions. We therefore deny Public Service's proposal to add "other than computer software or code for which a license is required," in two places in paragraph 3614(b).

20. We also recognize that, in certain circumstances, a waiver from the provisions in rule 3614 may be appropriate. For example, if a utility receives a signed NDA pursuant to rule 3614 and it believes that particular NDA should not be honored, the utility should expeditiously file a rule waiver petition. Delay in filing such a petition would likely prejudice

the party seeking access to the highly confidential information and will therefore not be countenanced.

4. Paragraph 3615(b). Evaluation of Resources Outside of a Resource Plan

21. Public Service proposes to add the phrase "at the request of the bidder" to the requirement to provide information to bidders outside of a resource plan.

22. We disagree with this proposed language. Although we recognize that HB 11-1262 requires the provision of such information "at the request of a bidder," we found that, for resources within a resource plan proceeding, it is more efficient for the utility to provide the information automatically so as to avoid delay. For resources acquired outside of a resource plan proceeding, the acquisition process will likely be expedited. The automatic provision of information is therefore likewise appropriate. Furthermore, we do not anticipate that such automatic provision of information will be a significant burden, as resource acquisitions conducted outside of our ERP process should be infrequent, targeted, and affecting few bidders.

5. Additional Rule Changes

23. We find good cause to grant the following minor rule changes. In paragraph 3602(i), we grant Public Service's request to strike the word "alleged" from the definition of "modeling errors and omissions." Likewise, we grant Black Hills' request to strike "or outputs from" from the same paragraph. Finally, we grant Public Service's request to strike "at a minimum" from paragraph 3613(b).

24. All requests for RRR not addressed by this Decision are denied.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave to File Response to Applications for Rehearing, Reargument or Reconsideration (RRR) of Commission Decision C11-0810 filed by Black Hills/Colorado Electric Utility Company LP (Black Hills) on August 22, 2011 is granted.

2. Colorado Independent Energy Association's Application for RRR of Commission Decision C11-0810, filed on August 16, 2011, is granted.

3. Public Service Company of Colorado's Application for RRR of Commission Decision C11-0810, filed on August 16, 2011, is granted, in part, and denied, in part, consistent with the discussion above.

4. Black Hills' Application for RRR of Commission Decision C11-0810, filed on August 16, 2011, is granted, in part, and denied, in part, consistent with the discussion above.

5. The Commission adopts the rules attached to this Order as Attachment A, consistent with the discussion above.

6. The rules shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

7. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

8. A copy of the rules adopted by this Order shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

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

10. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING August 24, 2011.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL
_____

JAMES K. TARPEY
_____

MATT BAKER
_____

Commissioners

Decision No. C11-1034

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11R-416E

IN THE MATTER OF THE PROPOSED REVISIONS TO THE COMMISSION'S ELECTRIC RESOURCE PLANNING RULES 4 CCR 723-3-3600 THROUGH 3618.

ORDER DENYING APPLICATION FOR REHEARING, REARGUMENT AND RECONSIDERATION

Mailed Date: September 22, 2011
Adopted Date: September 21, 2011

I. BY THE COMMISSION

A. Statement

1. On July 27, 2011, the Commission issued Decision No. C11-0810 adopting revisions to its Electric Resource Planning (ERP) Rules contained in 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.* The rule revisions relate to the transparency and confidentiality of information associated with the planning and acquisition of electric generation resources. The rule revisions satisfy various requirements resulting from the passage of House Bill (HB) 11-1262, codified at § 40-6-107, C.R.S.

2. On August 29, 2011, the Commission issued Decision No. C11-0934, which granted, in part, Applications for Rehearing, Reargument, or Reconsideration (RRR) concerning Decision No. C11-0810.

3. On September 19, 2011, Western Resource Advocates (WRA) timely filed an Application for Rehearing, Reargument and Reconsideration of Decision No. C11-0934.

4. Now being duly advised in the matter, we deny WRA's Application for RRR and adopt the rules as set forth in Attachment A, consistent with the discussion below.

B. Background

5. By Decision No. C11-0810, we adopted a requirement for the utility to release as public all bids and utility proposals. The adopted requirements were set forth in paragraph 3613(k) as follows:

> Upon completion of the competitive acquisition process under paragraph 3613(i), the utility shall post on its website all bids and utility proposals. The utility shall post for a minimum of 30 calendar days all bid information that bidders submitted and all information for resources the utility proposed to build and own as a rate base investment on its website as public information.

6. Public Service Company of Colorado (Public Service), Colorado Independent Energy Association (CIEA), Black Hills/Colorado Electric Utility Company, L.P. (Black Hills), filed Applications for RRR regarding the new requirements in paragraph 3613(k).

7. Public Service and CIEA filed a joint proposal to modify paragraph 3613(k) in their Applications for RRR, as follows:

> Upon completion of the competitive acquisition process under paragraph 3613(i), the utility shall post on its website the following information from all bids and utility proposals: bidder name; bid price and utility cost, stated in terms that allow reasonable comparison of the bids with utility proposals; generation technology type; size of facility; contract duration or expected useful life of facility for utility proposals; and whether the proposed power purchase contract includes an option for the utility to purchase the facility during or at the end of the contract term.

8. In contrast, through its Application for RRR, Black Hills proposed to delete the requirement of paragraph 3613(k) as set forth in Decision No. C11-0810. Black Hills also filed a response to the Applications for RRR filed by Public Service and CIEA in which it advocates rejection of the modified language or further rehearing. Finally, Noble Energy, Inc., Chesapeake Energy Corporation, and EnCana Oil & Gas (USA) (collectively, Gas Intervenors) filed a response to the Applications for RRR filed by Public Service and CIEA requesting further rehearing on the modified language.

9. We adopted the language proposed by Public Service and CIEA by Decision No. C11-0934.

C. Discussion

10. WRA states that it supports the version of the rule adopted in Decision No. C11-0810 requiring all bid information to be publicly disclosed. WRA contends that the rule language we adopted by Decision No. C11-0934 is substantially different than the terms for public disclosure of bid information in the Commission's original redlined rules adopted by Decision No. C11-0810. WRA contends that a rule requiring full disclosure of bid information on the utility website is the best outcome. WRA thus requests that the Commission revert to the version of paragraph 3613(k) we had adopted by Decision No. C11-0810.

11. As we stated in Decision No. C11-0934, the adopted rule language for paragraph 3613(k) is within the spectrum of positions advanced in comments and at hearing in this proceeding. Moreover, the rule language we adopted will provide sufficient information to allow bidders to understand how certain aspects of its bid compared with others, without the potential downside of releasing all bid information. Therefore, we deny WRA's request to revert back to the language adopted by Decision No. C11-0810.

12. Alternatively, if the Commission denies WRA to revert to the earlier version of paragraph 3613(k), WRA proposes that we modify the rule language by adding the following to the elements of bids to be disclosed:

- CO2 emissions/MWh
- NOx emissions/MWh
- SOx emissions/MWh
- Mercury emissions/MWh
- Particulate emissions/MWh
- Water usage in gallons/MWh
- Whether the unit conforms to the definition of a Section 123 resource

13. WRA asserts that its proposed revisions are consistent with the spirit and goals of this Docket and HB 11-1262. Further, WRA argues that the failure to disclose this additional bid information will handicap the ability of bidders and the public to compare alternatives and objectively assess and understand the resource planning process and results.

14. We find that WRA's suggested changes are misplaced, because the bids received in a competitive solicitation might not include the information WRA seeks to have released to the public. For example, bids are not contemplated to include emissions information under Rule 3616 Request for Proposals.

15. Rather, we expect that WRA's additions will likely be part of the results of each utility's bid analysis conducted during Phase II of its ERP proceeding, particularly if the emissions profiles of the bids play a role in resource selection. For instance, emission rates per MWh, as specified by WRA, typically vary with respect to unit loading. Thus, we find that use of the paragraph 3613(j) process, which process enables parties to the ERP proceeding to advocate for the release of previously confidential and highly confidential information following the completion of the Phase II proceeding, to be a better fit than mandating disclosure pursuant to paragraph 3613(k). We thus deny WRA's alternative request to modify paragraph 3613(k).

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument and Reconsideration of Decision No. C11-0934 filed by Western Resource Advocates on September 19, 2011 is denied.

2. The Commission adopts the rules attached to this Order as Attachment A.

3. The rules shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

4. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

5. A copy of the rules adopted by this Order shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

6. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 21, 2011.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

MATT BAKER

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director