

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of Black Hills ) Application No. P-12.32  
Nebraska Gas, LLC d/b/a Black )  
Hills Energy, Rapid City, South )  
Dakota, seeking to extend its ) PROTECTIVE ORDER  
service area for purposes of )  
serving an Omaha Public Power )  
District site in Sarpy County. ) Entered: February 25, 2021

BY THE HEARING OFFICER:

On February 23, 2021, Black Hills Nebraska Gas, LLC, d/b/a Black Hills Energy ("Black Hills" or "Applicant") filed an application seeking to extend its service area for purposes of serving an Omaha Public Power District site in Sarpy County, pursuant to Neb. Rev. Stat. § 66-1829. Concurrently with that application, Black Hills filed a motion for Protective Order pursuant to 291 Neb. Admin. Code § 9-006. The Hearing Officer finds that the Motion should be granted.

1. This Protective Order shall govern the use of all confidential information and documents produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Nebraska Public Service Commission.
2. In accordance with the procedures set forth in 291 Neb. Admin. Code § 9-006, "Confidential Information," a Participant may designate as protected those materials which customarily are treated by that Participant as sensitive and proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury.
3. Definitions. For purposes of this Protective Order:
  - a. The term "Participant" shall mean Applicant and any other necessary or permitted party in this Docket. Participant does not include Commission staff.
  - b. The term "Confidential Material" shall mean:
    - (1) materials (including depositions) provided by a Participant in these proceedings, work papers, contracts, formulas, rate models, responses to

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discovery requests, and other materials designated by such Participant as protected, and marked in accordance with the provisions of this Order;

- (2) any information contained in or obtained from such designated materials;
- (3) any other materials which are made subject to this Protective Order by the Commission, or its Staff, by any Court or other body having appropriate authority, or by agreement of the Participant;
- (4) notes of Confidential Materials; and
- (5) copies of Confidential Materials.

The Participant producing the Confidential Materials shall physically mark them on each page as "CONFIDENTIAL MATERIALS - COMMISSION DOCKET NO. P-12.32" or "HIGHLY CONFIDENTIAL - RESTRICTED REVIEW ONLY - COMMISSION DOCKET NO. P-12.32" in accordance with the provisions of this Protective Order.

Confidential Materials shall not include (1) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (2) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

- c. The term "Notes of Confidential Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b). Notes of Confidential Materials are subject to the same restrictions provided in this Protective Order for Confidential Materials of the type from which the Notes of Confidential Materials are derived except as otherwise specifically provided in this Protective Order.

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- d. The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Confidential Materials shall certify their understanding that such access to Confidential Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Commission in this proceeding.
- e. The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:
- 1) The Public Advocate;
  - 2) an attorney who has made an appearance in this proceeding for a Participant;
  - 3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in (2);
  - 4) a consultant or an expert or an employee of a consultant or an expert retained by a Participant, the Commission, or the Public Advocate for the purpose of advising, preparing for, or testifying in this proceeding;
  - 5) a person designated as a Reviewing Representative by order of a Hearing Officer, Presiding Judge, or the Commission; or
  - 6) employees or other representatives of Participants appearing in this proceeding or the Public Advocate with significant responsibility for this docket.

A Reviewing Representative shall not be an individual involved in (i) consulting, marketing, purchase, or sales of energy or the supervision of consulting, marketing, purchasing, or sales of energy if the information at issue is confidential and specific to another vendor or customer of Black Hills, or (ii) negotiating gas supply, transportation or sale arrangements with Black Hills if the information at issue is confidential and involves other Black Hills customers,

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suppliers, interstate transporters, shipping, or potential shippers' negotiations with Black Hills regarding capacity arrangements, or (iii) negotiating with customers (current or potential) for service on behalf of entities competing with Black Hills if the information at issue is confidential and concerns potential expansion or extension of Black Hills's existing facilities or the renewal or renegotiation of existing service agreements of Black Hills or the negotiation of new service agreements of Black Hills.

4. Confidential Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraph 7, 8, and 9.
5. Confidential Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Confidential Material is concluded and is no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen (15) days of such request, return the Confidential Materials (excluding Notes of Confidential Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Confidential Materials, and Notes of Confidential Materials may be retained, if they are maintained in accordance with Paragraph 6 below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Confidential Materials and Notes of Confidential Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Confidential Materials are not returned or destroyed, they shall remain subject to the Protective Order.
6. All Confidential Materials shall be maintained by each Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8 and 9. The Commission shall place any Confidential Materials filed with the Commission in a non-public file in accordance with its Rules and Regulations. By placing such documents in a non-

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public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. Disclosure of "Confidential Materials" shall be governed by Neb. Rev. Stat. § 66-1829.

7. Confidential Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Confidential Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding and who qualifies for access to such material pursuant to Paragraph 3(e) hereof. Reviewing Representatives may make copies of Confidential Materials, but such copies become Confidential Materials. Reviewing Representatives may make notes of Confidential Materials, which shall be treated as Notes of Confidential Materials if they disclose the contents of Confidential Materials.
8. (a) If a Reviewing Representative's scope of employment includes the marketing, purchasing, or sale of energy, the direct supervision of any employee or employees whose duties include the marketing, purchasing, or sale of energy, the provision of consulting services to any person whose duties include the marketing, purchasing, or sale of energy, or the direct supervision of any employee or employees whose duties include the marketing, purchasing, or sale of energy, such Reviewing Representative may be prohibited from reviewing Confidential Materials of Black Hills. If Black Hills consents to the review, then the Reviewing Representative may not use information contained by any Confidential Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.  
  
(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(e) above, the Participant shall seek agreement from the Participant providing the Confidential Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 3(e) above with respect to those materials. If no agreement is reached, the

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Participant shall submit the disputed designation to the Commission or any reviewing court for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to, Confidential Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate, provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial, and clerical personnel under the attorney's instruction, supervision, or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Confidential Materials to that Reviewing Representative.

(b) Other than Commission staff, only the following individuals, who have first complied with the provisions of paragraph 9(a) of this Protective Order, shall be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to, any Confidential Materials that are designated pursuant to this Protective Order as "HIGHLY CONFIDENTIAL - RESTRICTED REVIEW ONLY - COMMISSION DOCKET NO. P-12.32":

- (1) the Public Advocate;
- (2) an attorney who has made an appearance in this proceeding for the Public Advocate;
- (3) a consultant, an expert, or an employee of a consultant or an expert retained by the Commission or the Public Advocate for the purpose of advising, preparing for, or testifying in this proceeding.

(c) Any party, having complied with the provisions of paragraph 9(a) of this Protective Order, who seeks to gain access to any Confidential Materials designated pursuant to this Protective Order as "HIGHLY CONFIDENTIAL - RESTRICTED REVIEW ONLY - COMMISSION DOCKET NO. P-12.32" may make a request to the Commission for access.

(d) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

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10. Any Reviewing Representative may disclose Confidential Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate and the receiving Reviewing Representatives qualifies for access to that type of material under Paragraph 3(e). In the event that any Reviewing Representative to whom the Confidential Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(e), access to Confidential Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.
11. Subject to Paragraph 17, the Commission or its designee shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission or its designee, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as protected shall notify the party that provided the confidential Materials by specifying in writing the materials whose designation is contested. In any challenge to the designation of materials as protected, the burden of proof shall be on the Participant asserting the protection. After consideration of the criteria set forth in Neb. Rev. Stat. § 66-1829, if the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 shall apply.
12. All copies of all documents reflecting Confidential Materials, including any portions of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Confidential Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order and in accordance with 291 Neb. Admin. Code § 9-006. Such documents shall be marked as set forth in paragraph 3(b) of this Order and shall be filed under seal and served under seal upon the Commission and all Reviewing Representatives who are on the service list in accordance with Commission Rules and Regulations. For anything filed under seal, redacted versions, or where an entire document is protected, a letter indicating such will also be filed with the



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Commission and served on all parties on the service list. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Confidential Materials are not distributed to unauthorized persons.

If any Participant desires to include, utilize or refer to any Confidential Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such Participant shall first notify both Counsel for the disclosing Participant and the Commission of such desire, identifying with particularity each of the Confidential Materials. Thereafter, use of such Confidential Material will be governed by procedures determined by the Commission in accordance with the provisions of the State Natural Gas Regulation Act, Neb. Rev. Stat. § 66-1801 et seq., and the Commission's Rules and Regulations.

13. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Confidential Materials on any legal grounds.
14. Nothing in this Protective Order shall preclude any Participant from requesting the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Confidential Materials pursuant to this Protective Order. The Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.
15. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Commission or the Hearing Officer.
16. All Confidential Materials filed with the Commission or any other judicial or administrative body in support of or as a part of a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Confidential Materials, as well as



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the type of Confidential Materials under paragraph 3(b), subject to this Protective Order.

17. If the Commission finds at any time in the course of this proceeding that all or part of the Confidential Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for five (5) business days from the date of issuance of the Commission's decision, and if the Participant seeking protection files an interlocutory appeal, for an addition seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Commission's decisions respecting Confidential Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof.
18. In the course of this proceeding, any hearings during which documents or information obtained pursuant to the terms of this Order are likely to be disclosed shall be conducted *in camera*, attended only by persons authorized to have access to such information under this Order, provided that there has been no prior Hearing Officer determination that the documents or information in question are not confidential. The transcript of such *in camera* proceedings shall be kept under seal.
19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.
20. None of the Participants waive the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Confidential Materials.
21. The contents of Confidential Materials or any other form of information that copies or discloses Confidential Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

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O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that this Protective Order shall be entered in the above-captioned proceeding.

MADE AND ENTERED at Lincoln, Nebraska, this 25<sup>th</sup> day of February, 2021.

NEBRASKA PUBLIC SERVICE COMMISSION

BY:

A handwritten signature in blue ink, appearing to read "Dan Watermeier", is written over a horizontal line.

Commissioner Dan Watermeier  
Hearing Officer

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In the matter of Black Hills ) Application No. P-12.32  
Nebraska Gas, LLC d/b/a Black )  
Hills Energy, Rapid City, South )  
Dakota, seeking to extend its ) **NON-DISCLOSURE CERTIFICATE**  
service area for purposes of )  
serving an Omaha Public Power )  
District site in Sarpy County. )

I, \_\_\_\_\_, hereby certify my understanding that access to Confidential Material is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it.

I understand that the contents of the Confidential Materials, any notes or other memoranda, or any other form of information that copies or discloses Confidential Materials shall not be disclosed to anyone other than in accordance with the Protective Order.

I acknowledge that a violation of this certificate constitutes a violation of an order of the Commission.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Date: \_\_\_\_\_