

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	
<b>BLACK HILLS POWER, INC. d/b/a BLACK</b>	)	<b>RESPONSE TO MCKEE MOTION TO</b>
<b>HILLS ENERGY FOR AUTHORITY TO</b>	)	<b>ADOPT PROTECTIVE ORDER</b>
<b>INCREASE RATES FOR ITS UTILITY SERVICE</b>	)	
<b>IN SOUTH DAKOTA</b>	)	<b>EL26-003</b>

COMES NOW, Black Hills Power, Inc. d/b/a Black Hills Energy (“Black Hills Power”) and submits this response to the “Motion To Adopt Protective Order” filed by Intervenor, Mr. John D. McKee, (“Mr. McKee”), with the South Dakota Public Utilities Commission (“Commission”) on June 8, 2026. Specifically, Black Hills Power requests that the Commission deny Mr. McKee’s Motion To Adopt Protective Order because it is (1) is overly broad and vague, (2) inconsistent with Commission rules and regulations, (3) inconsistent with prior Protective Orders or Confidentiality Agreements approved by the Commission, and (4) does not protect confidential information that may be subject to public Artificial Intelligence systems.

Alternatively, Black Hills Power requests that the Commission adopt and approve a Confidentiality Agreement as set forth in Attachment A to apply to all the Confidential or Highly Confidential information designated or to be designated in this rate proceeding that will be provided to Mr. McKee.<sup>1</sup> The Confidentiality Agreement for Mr. McKee set forth in Attachment A of this response is designed to provide the adequate protection of Confidential and Highly Confidential Information that Black Hills Power seeks in this proceeding. The terms and conditions contained within the proposed Confidentiality Agreement for Mr. McKee are identical to the provisions that have been agreed to by Black Hills Power and the only other Commission-

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<sup>1</sup> Black Hills Power and the South Dakota Large Customer Group have separately entered into a Confidentiality Agreement dated April 22, 2026 to protect the Confidential and Highly Confidential information provided in this proceeding. SDLCG and Commission Staff have access to Confidential Information provided by Black Hills Power.

approved Intervenor in this proceeding, the South Dakota Large Customer Group. In addition, the adoption and approval of requiring Mr. McKee to enter into the Confidentiality Agreement set forth in Attachment A will avoid the necessity of Black Hills Power filing multiple Petitions for Confidential Treatment with the Commission to protect Black Hills Power's Confidential or Highly Confidential Information provided in response to data requests to Black Hills Power.

Black Hills Power sets forth its arguments in support of Black Hills Power's request that the Commission deny Mr. McKee's Motion for the Commission to adopt Mr. McKee's proposed Protective Order and instead to adopt and approve the Confidentiality Agreement set forth in Attachment A below.

**1. Mr. McKee's Proposed Protective Order Is Overly Broad and Vague.**

Black Hills Power and its affiliates are public utility electric and gas distribution entities that provide electric and natural gas services in eight different states.<sup>2</sup> The electric and natural gas services provided by Black Hills Power and its affiliates are regulated by utility commissions authorized under the respective applicable state laws and regulations of those states.

As one would expect, with a multi-state service area, Black Hills Power and its regulated gas and electric service affiliates engage in a significant number of regulatory proceedings annually. Black Hills Power and its affiliates are currently engaged in four different rate application proceedings.<sup>3</sup> This level of regulatory filings often involves the production of Confidential or Highly Confidential information as part of the investigation and discovery process established in those respective regulatory proceedings. To protect the production of Confidential or Highly Confidential Information from public disclosure, as in South Dakota, it is

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<sup>2</sup> Black Hills Power offers regulated electric service in South Dakota and Wyoming. Other affiliates of Black Hills Power offer natural gas or electric services subject to approval by regulatory commissions in the following states: Arkansas, Colorado, Iowa, Kansas, and Nebraska.

<sup>3</sup> Those rate proceedings are ongoing in Arkansas, Kansas, Wyoming, and South Dakota.

customary for the Commission to issue a Protective Order or otherwise issue protection of information that qualifies for confidential treatment.

Upon review of Mr. McKee’s proposed Protective Order, Black Hills Power finds that document contains provisions that appear to be overly broad and vague, which would make enforcement of the protection of confidentiality provisions more difficult, if not impossible. For example, each of the provisions under Mr. McKee’s proposed Protective Order contain briefly stated bullet points. There is little or no additional language or direction related to the different bullets. The bulleted provisions alone are general and overly broad, leaving many possible legal or regulatory questions as to the scope of the provision. While the bullet provisions contained in Mr. McKee’s proposed Protective Order may provide an outline and structure of a Protective Order, Black Hills Power contends that it should not be adopted as the Protective Order covering Confidential and Highly Confidential information provided to Mr. McKee in this proceeding. Mr. McKee’s proposed Protective Order is inadequate and lacks definitional guidance. It is also overly broad, which could lead to arbitrary interpretation and enforcement.

**2. Mr. McKee’s Proposed Protective Order Is Inconsistent with Commission Rules and Regulations.**

The Commission’s rules and regulations governing confidential information can be found in Administrative Rules of South Dakota (“ARSD”) sections 20:10:01:39 through 20:10:01:45.<sup>4</sup> ARSD § 20:10:01:39 provides for the definition of Confidential Information.

Mr. McKee’s Proposed Protective Order contains multiple procedural requirements, restrictions, and definitions that do not appear in—and in some cases conflict with—the Commission’s own confidentiality rules. ARSD § 20:10:01:39 through 20:10:01:45 establishes

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<sup>4</sup> [Administrative Rule | South Dakota Legislature](#)

a Commission-controlled framework for confidentiality. The Proposed Order, by contrast, shifts authority to the producing utility, imposes extra-regulatory burdens, and narrows or expands confidentiality treatment beyond what the Commission’s rules authorize. Black Hills Power contends that these inconsistencies provide a strong basis for the Commission to decline adoption or require substantial revision.

For example, Mr. McKee’s proposed Protective Order, provision 2 sets forth a “Definition of Confidential Information” but only lists three bullets:

- falls within a category recognized under South Dakota law as confidential;
- is specifically identified by BHP at the time of production; and
- is accompanied by a written explanation of the basis for confidentiality.

The Confidential Information definition provided in Mr. McKee’s proposed Protective Order is not the same definition adopted by the Commission and set forth in Commission Regulation ARSD § 20:10:01:39, which provides a list of specific items that are confidential.

As noted above, Mr. McKee’s Protective Order is overly broad and vague, and appears to select some of the Commission’s regulations but not all. For example, the first bullet states that Confidential Information is defined as information that “falls within a category recognized under South Dakota law as confidential.”<sup>5</sup> However, Mr. McKee then expands that definition by including additional requirements that are either contained in other Commission regulations or not included within the Commission regulations at all. The second bullet of Mr. McKee’s proposed Protective Order, as set forth immediately above, requires that the Confidential Information “is specifically identified by BHP at the time of Production.” Black Hills Power does not disagree that Confidential Information should be properly designated, but this specific

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<sup>5</sup> *McKee Protective Order at Paragraph 2.*

requirement does not expressly appear in the Commission’s formal regulations of ARSD § 20:10:01:39 through 20:10:01:45, which the Protective Order states govern for this proceeding.

In addition, ARSD § 20:10:01:41 provides the Commission’s rule and requirements for **“Requests for confidential treatment of information by a submitting party.”** Mr. McKee’s proposed Protective Order appears to include a modified version of ARSD § 20:10:01:41(4), which states as follows:

(4) The statutory or common law grounds and any administrative rules under which confidentiality is requested. Failure to include all possible grounds for confidential treatment does not preclude the party from raising additional grounds in the future.<sup>6</sup>

Mr. McKee’s proposed Protective Order generally states that Confidential Information designation must be accompanied by a written explanation of the basis for confidentiality. By adopting Mr. McKee’s Protective Order, one could misinterpret the Commission’s action to modify its existing regulations and prior practices covering Confidential Information. Moreover, because Mr. McKee’s proposed Protective Order is inconsistent with and fails to fully comply with the Commission’s rules governing Confidential Information, the proposed Protective Order should be rejected for this proceeding.

The table below shows other inconsistencies between Mr. McKee’s proposed Protective Order and the Commission’s Confidentiality Regulations:

<b>Topic</b>	<b>McKee Proposed Protective Order</b>	<b>ARSD § 20:10:01:39–45</b>	<b>Inconsistency / Reason Not to Adopt</b>
<b>Definition of Confidential Information</b>	Requires BHP justification, prohibits blanket designations	ARSD defines confidentiality categorically	Improperly narrows and redefines confidentiality beyond ARSD
<b>Designation Procedure</b>	Requires markings, statutory citations, descriptions	ARSD contains no such procedure	Adds procedural burdens not authorized by rule

<sup>6</sup> [Administrative Rule 20:10:01:41 | South Dakota Legislature](#)

<b>Topic</b>	<b>McKee Proposed Protective Order</b>	<b>ARSD § 20:10:01:39–45</b>	<b>Inconsistency / Reason Not to Adopt</b>
<b>Challenge Process</b>	Creates burden-shifting process	ARSD silent	Alters legal standards without rulemaking
<b>AI / Software Use</b>	Permits AI technology-specific use and restrictions	ARSD silent	Exceeds regulatory authority
<b>Redacted Public Versions</b>	Requires redacted filings	ARSD does not require redactions	Imposes additional filing obligations
<b>Retroactive Application</b>	Applies to previously produced information	ARSD does not authorize retroactivity	Potential conflict with public-records law

In summary, Mr. McKee’s proposed Protective Order is not consistent with ARSD § 20:10:01:39 through 20:10:01:45 because that proposed order:

- Adds new procedural requirements not found in the Commission’s rules
- Narrows or expands confidentiality beyond ARSD definitions
- Imposes obligations on parties that the Commission has not adopted through rulemaking
- Shifts authority from the Commission to the producing utility
- Creates legal standards (burdens, procedures, technology rules) not supported by ARSD

For these reasons, the Commission has a strong basis to decline adoption of Mr. McKee’s proposed Protective Order.

As noted, Black Hills Power separately is proposing that the Commission approve a Confidentiality Agreement that would apply to Confidential Information provided to Mr. McKee by Black Hills Power. The Confidentiality Agreement proposed by Black Hills Power for Confidential or Highly Confidential Information provided to Mr. McKee is consistent with the Confidentiality Agreement agreed to between Black Hills Power and the South Dakota Large

Customer Group. That Confidentiality Agreement is consistent with Commission regulations and with other Confidentiality Agreements approved by this Commission.

3. **Mr. McKee's Proposed Protective Order Is Inconsistent with Prior Protective Orders or Confidentiality Agreements Approved by the Commission.**

The Commission has already established precedent which requires that intervenors execute the producing party's confidentiality agreement as a condition of receiving access to Confidential Information. In Commission Docket No. EL16-042, Black Hills Power required an intervenor to sign a Non-Disclosure Agreement prior to reviewing confidential information.<sup>7</sup> The intervenor expressly refused to agree to the Non-Disclosure Agreement's terms and instead sought access through more generalized protections. The Commission's handling of that dispute confirms that such refusal is not sufficient to compel disclosure and that access to confidential information is appropriately conditioned on execution of Black Hills Power's Confidentiality Agreement, and absent agreement to those terms, the intervenor is not entitled to obtain confidential information. This precedent is directly applicable in this situation. Mr. McKee's attempt to obtain access through a generalized protection order, without agreeing to Black Hills Power's specific Confidentiality Agreement, improperly seeks to circumvent the Commission's established framework for protecting sensitive information. As Commission Docket No. EL16-042 demonstrates, a generalized protection order does not displace the producing party's right to impose reasonable, tailored confidentiality obligations, particularly where the information is commercially sensitive.

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<sup>7</sup> *In the Matter of Black Hills Power, Inc. dba Black Hills Energy's Application for Adjustment in its Cogeneration and Small Power Production Service Simultaneous Net Billing Generation Credit Rate(s) (Order Granting Request For Access to Confidential Information and Denying Hold on 90-Day Extension) (March 21, 2017) Docket No. EL-16-042.*

Black Hills Power acknowledges that Mr. McKee’s proposed Protective Order contains an outline and general structure of a Protective Order, but as noted, the proposed Protective Order fails to fully articulate or otherwise provide adequate definition, guidance, and assurance of protection for Confidential and Highly Confidential Information to be provided in this rate proceeding. In addition, Mr. McKee’s proposed Protective Order does not address available or adequate remedies for a breach or violation of the Protective Order if Confidential or Highly Confidential Information is disclosed either intentionally or otherwise. The Confidentiality Agreement set forth in Attachment A does address that issue and provides the parties with guidance related to material breach or other violation of the Confidentiality Agreement.

In addition to being overly broad and vague or inconsistent with the Commission’s regulations for Confidential Information, Mr. McKee’s proposed Protective Order is inconsistent with other Protective Orders and Confidentiality Agreements approved by the Commission in other similar proceedings. For example, the Commission ordered the Commission Staff and parties in this proceeding to treat Highly Confidential Information and Confidential Information filed with the Commission or produced through discovery as confidential information pursuant to ARSD § 20:10:01:39 through 20:10:01:45, and subject to the following provisions of this Stipulated Protective Order (“Order”).<sup>8</sup>

Mr. McKee’s proposed Protective Order does not come close to consistency with the Stipulated Protective Order approved in Commission Docket No. GE25-001. For example, Mr. McKee’s proposed Protective Order fails to address how the Commission and other parties must treat information that may be designated as “Highly Confidential.” In addition, Mr. McKee’s

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<sup>8</sup> See, *In Re Joint Application of NorthWestern Energy Public Service Corporation, Black Hills Corporation, and NorthWestern Energy Group for Approval of a Merger* in Docket No. GE25-001, *Stipulated Protective Order*. [Attach A.pdf](#)

proposed Protective Order is inconsistent with a Protective Order approved by the Commission in Commission Docket No. TC21-001 wherein the parties in that proceeding provided for recalling privileged or confidential information that was inadvertently disclosed.<sup>9</sup> Black Hills Power understands and recognizes that the Parties in those other proceedings jointly stipulated to those provisions. However, those orders are provided to demonstrate the significant inconsistency of the Protective Order that Mr. McKee proposes with just two previous Protective Orders approved by the Commission. The difference between Mr. McKee's proposed Protective Order and other Protective Orders approved by the Commission is stark. As argued herein, Black Hills Power opposes the proposed Protective Order presented by Mr. McKee for adoption by the Commission in this proceeding.

In addition to the inconsistency of Mr. McKee's proposed Protective Order in this proceeding with other Protective Orders issued by this Commission, the proposed Protective Order is also vastly inconsistent and different from Protective Order or Confidentiality Agreements approved by other states in which Black Hills Power or its electric and gas utility affiliates operate, including specifically, the Wyoming Public Service Commission wherein Black Hills Power also has a rate application pending before the Wyoming Public Service Commission in Docket No. 20002-148-ER-26 (Record No. 18089).<sup>10</sup>

Black Hills Power believes that the Commission should deny Mr. McKee's Motion to Adopt his proposed Protective Order, in part, due to the glaring inconsistency of Mr. McKee's proposed Protective Order with other Protective Orders issued by this Commission.

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<sup>9</sup> See [TC21-001stipprotectiveorder.pdf](#).

<sup>10</sup> *In the Matter of the Application of Black Hills Power, Inc. d/b/a Black Hills Energy For Approval of a General Rate Increase*, Docket No. 20002-148-ER-26 (Record No. 18089) [coverb\\_31638\\_052120261102.25AM\\_20002-148-31638.pdf](#)

4. **Mr. McKee’s Proposed Protective Order Does Not Protect Confidential or Highly Information That May Be Subject To Public Artificial Intelligence systems.**

Paragraph 7 of Mr. McKee’s proposed Protective Order states as follows:

**“ 7. Use of Analytical Tools, Including AI Systems**

Nothing in this Order prohibits the use of software-assisted analytical tools, including but not limited to:

- text-analysis software,
- document-management systems,
- search tools,
- machine-learning or artificial-intelligence-assisted drafting or review tools,

**provided that such tools do not disseminate, publish, or make the Confidential Information publicly accessible.**

Use of such tools is treated as functionally equivalent to other automated processes (e.g., indexing, OCR, spell-checking) and is permissible so long as confidentiality is preserved.”<sup>11</sup>

While one could reasonably interpret the above-reference provision in Mr. McKee’s proposed Protective Order to permit the use of AI systems, Black Hills Power hold strong reservation and opposition to the use of AI that will result in the dissemination, publication, or making public any of the Confidential and Highly Confidential Information produced in this rate proceeding through a third-party platform that is not a party to the proceeding, has not agreed to

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<sup>11</sup> McKee proposed Protective Order at Paragraph 7.

be bound by the Protective Order, and is not under the Commission's jurisdiction or enforcement authority.

Mr. McKee does not explain either in his Motion to Adopt the proposed Protective Order or in the proposed Protective Order how such AI system protections will be accomplished. In addition, there is no provision or reference requiring Mr. McKee to identify which AI system Mr. McKee intends to use for this rate proceeding. Many AI systems, especially open or third-party platforms, may retain inputs, use them to train models, or make them accessible beyond the immediate user. Once Confidential Information is introduced into such a system, Black Hills Power cannot verify how the information is stored, whether it is comingled with other data, whether it can be retrieved or deleted, or whether it could be disclosed to third parties or used for purposes outside the scope of the Confidentiality Agreement. These risks are fundamentally inconsistent with the Black Hills Power's obligations to protect its confidential, proprietary, and regulated information. There is no remedy identified within the proposed Protective Order if Confidential or Highly Confidential Information is disclosed through Mr. McKee's use of an AI System.

On the other hand, Black Hills Power has proposed a Confidentiality Agreement that addresses the use of Artificial Intelligence systems for Confidential Information provided by Black Hills Power in this proceeding. That AI provision is as follows:

Recipient agrees not to sell, disclose, discuss, use, reproduce, duplicate, distribute, copy, reconstruct or in any way communicate, directly or indirectly, the Confidential or Highly Confidential Information for purposes other than in connection with the Purpose. Recipient shall use all reasonable efforts to protect the confidentiality of such information and to prevent any unauthorized use or disclosure of Confidential or Highly Confidential Information. Recipient expressly understands and agrees that the input, uploading, submittal, or disclosure of any Confidential or Highly Confidential Information into any Artificial Intelligence

System (“AI System”) is strictly prohibited and a material breach of this Agreement. Recipient may share Confidential or Highly Confidential Information only with Authorized Personnel. “Authorized Personnel” means consultants and attorneys who (a) need to have access to such Confidential or Highly Confidential Information in order to assist Recipient in connection with the Purpose (b) are made aware of the Recipient’s confidentiality obligations and other obligations set forth in this Agreement, and (c) agree to be bound by those obligations. Authorized Personnel shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to, Confidential or Highly Confidential Information pursuant to this Agreement unless the Authorized Personnel has first executed a Non-Disclosure Certificate, provided that if an attorney qualified as an Authorized Personnel 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 by Recipient to the Company prior to disclosure of any Confidential or Highly Confidential Information to the Authorized Personnel. Recipient will ensure compliance by Authorized Personnel with the terms and conditions of this Agreement and will be responsible for any breach of such terms and conditions by any Authorized Personnel. Recipient shall notify Company immediately of any loss, misuse, or misappropriation of any Confidential or Highly Confidential Information of which Recipient becomes aware. In the event Recipient becomes aware of a breach of these terms and conditions by any Authorized Personnel, Recipient shall take prompt action as may be required to limit or prevent furtherance of such breach by the responsible Authorized Personnel.

The concern with the proposed Protective Order’s permission to use AI coupled with a lack of limitation regarding AI systems is that submitting protected Confidential or Highly Confidential information to any Artificial Intelligence platform may constitute a third-party that is not a party to the proceeding, has not agreed to be bound by the Protective Order or Confidentiality Agreement provisions applicable in this proceeding, and is not under the Commission’s jurisdiction or enforcement authority.

Black Hills Power does not oppose the general use of artificial intelligence as a productivity or analytical tool in connection with the proceeding, provided such use does not

involve the input, disclosure, or incorporation of the Company's Confidential or Highly Confidential Information. Black Hills Power's position is narrowly tailored to prohibit only the entry of Confidential and Highly Confidential Information into any AI System, not the broader, appropriate use of artificial intelligence based solely on public, non-confidential, or independently developed information.

Additionally, Black Hills Power acknowledges that Black Hills Power and its affiliates routinely use Microsoft Copilot (Copilot) in conducting their business. However, the Copilot used by Black Hills Power works entirely inside Black Hills Corporation's own secure Microsoft environment. Any information used with the proprietary version of Copilot used by Black Hills Power or its affiliates stays within the Company's systems and is protected by the same security, access controls, and encryption used for email, documents, and other internal data. Consequently, information entered in Black Hills Power's Copilot AI platform does not leave Black Hills Corporation and cannot be accessed by Microsoft or the public.

Accordingly, unless Mr. McKee has a proprietary AI system that can protect the Confidential and Highly Confidential information of Black Hills Power, the use of AI systems should be prohibited or strictly limited to ensure that Confidential or Highly Confidential Information is not disclosed to the public.

Black Hills Power submits that another reason for the Commission to deny Mr. McKee's Motion for the Commission to adopt Mr. McKee's proposed Protective Order is because Mr. McKee's proposed Protective Order permits undescribed and generally unlimited use of any AI system "... so long as the AI tools do not disseminate, publish, or make the Confidential Information publicly accessible."<sup>12</sup>

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<sup>12</sup> *Id.*

Finally, like many other state utility Commissions, the South Dakota Public Utilities Commission has not yet adopted a set of administrative rules and regulations governing the use of or other restrictions associated with AI systems. Thus, until the Commission can provide for more industry guidance, Black Hills Power asserts that the use of AI systems by Intervenors seeking Confidential or Highly Confidential information should be highly restrictive, if not prohibited. As noted above, Black Hills Power opposes the use of AI as proposed by Mr. McKee in his proposed Protective Order for the reasons stated above.

**5. The Commission Should Adopt and Approve the Confidentiality Agreement in Attachment A of this Black Hills Power Response for Mr. McKee.**

The Confidentiality Agreement set forth in Attachment A is reasonable and consistent with the Commission's confidentiality regulations. Once Mr. McKee signs the Non-Disclosure Agreement, Black Hills Power will provide Confidential and Highly Confidential information provided by Black Hills Power in response to current or future data responses. Until an agreement or other protection is in place, Black Hills Power is unable to provide that information and maintain its confidential treatment.

**CONCLUSION**

For the reasons provided above, Black Hills Power requests that the Commission deny Mr. McKee's Motion To Adopt Protective Order because it is (1) overly broad and vague, (2) inconsistent with Commission rules and regulations, (3) inconsistent with prior Protective Orders or Confidentiality Agreements approved by the Commission, and (4) does not protect confidential information that may be subject to public Artificial Intelligence systems.

Alternatively, Black Hills Power is requesting that the Commission adopt and approve the Confidential Agreement set forth in Attachment A of this Black Hills Power Response to protect all the Confidential or Highly Confidential information designated or to be designated in

this rate proceeding. For Mr. McKee to obtain the Confidential and Highly Confidential information he has requested in this proceeding, Mr. McKee will need to sign and return a Non-Disclosure Agreement affirming that he agrees to be bound by the terms and conditions of that Confidentiality Agreement.<sup>13</sup> The terms and conditions contained within the proposed Confidentiality Agreement for Mr. McKee are reasonable and consistent with Commission's confidentiality regulations. In addition, the Attachment A Confidentiality Agreement is consistent with the provisions of the Confidentiality Agreement that has been agreed to by Black Hills Power and the only other Commission-approved Intervenor in this proceeding.

In summary, the Confidentiality Agreement set forth in Attachment A of this Response is consistent with ARSD § 20:10:01:39 through 20:10:01:45. That Confidentiality Agreement defers to the Commission's authority, does not redefine confidentiality, does not impose new procedural burdens, does not add obligations beyond the Commission's ARSD confidentiality regulations, restricts Artificial Intelligence applications that do not protect Confidential Information, and follows the standard format used in past Commission dockets.

Dated this 16<sup>th</sup> day of June, 2026.

Respectfully Submitted,

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<sup>13</sup> As noted above, this requirement would be consistent with action that the Commission ordered in Commission Docket No. EL16-042.