

<p>DISTRICT COURT, DENVER COUNTY, COLORADO  Denver City and County Building  1437 Bannock Street, Room 256  Denver, Colorado 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>INTERMOUNTAIN RURAL ELECTRIC  ASSOCIATION d/b/a CORE ELECTRIC  COOPERATIVE,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>PUBLIC SERVICE COMPANY OF COLORADO,</p> <p style="text-align: center;">Defendant.</p>	
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<p style="text-align: center;"><b>EX PARTE MOTION TO FILE UNREDACTED COMPLAINT AND EXHIBITS A-B  AND F-L AS TEMPORARILY RESTRICTED PENDING FINAL DETERMINATION</b></p>	

**INTRODUCTION**

Plaintiff Intermountain Rural Electric Association d/b/a CORE Electric Cooperative (“CORE”) filed a Complaint against Defendant Public Service Company of Colorado (“PSCo”) for breach of contract, among other claims, for PSCo's imprudent operation and maintenance of the Comanche 3 power generating station, of which CORE is a part owner. CORE's Complaint quotes from, refers to, and attaches certain documents that are designated “confidential” or which

PSCo has in other venues claimed contain confidential information. Colorado law favors public access to filed pleadings, and CORE contends that Colorado law requires the documents be made publicly accessible. *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996). Nevertheless, in order to give PSCo an opportunity to identify what information it contends is confidential (and why) and to preserve the issue for the Court's determination, CORE has filed an unredacted copy of the Complaint and exhibits A-B and F-L as restricted pursuant to C.R.C.P. 121 § 1-5. CORE has also filed a redacted Complaint that is publicly-accessible. Through this motion, CORE requests the Court enter an order temporarily designating the unredacted Complaint and exhibits A-B and F-L as restricted until the parties complete briefing on this motion and Court determines whether the unredacted Complaint and all attached exhibits should be made publicly available or permanently restricted.

#### **C.R.C.P. 121 § 1-15(8) CERTIFICATION**

Under C.R.C.P. 121 § 1-15(8) pre-filing conferral is required unless a “rule governing the motion provides that it may be filed without notice.” Here, C.R.C.P. 121 § 1-5 states that a “motion for limitation of access may be granted, ex parte, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.” Accordingly, CORE has filed this motion, ex parte, with its complaint and accompanied by a supporting declaration. Upon service of the Complaint and an entry of appearance by counsel for PSCo, CORE will confer with PSCo regarding this motion and supplement this conferral certificate.

## FACTS

### **I. CORE purchased an ownership interest in a power plant operated by PSCo.**

CORE is a Colorado electric cooperative that provides retail electric service to customers from the Eastern Plains to the Colorado Front Range, including the towns of Elizabeth, Bennett, Castle Rock, Parker, Larkspur and Woodland Park. Compl. ¶ 1. In order to serve its customers, CORE owns a share of the Comanche Unit 3 electric generation facility near Pueblo, Colorado (“Comanche 3”). *Id.* The majority owner of Comanche 3 is PSCo. *Id.* Holy Cross Electric Association (“Holy Cross”) owns the remaining interest. *Id.*

Comanche 3 was proposed to be a state-of-the-art, 750-megawatt super-critical electric generating facility and commenced commercial operation in 2010. Compl. ¶ 2. It was projected to have a useful lifespan of at least 60 years. *Id.* PSCo is the sole operator of Comanche 3 and is contractually obligated to operate and maintain Comanche 3 consistent with Prudent Utility Practices and to deliver to CORE and Holy Cross their percentage share of the electric output of Comanche 3. *Id.*

### **II. PSCo damaged Comanche 3 by imprudently operating it.**

This case arises from PSCo’s failure to operate Comanche 3 in accordance with its contractual obligations and Prudent Utility Practices. Because of PSCo’s failures, the facility has been plagued with outages and is out of service, on average, more than 91 days per year – the worst reliability record of any of PSCo’s generation facilities. Compl. ¶ 3. Most recently, Comanche 3 was out of service from January 2020 to January 2021 largely due to a failure of its steam turbine, which was damaged because of years of neglect, and the subsequent destruction of its bearings when a PSCo employee shut-off the lubrication oil feed when the turbine was spinning at high

speed. *Id.* Following the numerous incidents that led to Comanche 3's unplanned shutdown in 2020, PSCo retained expert consultants and used internal resources to investigate the root cause(s) of the incidents.

The Colorado Public Utilities Commission (“PUC”) launched its own investigatory proceeding to understand why, among other things, “Comanche 3, a unit still in the first decade of its 60-year useful service life, [is] plagued with such poor unit reliability?” Compl. ¶ 28. During the course of the PUC's investigation, the PUC requested that PSCo turn over copies of the root cause analysis reports it had commissioned (“Root Cause Reports”). The PUC reviewed the Root Cause Reports, along with other information, and issued a public report in which it made a number of damning findings concerning PSCo's operation of Comanche 3. *Id.* The PUC stated that PSCo “has a responsibility to prudently manage Comanche 3 using industry best practices. However, the reviews performed by [PSCo] and outside experts appear to suggest otherwise.” *Id.* ¶ 77. In the PUC's public report, it redacted portions of its report that quoted or directly referenced the Root Cause Reports. *See generally* Compl., Ex. E. The PUC later agreed to maintain those redactions because it believed that Colorado statute requires the PUC to keep the information confidential until PSCo agrees to release it or until a court orders it released. *See* PUC Interim Decision Granting Motion for Extraordinary Protection, attached hereto as Exhibit A, at ¶ 15. In addition, the PUC relied on “policy consideration[s]” arising from the PUC's relationship with the utilities that it regulates. *Id.* ¶ 18. Notably, the PUC found that if it commenced a “complaint proceeding” against PSCo, it would revisit its decision to keep the information confidential. *Id.*

**III. CORE seeks millions of dollars in damages from PSCo for its breaches of contract and other misconduct.**

CORE commenced this action to recover damages from PSCo for, *inter alia*, its breaches of contract for its imprudent operation of Comanche 3. *See generally* Compl. CORE's claims against PSCo are based, in part, on the parties' contract documents and the findings of the Root Cause Reports, which CORE alleges show that PSCo is responsible for the operational and maintenance problems at Comanche 3. CORE's Complaint quotes from the Root Cause Reports and attaches them as exhibits. *See, e.g.*, Compl. ¶¶ 21-26.

The Complaint demonstrates that PSCo's failure to operate Comanche 3 in accordance with Prudent Utility Practices has caused CORE to incur millions of dollars of additional repair and maintenance costs and has caused CORE to spend millions more to purchase replacement power during Comanche 3's numerous lengthy outages. Compl. ¶ 4. Further, the Complaint explains how PSCo permanently damaged Comanche 3, which will cause CORE to pay excessive repair and maintenance costs and for unplanned outages in the future. *Id.* This will ultimately result in Comanche 3 being retired from service prematurely. *Id.* Its early retirement will force CORE to secure replacement power at a higher cost resulting in additional recoverable damages. *Id.* In addition, Comanche 3 has suffered a permanent diminution in value because of PSCo's ongoing failures of operation and maintenance. *Id.* This is a direct loss of CORE's benefit of the bargain with PSCo at Comanche 3. In total, CORE seeks millions of dollars in compensatory damages to be made whole for the damages that are a direct result of PSCo's failure to operate Comanche 3 in accordance with its contractual obligations and Prudent Utility Practices.

#### **IV. Colorado law favors public access to the courts.**

CORE filed the unredacted Complaint and exhibits A-B and F-L as restricted to provide PSCo an opportunity to be heard on whether the redacted information and restricted exhibits are confidential. As outlined below, the public's interest in open access to the courts outweighs any confidentiality claim. The public has a particularly strong interest in this case, as PSCo is a public utility and CORE is a cooperative that provides retail electrical service to thousands of Colorado residents. PSCo's prior claims of confidentiality do not withstand scrutiny or outweigh the public's interest in accessing the unredacted Complaint and all its exhibits.

#### **LEGAL STANDARD**

Under Colorado law, the “public is entitled” to access public records. *Anderson*, 924 P.2d at 1126.

In the Open Records Act, § 24–72–201, C.R.S. (1988 Repl. Vol. 10B), the General Assembly has declared that, with certain specified exceptions, it is 'the public policy of this state that all public records shall be open for inspection by any person at reasonable times....' This public policy means that, unless there exists a legitimate reason for non-disclosure, any member of the public is entitled to review all public records. There is no requirement that the party seeking access must demonstrate a special interest in the records requested.

*Id.* “The Act restricts the public’s right to obtain access to court records, if such inspection ‘is prohibited by rules promulgated by the supreme court or by the order of any court.’” *Id.* (quoting C.R.S. § 24-72-204(1)(c)). The Colorado Supreme Court has promulgated the Colorado Rules of Civil Procedure, and specifically Rule 121 § 1-5. Under this rule, the Court may restrict access to court files only “upon a finding that the harm to the privacy of a person in interest outweighs the public interest.” C.R.C.P. 121 § 1-5(2).

“Hence, the rule [C.R.C.P. 121 § 1-5] creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties’ right of privacy outweighs the public’s right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order.” *Anderson*, 924 P.2d at 1126. Further, “C.R.C.P. 121 § 1–5 squarely places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files.” *Id.*

In considering a motion to limit access to the court file pursuant to C.R.C.P. 121 § 1-5:

[T]he only criterion the court could properly consider was whether the parties’ privacy rights outweighed the public interest in the subject matter. Since that is the sole standard stated in the rule, we must assume that the supreme court, in promulgating C.R.C.P. 121 § 1–5, took into account other non-privacy considerations and determined that such were not of sufficient moment to justify limiting the public’s access to the court’s public records.

*Id.* at 1126-27.

“Generally, under the common law, a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated.” *Id.* at 1127. “Likewise, *prospective injury to reputation*, an inherent risk in almost every civil lawsuit, *is generally insufficient to overcome the strong presumption in favor of public access to court records.*” *Id.* (emphasis added).

## ARGUMENT

The unredacted Complaint and exhibits A-B and F-L should be temporarily restricted only until the Court holds a hearing or otherwise determines whether the designation should be made

permanent. At that time, the Court should make the unredacted Complaint and all its exhibits accessible to the public because PSCo cannot prove that its privacy rights outweigh the public's strong interest in access to court records.

**I. The public has a strong interest in accessing court records, including the unredacted Complaint and its exhibits.**

Colorado law *presumes* that all court records are publicly accessible unless and until the party seeking to protect the documents from disclosure demonstrates that its privacy interests outweigh the public interest. *Anderson*, 924 P.2d at 1126. Here, the public interest is significant. The unredacted Complaint and exhibits A-B and F-L describe the operational and maintenance obligations PSCo owed to CORE at Comanche 3, and PSCo's breach of those obligations, which failures have caused CORE to suffer millions of dollars in damages. CORE serves thousands of customers across Colorado and PSCo is a utility, heightening the public interest. CORE's members and the public at large have an interest in understanding how and why Comanche 3's operational costs are so high and why the value of CORE's ownership interest in Comanche 3 is now so low on account of PSCo's actions. If, as PSCo seeks, unflattering information and documents such as the Complaint and its exhibits can be shielded from public view, then very little about this case could ever be disclosed because CORE's claims largely arise from PSCo's operational deficiencies as outlined in the unredacted Complaint and its exhibits. Virtually every document filed in this case will likely cause some embarrassment to PSCo. Shielding the unredacted Complaint and exhibits A-B and F-L from public view would set a precedent directly contrary to Colorado's strong policy favoring public access.

**II. PSCo has no legally cognizable privacy interest, much less one that outweighs the presumption that court records are publicly accessible.**

None of the information in the unredacted Complaint or exhibits A-B and F-L falls within the recognized categories of information that may be suppressed: accusations of sexual assault, trade secrets, potentially defamatory material, or threats to national security. *Anderson*, 924 P.2d at 1127. The only *possibly applicable* category is trade secrets. *Id.* However, under Colorado law neither the unredacted Complaint nor its exhibits are themselves, nor do they contain, trade secrets.

Under Colorado statute:

‘Trade secret’ means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is *secret and of value*.

C.R.S. § 7-74-102(4) (emphasis added).<sup>1</sup> “Colorado courts may consider several factors to make the factual determination of whether a trade secret exists under this statutory definition, including: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, such as the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.” *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 521–22 (Colo. App. 2011).

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<sup>1</sup> Colorado common law defines trade secret as a “plan or process known only to its owner, and those of his employees to whom it is necessary to confide it.” *Rumnock v. Anschutz*, 2016 CO 77, ¶ 13 n. 3 (quoting *Julius Hyman & Co. v. Velsicol Corp.*, 233 P.2d 977, 999 (Colo. 1951)).

The unredacted Complaint and exhibits A-B and F-L do not contain any proprietary information. Instead, they identify and analyze PSCo's operational deficiencies and the source (root cause) of PSCo's errors that caused Comanche 3 to be damaged. They contain no information that is traditionally considered a trade secret such as customer lists or source code. *See Kondash v. Kia Motors Am., Inc.*, 767 F. App'x 635, 639 (6th Cir. 2019) ("investigative reports created in response to, and for the purpose of, investigating an incident that result in litigation" are not trade secret).

The unredacted Complaint and exhibits A-B and F-L also do not contain anything of “value” as that term is understood in trade secrets law. The factors the court considers include “(4) the savings effected and the value to the holder in having the information as against competitors . . . [and] (6) the amount of time and expense it would take for others to acquire and duplicate the information.” *Saturn*, 252 P.3d at 521–22. Neither applies here. The unredacted Complaint, supported by its exhibits, details how PSCo poorly operates Comanche 3, its deficient training programs, substandard management, and many other problems. The Root Cause Reports were generated to help PSCo understand why specific events occurred. They were not produced to improve its competitive standing. There is no value in PSCo having the information in the reports “as against competitors,” *see id.*, and others would not (and could not) duplicate the reports for competitive purposes, because the reports apply only to PSCo's deficient operation of Comanche 3. No “competitor” would get a leg up on PSCo by reading them.<sup>2</sup> In other words, while the

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<sup>2</sup> To the extent PSCo claims the unredacted Complaint or any of its exhibits contain trade secrets, PSCo cannot paint with a broad brush and claim they are entirely subject to trade secret protection. *Nutritional Biomimetics, LLC v. Empirical Labs Inc.*, No. 16-CV-01162-KMT, 2018 WL 2567872, at \*3 (D. Colo. Apr. 24, 2018) (chastising parties seeking trade secret protection for failing to specifically identify alleged secrets in documents, stating “Plaintiffs should be using a

information in the reports is surely *valuable* in the sense that PSCo can use the information to improve its operations, it is not *competitively valuable*, which is what trade secrets law is designed to protect.

The only apparent reason PSCo would seek to keep the unredacted Complaint and its exhibits from the public is to avoid embarrassment and reputational harm. To be sure, they paint an unflattering picture of PSCo's operation of Comanche 3. However, embarrassment by one's own operational problems does not justify the denial of public access to this case. *Anderson*, 924 P.2d at 1127. Instead, it actually strongly *favors* public access. *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (“Sunlight is said to be the best of disinfectants . . . .”). Therefore, PSCo cannot claim that it has a privacy interest that outweighs the public's interest in full access to unredacted Complaint and its exhibits.

### **III. PSCo's prior claims of confidentiality do not satisfy C.R.C.P. 121 § 1-5.**

To the extent PSCo relies on the PUC's decision to maintain the confidentiality of the Root Cause Reports, the claim is insufficient to satisfy its burden of proving that its privacy interest outweighs the public interest. First, the PUC relied on its belief that it was prohibited from releasing the information publicly until PSCo agreed or it was ordered by the court, effectively avoiding the confidentiality issue and deferring to the judiciary. As such, the PUC's decision does not establish a precedent this Court is obligated to follow; rather, it demonstrates that this Court is the appropriate venue to make this determination. Second, the PUC relied on policy

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scalpel here—not a sledgehammer, let alone a shot-gun” to identify the alleged secrets). Instead, it must identify the trade secrets specifically. *Id.* From PSCo's prior efforts to block public access to the Root Cause Reports in their entirety, the Court can reasonably infer that PSCo is more concerned about being embarrassed by the reports' findings than protecting alleged “trade secrets.”

considerations—the impact public disclosure would have on its relationships with the utilities it regulates—that cannot be considered here. *Anderson*, 924 P.2d at 1126-27 (identifying “parties’ privacy rights” as “only criterion the court could properly consider”). The PUC made no finding that PSCo had a “privacy” interest, nor did it conduct the balancing test required by C.R.C.P. 121 § 1-5 and Colorado case law to find that PSCo's privacy interest outweighed the public interest. *Anderson*, 924 P.2d at 1126. Therefore, the PUC's decision is not applicable here.

### CONCLUSION

CORE respectfully requests that the Court grant this motion and temporarily accept the unredacted Complaint and certain exhibits as restricted documents but ultimately order that the Complaint and its exhibits be made publicly accessible.

Respectfully submitted this 7<sup>th</sup> day of September, 2021.

**STINSON LLP**

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