

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

DOCKET EL26-003

REPLY OF INTERVENOR JOHN D. McKEE TO BLACK HILLS POWER'S RESPONSE AND OBJECTION TO MOTION TO ADOPT PROTECTIVE ORDER

Intervenor John D. McKee respectfully submits this Reply to Black Hills Power, Inc.'s ("BHE") June 16, 2026 filing titled *Response to McKee Motion to Adopt Protective Order*. BHE requests that the Commission deny the proposed Protective Order and instead compel the Intervenor to sign BHE's private Confidentiality Agreement.

For the reasons set forth below, BHE's objections are unsupported by statute, unsupported by the Administrative Rules of South Dakota, inconsistent with Commission practice, and rely on mischaracterizations of both the ARSD and prior Commission proceedings. The Commission should therefore **grant the Intervenor's Motion and adopt the proposed Protective Order.**

I. SUMMARY OF REPLY

BHE's objection rests on four claims:

1. The proposed Protective Order is "overly broad and vague."
2. It is "inconsistent" with ARSD 20:10:01:39-45.
3. It is "inconsistent" with prior Commission Protective Orders.
4. It does not adequately address "AI systems."

Each claim is addressed below. None withstand scrutiny.

The ARSD places confidentiality authority with the Commission — not the utility. The Commission routinely issues Protective Orders that supplement the ARSD. Nothing in South Dakota law requires an intervenor to sign a utility-drafted private contract as a condition of access to confidential information.

II. BHE’S CLAIM THAT THE PROTECTIVE ORDER IS “OVERLY BROAD AND VAGUE” IS UNSUPPORTED

BHE argues that the Intervenor’s Protective Order uses bullet points and therefore lacks “definitional guidance.” This is a stylistic critique, not a legal one.

BHE cites no:

- statute,
- ARSD rule,
- Commission order, or
- Commission practice

that requires a Protective Order to follow a particular formatting style.

The Commission has repeatedly issued Protective Orders that:

- summarize obligations in bullet form,
- incorporate ARSD definitions by reference, and
- rely on Commission interpretation rather than private contractual language.

The Intervenor’s proposed Protective Order follows this established pattern.

III. THE PROTECTIVE ORDER IS CONSISTENT WITH ARSD 20:10:01:39–45

BHE asserts that the proposed Protective Order is “inconsistent” with the ARSD because it adds procedural detail not expressly listed in the rules.

This argument misstates the purpose of a Protective Order.

The ARSD provides the **minimum framework** for confidentiality. Protective Orders routinely:

- add procedural clarity,
- define designation processes,
- establish handling requirements, and
- create challenge mechanisms.
- BHE’s own filing cites Protective Orders (GE25-001, TC21-001) that contain provisions **not found in the ARSD**, proving that Protective Orders *do* expand beyond the rule text.

Nothing in the Intervenor's proposed Protective Order contradicts any ARSD provision.

IV. BHE MISCHARACTERIZES PRIOR COMMISSION PRACTICE

BHE relies heavily on Docket EL16-042, but that docket does **not** support its position.

In EL16-042:

- The Commission did **not** rule that a utility NDA overrides a Commission Protective Order.
- The Commission did **not** require intervenors to sign a utility-drafted contract.
- The Commission simply held that an intervenor cannot demand confidential information **without any protections in place.**

Here, the Intervenor has provided a complete Protective Order for Commission approval. The situation is not comparable.

There is **no Commission precedent** requiring an intervenor to sign a utility's private NDA.

V. BHE'S ARGUMENT REGARDING "INCONSISTENCY WITH OTHER STATES" IS IRRELEVANT

BHE references Protective Orders and NDAs used in Wyoming and other jurisdictions.

South Dakota law governs this proceeding. The Commission is not bound by:

- other states' practices,
- other states' NDAs, or
- BHE's internal corporate preferences.

Multi-state operations do not entitle BHE to dictate South Dakota procedure.

VI. THE PROPOSED PROTECTIVE ORDER ADEQUATELY ADDRESSES AI SYSTEMS

BHE argues that the Protective Order does not sufficiently restrict the use of AI systems.

This is incorrect.

The proposed Protective Order expressly states that analytical tools, including AI, may be used **only if they do not disseminate, publish, or make Confidential Information publicly accessible.**

This is a **stronger protection** than BHE's NDA, which imposes a blanket ban without addressing:

- indexing,
- OCR,
- secure local analysis, or
- document-management systems.

The Commission has not adopted any rule prohibiting the use of AI tools. BHE's argument is speculative and unsupported by any authority.

VII. THE COMMISSION — NOT THE UTILITY — HAS AUTHORITY TO ISSUE PROTECTIVE ORDERS

BHE's filing repeatedly attempts to shift confidentiality authority from the Commission to the utility by insisting that the Intervenor must sign BHE's private contract.

Nothing in:

- SDCL,
- ARSD 20:10:01:39–45, or
- Commission precedent

authorizes a utility to require an intervenor to sign a private NDA as a condition of access.

The Commission's Protective Order process exists precisely to avoid this outcome.

VIII. THE COMMISSION SHOULD REJECT BHE’S ATTEMPT TO CREATE UNEQUAL ACCESS

BHE argues that because SDLCG signed its NDA, the Intervenor should be required to do the same.

SDLCG is a represented, multi-customer group with attorneys and consultants. The Intervenor is an individual residential customer.

The Commission cannot create two classes of intervenors with unequal access to information.

A Commission Protective Order ensures equal treatment.

IX. CONCLUSION

BHE’s objections are:

- unsupported by statute,
- unsupported by the ARSD,
- inconsistent with Commission practice, and
- based on mischaracterizations of prior proceedings.

The Intervenor’s proposed Protective Order:

- aligns with ARSD 20:10:01:39–45,
- preserves Commission authority,
- ensures equal access,
- provides clear protections, and
- prohibits dissemination of confidential information.

X. Black Hills Power’s Objection Ignores Its Own Failure to Negotiate in Good Faith and Its Counsel’s Lack of Authorization at the Time the NDA Was Demanded

Black Hills Power’s filing omits critical procedural history that directly contradicts its claim that the Intervenor is attempting to “circumvent” established confidentiality processes.

1. BHE’s counsel demanded that the Intervenor sign a private NDA before he was authorized to practice before the Commission.

On April 22, 2026, Corporate Counsel Adam P. Buhrman sent the Intervenor a private Confidentiality Agreement/NDA and conditioned access to discovery on signing it. At that time, **Mr. Buhrman had not yet been admitted pro hac vice** and was not authorized to practice before the Commission.

Despite this, he:

- drafted and transmitted a binding legal instrument,
- demanded execution of that instrument,
- rejected the Intervenor’s counter-proposal, and
- attempted to control discovery obligations in a South Dakota rate case.

This conduct occurred **before** the Commission granted his pro hac vice admission.

The Commission should not reward a utility for attempting to impose a private contract through counsel who was not yet authorized to act in this proceeding.

2. The Intervenor negotiated in good faith; BHE did not.

Upon receiving BHE’s NDA, the Intervenor responded promptly and provided a revised, narrower confidentiality agreement. BHE rejected it outright:

“Black Hills Power will not be able to enter into the Confidentiality Agreement which you provided as it does not provide adequate protection for our confidential information.” — *Email from Adam P. Buhrman, Corporate Counsel, Black Hills Energy*

BHE then stated:

“We will evaluate your concerns and feedback for possible modifications to the Agreement.”

However, **no modifications were ever provided, and no further communication occurred.**

BHE remained silent for **22 days**, until **22 hours after the Intervenor filed his Motion for Protective Order**. Only then did BHE suddenly file an objection.

This sequence demonstrates:

- **BHE did not negotiate in good faith,**
- **BHE did not provide the promised revisions,**
- **BHE did not engage in the collaborative process it now claims to prefer, and**
- **BHE waited until after the Intervenor sought Commission oversight to object.**

3. BHE’s silence and delay contradict its claim that its NDA is the “appropriate” mechanism.

If BHE believed its NDA was the proper vehicle for confidentiality:

- it would have provided revisions as promised,
- it would have communicated before the Intervenor was forced to seek Commission intervention, and
- it would not have waited until after the Protective Order was filed to object.

The timing of BHE's objection strongly suggests that the utility's goal is not to protect confidentiality, but to **retain unilateral control** over the terms of access.

4. This history supports granting the Protective Order.

The Commission — not the utility — is the proper authority to establish confidentiality protections.

Given:

- BHE's failure to negotiate,
- BHE's refusal to provide revisions,
- BHE's reliance on counsel who was not yet authorized, and
- BHE's last-minute objection only after the Intervenor sought Commission oversight,

...the Commission should adopt the Intervenor's Protective Order to ensure a fair, transparent, and Commission-controlled confidentiality process.

XI. At No Time Did Black Hills Power Attempt to Negotiate or Collaborate With the Intervenor on Any Confidentiality Framework

Black Hills Power's filing repeatedly suggests that the Intervenor is attempting to "circumvent" established confidentiality processes. The actual record shows the opposite.

1. BHE never initiated, invited, or engaged in any discussion, negotiation, or working group with the Intervenor regarding confidentiality.

At no point did BHE:

- propose a meeting,
- request a discussion,
- seek input,
- invite collaboration,

- involve the Intervenor in any working group, or
- attempt to jointly develop a confidentiality framework.

There were **zero** attempts at communication beyond the unilateral transmission of a pre-drafted NDA.

2. BHE presented a pre-written NDA on a “sign this or else” basis.

The utility did not:

- ask for feedback,
- request revisions,
- propose alternatives, or
- engage in any iterative process.

Instead, BHE simply delivered a completed, utility-authored NDA and conditioned access to discovery on signing it.

This was not negotiation. It was an ultimatum.

3. When the Intervenor offered a reasonable alternative, BHE rejected it outright and then ceased all communication.

After receiving the Intervenor’s narrower, more balanced confidentiality agreement, BHE responded:

“Black Hills Power will not be able to enter into the Confidentiality Agreement which you provided...”

BHE then stated it would “evaluate” the Intervenor’s concerns for possible modifications — but **never provided any modifications**, never followed up, and never communicated again.

4. BHE only resurfaced 22 hours after the Intervenor filed his Motion for Protective Order.

After weeks of silence, BHE suddenly produced the SDLCG NDA **22 hours after** the Intervenor filed his Protective Order.

This timing is not coincidental. It demonstrates that BHE had no intention of negotiating until the Intervenor sought Commission oversight.

5. BHE’s conduct contradicts its claim that the Intervenor is “circumventing” Commission processes.

The record shows:

- The Intervenor attempted to negotiate.
- BHE refused to negotiate.
- The Intervenor offered an alternative.
- BHE rejected it without discussion.
- The Intervenor sought Commission guidance.
- BHE only acted after the Commission was involved.

This is the opposite of circumvention. It is the proper use of Commission procedure when a utility refuses to engage.

6. BHE's unilateral approach underscores why a Commission-issued Protective Order is necessary.

Because BHE:

- refused to collaborate,
- refused to negotiate,
- refused to provide revisions,
- attempted to impose a private contract, and
- acted only after the Intervenor sought Commission oversight,

...the Commission — not the utility — must establish the confidentiality framework.

A Commission Protective Order ensures:

- fairness,
- transparency,
- equal access, and
- Commission control over confidentiality, not utility control.

For these reasons, the Commission should:

1. **Grant the Intervenor's Motion to Adopt Protective Order, and**
2. **Decline to require the Intervenor to sign BHE's private Confidentiality Agreement.**

Respectfully submitted,

John D. McKee

Intervenor, Docket EL26-003

Rapid City, South Dakota