

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
THE GAS COMPANY, LLC dba HAWAII GAS) DOCKET NO. 2024-0304
)
For Modifications of General)
Order No. 9 Paragraph 2.3.f.2.)
Requirements Relating to Capital)
Improvements.)
_____)

PROTECTIVE ORDER NO. 41124

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OF THE STATE OF HAWAII

In the Matter of the Application of))	
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THE GAS COMPANY, LLC dba HAWAII GAS))	DOCKET NO. 2024-0304
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For Modifications of General))	PROTECTIVE ORDER NO. 41124
Order No. 9 Paragraph 2.3.f.2.))	
Requirements Relating to Capital))	
Improvements.))	
_____))	

PROTECTIVE ORDER

The Public Utilities Commission ("Commission") grants, in part, THE GAS COMPANY, LLC dba HAWAII GAS' ("Hawaii Gas" or "Company") Motion for Protective Order ("Motion") filed on September 24, 2024.¹ The Commission hereby issues this Protective Order to govern the classification, acquisition, and use of trade secrets, and other confidential information that is produced in this docket.²

¹"Applicants' Motion for Protective Order; and Certificate of Service," filed September 24, 2024 ("Motion").

²The Parties to this proceeding are THE GAS COMPANY, LLC dba HAWAII GAS ("Hawaii Gas" or "Company"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 16-601-62(a).

I.

BACKGROUND

Pursuant to the Commission's General Order No. 9³ ("G.O.9"), Hawaii Gas is required to submit for Commission review "[p]roposed capital expenditures for any single project related to plant replacement, expansion or modernization, in excess of \$500,000 or 10 per cent of the total plant in service, whichever is less[,]. . ."⁴ Proposed capital expenditures that meet the G.O.9 monetary or percentile threshold "shall be submitted to the Commission for review at least 60 days prior to the commencement of construction or commitment for expenditure, whichever is earlier."⁵ On September 18, 2024, Hawaii Gas filed its Application⁶ requesting a permanent modification to the G.O.9 monetary threshold for capital expenditures by increasing the amount from \$500,000 to \$2,750,000.⁷

³"Standards for Gas Service Calorimetry, Holders & Vessels in the State of Hawaii; General Order No. 9," ("G.O.9").

⁴G.O.9, Section 2.3.f.2.

⁵G.O.9, Section 2.3.f.2.

⁶"Application; Exhibits A-C; Confidentiality Log; Verification; and Certificate of Service," filed July 12, 2024 ("Application").

⁷Application at 1.

On September 24, 2024, Hawaii Gas filed a Motion for Protective Order.⁸ Hawaii Gas states that a Protective Order is necessary to prevent public disclosure of specific information in its filings, Information Requests ("IRs"), or responses to IRs in this matter.⁹ The Company asserts that some information contained in the prospective filings will fall under one of the Uniform Information Practice Act's ("UIPA") five exceptions to public disclosure.¹⁰ Alternatively, the Company maintains some information may be designated confidential pursuant to the Homeland Security Act of 2002.¹¹ Additionally, Hawaii Gas requests the Commission issue a "two-tiered" Protective Order.¹²

In response to the Company's Motion, the Consumer Advocate states it does not oppose Hawaii Gas' request for a Protective Order.¹³ The Consumer Advocate notes that, consistent with the Commission's instructions in

⁸"Applicant's Motion for Protective Order and Certificate of Service," filed September 24, 2024 ("Motion").

⁹Motion at 1 and 2.

¹⁰Motion at 2 and 3.

¹¹Motion at 3.

¹²Motion at 4.

¹³"Division of Consumer Advocacy's Response to the Gas Company, LLC dba Hawaii Gas' Motion for Protective Order," filed October 1, 2024 ("Consumer Advocate Response").

Order No. 34521,¹⁴ Hawaii Gas must provide a basis for each specific piece of information designated as confidential, and the Consumer Advocate reserves the right to comment on those designations.¹⁵

II.

DISCUSSION

Based on the Commission's review of the record, including Hawaii Gas' representations and the Consumer Advocate's Response, the Commission grants, in part, Hawaii Gas' Motion. However, the Commission denies Hawaii Gas' request for a "two-tiered" Protective Order. The Commission's reasoning is discussed below.

A.

Hawaii Gas' Request for a Protective Order

The Commission grants, in part, Hawaii Gas' Motion based on its representations that the Company will designate as

¹⁴See Docket No. 2016-0328, Order No. 34521, "Addressing Hawaiian Electric Company, Inc.'s Motion for Clarification and/or Partial Reconsideration of Order No. 34367; Instructing Hawaiian Electric Company, Inc. to Supplement Its February 22, 2017 Confidentiality Filings; and Proposing Modifications to Order No. 34367," filed May 2, 2017 ("Order No. 34521").

¹⁵Consumer Advocate Response at 2.

confidential only information that falls within the parameters of the UIPA. However, the Commission reminds Hawaii Gas of the guidance it has issued in the past regarding the application of the UIPA to Commission proceedings, particularly in Order No. 34521, Order No. 38689,¹⁶ and Order No. 39283.¹⁷

In Order No. 34521, the Commission explained some of the implications it faces for its decisions to withhold government records under UIPA exceptions, including the difficulty presented to the Commission to defend a third party's conclusory claims of confidentiality. As the Commission stated in Order No. 34521, "a decision to withhold government records should not be made lightly or with incomplete information."¹⁸

Further, as the Commission previously stated:

The Hawaii Supreme Court has directed that the Commission must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency. A conclusion requires evidence to support it and findings of appropriate definiteness to express it.¹⁹

¹⁶Docket No. 2022-0150, Order No. 38689, "Directing Hawaii Gas to Supplement its Confidentiality Logs," filed November 3, 2022, ("Order No. 38689") at 10-13.

¹⁷Docket No. 2022-0150, Order No. 39283, "Regarding Confidential Designations," filed May 18, 2023 ("Order No. 39283").

¹⁸Order No. 34521 at 12.

¹⁹Order No. 39283 at 11.

Accordingly, any information that Hawaii Gas seeks to designate as confidential should be narrowly tailored and not based on conclusory statements.²⁰ At all times, Hawaii Gas bears the burden of “specifically identify[ing] the document or information to be protected” and establishing, with particularity, the basis on which the information should be protected.²¹

B.

Two-Tiered Protective Order

Hawaii Gas further requested that any Protective Order issued be a “two-tiered” order.²² Under a “single tier” Protective Order, information designated as “confidential” may only be disclosed to the Commission and other Parties and Participants to the docket.²³ The “second tier” provides an additional layer of protection by allowing information to be designated as “restricted”.²⁴ “[Restricted] information may be

²⁰Order No. 38689 at 12-13 (“The Commission cannot rely on conclusory statements to support withholding information from public disclosure and will not speculate as to which law(s) may support Hawaii Gas’ positions.”).

²¹HAR § 16-601-50.

²²Motion at 4.

²³Order No. 34521 at 3.

²⁴Order No. 34521 at 3.

withheld from other Parties and Participants, but not [] [from] the [C]omission and the Consumer Advocate.”²⁵

Hawaii Gas bases its request for a “two-tiered” Protective Order on the possibility of intervening parties and participants.²⁶ However, the Commission notes that the intervention period for this matter has passed.²⁷ The only additional Party is the Consumer Advocate, who is not subject to the restrictions of the “second tier” of a “two-tiered” Protective Order. As such, Hawaii Gas has failed to show the necessity of a “two-tiered” Protective Order, and the Commission denies its request.

Accordingly, the Commission issues the Protective Order, as set forth below, to govern the classification, acquisition, and use of trade secrets, and other confidential information that is produced in this docket. The Commission instructs that for each redaction, the party or participant claiming confidentiality must demonstrate that its confidential docket filings may be withheld from disclosure under HRS Chapter 92F, the Uniform Information Practices Act (“UIPA”), and individually

²⁵Order No. 34521 at 3.

²⁶Motion at 4.

²⁷See HAR § 16-601-57 (3) (requiring motions to intervene or participate to be filed no later than twenty days after an application is filed).

comply with Paragraph 5, below, and "(1) identify, in reasonable detail, the information's source, character, and location; (2) state clearly the basis for the claim of confidentiality; and (3) describe, with particularity, the cognizable harm to the producing party or participant from any misuse or unpermitted disclosure of the information."

In addition, the Commission encourages the Parties to confer in good faith to minimize both the amount of any redactions in the docket filings and any disputed confidential designations.

III.

TERMS

A.

General Provisions

1. This Protective Order governs the classification, acquisition, and use of trade secrets, and other confidential information produced by any party or participant in this docket. For purposes of this Protective Order, the term "party" includes the Consumer Advocate and any intervenors. If the Consumer Advocate designates information as confidential, it shall also follow these procedures as applicable.

2. All parties or participants to all or any portion of this docket, including persons who are granted intervention or participation after the effective date of this Protective Order,

shall be subject to this Protective Order and shall be entitled to all confidential information under the provisions of this Protective Order to the extent allowed by the Commission.

B.

Application Of
The Uniform Information Practices Act

3. To the extent that any of the documents covered by this Protective Order consist of "government records," as defined in HRS § 92F-3, the provisions of HRS Chapter 92F, the UIPA, shall apply to the disclosure of information contained in such documents. In the event that any provision of this Protective Order conflicts with any provision of the UIPA, the UIPA shall control.

C.

Designation Of Confidential Information

4. Any information that a party or participant to this proceeding believes, in good faith, is confidential, including, but not limited to, trade secrets, research, development information, commercial information, customer usage, financial information, vendor information, bid information, cost support studies, or other information, may be designated as "confidential information" pursuant to the terms of this

Protective Order. Such confidential information shall be protected against disclosure to a non-qualified person pursuant to the terms of this Protective Order, unless such information is declassified or permission to disclose the information to such non-qualified person is granted by the party or participant claiming confidentiality, as provided in paragraph 15 below.

5. If a party or participant seeks to designate information, whether written, oral, electronic, or in some other form, as confidential information, it shall notify the Commission, the Consumer Advocate, and the other parties and participants, if any, that the information includes confidential information. The party or participant must: (1) identify, in reasonable detail, the information's source, character, and location; (2) state clearly the basis for the claim of confidentiality; and (3) describe, with particularity, the cognizable harm to the producing party or participant from any misuse or unpermitted disclosure of the information.

6. If a party or a participant designates information as confidential, it shall provide the confidential information to all parties or participants in this proceeding in accordance with the procedures described in paragraphs 13 through 15 (Section III.D, Disclosure To Qualified And Non-Qualified Persons) and paragraph 16 (Section III.E, Procedure For Obtaining Access) below. Notwithstanding the above, the party or participant shall

immediately provide the confidential information in writing to the Commission and the Consumer Advocate, their counsel, any outside counsel they have retained in this proceeding (including any persons employed by such counsel), and any consultants they have retained in this proceeding (including any persons employed by such consultants).

7. If any party or any participant challenges the claim of confidentiality for all or any of the information, the party or participant claiming confidentiality shall bear the burden of proof in supporting its claim that the information is confidential. The Commission shall determine whether the information shall continue to be designated as confidential pursuant to the terms of this Protective Order. Any challenge to a claim that certain information is confidential shall be made in accordance with paragraph 26 below. Any challenge to a claim of confidentiality asserted by the Commission will be made upon its own motion.

8. Confidential information provided to the Commission, a party, or a participant, orally, electronically, or in any form other than written form, shall be protected as fully as confidential information provided in written form.

9. All information claimed to be confidential shall be subject to the terms of this Protective Order, and shall be treated as confidential information by all qualified persons (as defined

by this Protective Order). Unless a different treatment is warranted, any notes, summaries, abstracts, or analyses that are prepared by counsel, experts, or other qualified persons, and that reflect the underlying confidential information, shall also be subject to the terms of this Protective Order.

10. Information that has been designated as confidential pursuant to the terms of this Protective Order shall conspicuously display on each page, or communicate as otherwise appropriate, the following legend:

**CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of the information is deemed to contain confidential information, the claim of confidentiality, to the extent reasonably practicable, shall be limited to only such portion. However, if such limitation is not reasonably practicable, the information in total may be designated as confidential information.

11. With respect to any confidential information that is not under the control of the party or participant claiming that the information is confidential, other persons shall, to the extent requested by that party or participant, cooperate to ensure that all copies of such confidential information bear the legend required in paragraph 10 above.

12. A party or a participant may request that the Commission designate as confidential information any information previously produced but not designated as confidential, provided that the party or participant, in the manner provided in paragraph 5 above, specifies the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm from any misuse or unpermitted disclosure of the information. In addition, the party or participant claiming confidentiality pursuant to this paragraph shall substitute the previously produced but not designated as confidential material with the identical material under designation as required in paragraph 10 above.

D.

Disclosure To Qualified And Non-Qualified Persons

13. Except as provided in paragraph 15 below, confidential information shall not be made available or disclosed to any person who is not a "qualified person" as defined in paragraph 14 below.

14. "Qualified person," as used in this Protective Order, means any one of the following:

- (a) The author(s), addressee(s), or originator(s) of the confidential information;

- (b) The Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants);
- (c) The Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants);
- (d) Any party or participant to this proceeding, its officers and employees, its designated representative of record, its staff, its counsel (including both in-house counsel and any outside counsel it has retained in this proceeding, and including any persons employed by such counsel) and any consultants (including any persons employed by such consultants) retained by the party or participant for this proceeding, to the extent permitted by the Commission;

(e) Any other person approved by the party or participant asserting the claim of confidentiality; and

(f) Subject to the terms of this Protective Order, and to the extent allowed by the Commission, any other person designated as a qualified person by order of the Commission.

15. When a qualified person wishes to disclose confidential information to a non-qualified person, the qualified person must request permission from the party or participant claiming confidentiality. The request shall: (a) identify the non-qualified person to whom disclosure is desired; (b) disclose any past, present, or anticipated affiliation between the qualified person and the non-qualified person; (c) specify the exact information to be disclosed; and (d) state the reasons for disclosure. If permission is granted by the party or participant claiming confidentiality, disclosure of the confidential information shall be limited strictly to confidential information covered by the permission granted and shall be made to such non-qualified person in the same manner as provided for qualified persons in paragraph 16 below.

E.

Procedure For Obtaining Access

16. Prior to disclosing confidential information to a qualified person, the qualified person shall read a copy of this Protective Order, complete a copy of the "Protective Agreement" attached as Exhibit A to this Protective Order, and sign the completed copy of the Protective Agreement. A copy of the executed Protective Agreement shall be filed with the Commission and served on the Consumer Advocate, and all parties and participants, if any.

The requirements set forth in paragraph 16 above, shall not apply to: (a) the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants); or (b) the Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants).

F.

Use Of Confidential Information

17. Any confidential information obtained under this Protective Order shall be used solely in connection with this

proceeding and any related administrative and judicial proceedings (at which time the information shall continue to be treated as confidential), and shall not be used for any other purpose, including business, governmental or commercial purposes, or in any other administrative or judicial proceeding, except as provided in paragraphs 18 and 19, and except as may be directed by: (a) an order of any court, agency, or other entity having jurisdiction; (b) an order of the Commission; or (c) the UIPA, including any ruling of the Office of Information Practices.

18. Notwithstanding paragraph 17 above, any confidential information obtained under this Protective Order may be used by the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants), in any proceeding pending before the Commission involving the Consumer Advocate, producing party, or producing participant, or where the intended use of such confidential information is for the purpose of assisting the Commission in fulfilling its statutory duties and responsibilities. The confidential information shall continue to be treated as confidential until the protection conferred by this Protective Order (or any other applicable Protective Order) is

terminated by the producing party or participant, or by further order of the Commission.

19. Any confidential information obtained under this Protective Order may be used by the Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants), in any proceeding pending before the Commission involving the producing party or producing participant, or where the intended use of such confidential information is for the purpose of assisting the Consumer Advocate in fulfilling its statutory duties and responsibilities. The confidential information shall continue to be treated as confidential until the protection conferred by this Protective Order (or any other applicable Protective Order) is terminated by the producing party or participant, or by further order of the Commission.

20. Unless otherwise ordered by the Commission, with respect to any written testimony, exhibits, or pleadings that contain or reflect the confidential information, only that part of the written testimony, exhibits, or pleadings containing or reflecting such information shall be treated as confidential, and that part of any hearing, if any, at which such information is discussed shall be held in camera or under other conditions imposed

by the Commission to prevent unnecessary public disclosure of such information. A copy of any such written testimony, exhibits, or pleadings, with any such confidential information deleted therefrom, shall be included in the public record, and shall contain the following designation in the upper left-hand corner of the page or conspicuously placed as otherwise appropriate:

**Confidential Information
Deleted Pursuant To
Protective Order No. _____**

G.

Retention Of Confidential Information

21. Confidential information shall be retained in a locked cabinet dedicated to the storage of confidential information, or otherwise secured to ensure that access to and disclosure of the confidential information is limited to a qualified person.

22. Confidential information that is provided to or filed with the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants) shall be separately bound and placed in a sealed envelope or other appropriate sealed container on which the following legend shall be conspicuously displayed:

THIS ENVELOPE IS SEALED PURSUANT TO PROTECTIVE ORDER NO. _____ AND CONTAINS DOCUMENTS WITH CONFIDENTIAL INFORMATION. IT IS NOT TO BE OPENED OR THE CONTENTS OF THIS ENVELOPE DISPLAYED OR REVEALED EXCEPT TO QUALIFIED PERSONS AUTHORIZED TO INSPECT THE ENCLOSED DOCUMENTS.

23. Confidential information shall not be reproduced or duplicated, except to make working copies and copies to be filed with the Commission under seal. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the following legend: **"Copying Prohibited."**

24. If a court, administrative agency, or other entity having jurisdiction requests, subpoenas, or orders production of confidential information that has been obtained under this Protective Order, the party or participant claiming confidentiality shall immediately be notified of the request, subpoena, or order. In addition, both the Commission and the Consumer Advocate shall be immediately notified of the request, subpoena, or order.

H.

Duration Of Confidentiality

25. The confidentiality of the information produced pursuant to this Protective Order shall be preserved until termination pursuant to an appropriate stipulation or by further order of the Commission.

I.

Appeal To The Commission

26. If a party or a participant disagrees with the designation of information as confidential, the party or participant claiming confidentiality shall first make a good faith attempt to resolve the dispute on an informal basis. If the dispute cannot be resolved, the party or participant contesting the confidentiality of the information shall file a motion to compel disclosure or other appropriate motion with the Commission. The party or participant claiming confidentiality shall bear the burden of proof in supporting its claim, and the Commission shall determine whether the information shall continue to be designated as confidential under this Protective Order. The Commission may, on its own motion, require a party or participant claiming confidentiality to support its claim. Pending disposition of any such motion made by the Commission, party, or participant, the information in question shall be treated as confidential information and shall not be disclosed except as permitted by this Protective Order.

J.

Non-Waiver Of Objections And Rights

27. The parties and participants retain the right to contest any assertion or finding of confidentiality or of

non-confidentiality. Nothing in this Protective Order shall prevent any party or participant from objecting to requests for production of information or other discovery request.

28. Any party or participant has the right to question, challenge, and object to the admissibility of confidential information on the grounds of relevancy or materiality.

K.

Modification Of The Protective Order

29. The Commission may modify this Protective Order on the motion of any party or participant, or on its own motion, upon reasonable notice and an opportunity to respond to such motion. The Commission may also modify this Protective Order upon receipt and approval of a written stipulation filed by the parties and if applicable, any participants.

L.

Disposal Of Confidential Information

30. Except as provided in paragraphs 31 and 32 below, within ninety (90) days after the conclusion of this proceeding, persons in possession of confidential information shall, at the option of the party or participant producing the confidential information, return or destroy all such materials and all copies, notes, tapes, papers, or other medium containing, summarizing,

excerpting, or otherwise embodying any confidential information. If the party or participant producing the confidential information requests destruction, the person destroying the information shall certify its destruction to the producing party or participant, indicating the name of the person destroying the documents, the method of destruction, and the identity of the specific documents destroyed. If the Consumer Advocate has designated information as confidential, it shall also follow these procedures as applicable.

31. Counsel and representatives of record for a party or participant shall be entitled to retain memoranda, pleadings, exhibits of record, written testimony, and transcripts embodying information derived from or incorporating confidential information to the extent reasonably necessary to preserve files associated with this proceeding. The files shall not be disclosed to any other person.

32. Confidential information produced in this proceeding shall remain in the possession of the Commission and the Consumer Advocate for the period required by applicable statutes, rules, and administrative directives, or as designated by the Commission, whichever is longer.

M.

Sanctions

33. Any person violating this Protective Order shall be subject to such sanctions as are consistent with applicable law and other authority.

IV.

ORDERS

THE COMMISSION ORDERS:

1. Hawaii Gas' Motion for Protective Order filed on September 24, 2024 is granted, in part, as set forth above.

2. The Terms set forth in Section III of this Protective Order shall govern the classification, acquisition, and use of trade secrets, and other confidential information that is produced in this docket, if any.

DONE at Honolulu, Hawaii OCTOBER 28, 2024.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Mark Kaetsu
Mark Kaetsu, Commission Counsel

2024-0304.ljk

EXHIBIT A
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

PROTECTIVE AGREEMENT

1. I, _____, have been presented with a copy of Protective Order No. _____ issued by the Hawaii Public Utilities Commission in Docket No. 2024-0304 on the _____ day of _____, 20__ ("Protective Order").

2. I am employed, retained or assisting _____ in Docket No. 2024-0304, and have requested review of the confidential information covered by the Protective Order.

3. I understand the confidential information covered by the Protective Order is to be used solely to assist _____ and that unless otherwise permitted by the Protective Order, I am to make no other use of the confidential information, nor am I to disclose the confidential information to any other person.

4. I further understand that at the conclusion of my assistance to _____, I shall account for each copy, extract, note and summary of, or other document containing any part of such confidential information to the party claiming confidentiality and I shall abide by the provisions in

paragraph 30 of the Protective Order, unless otherwise permitted by paragraph 31 of the Protective Order.

5. I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

DATED at: _____, _____, this _____, _____.
(City) (State) (Date)

Signature

Address

(____) _____
Telephone Number

CERTIFICATE OF SERVICE

The foregoing Order was served on the date it was uploaded to the Public Utilities Commission's Case and Document Management System and served through the Case and Document Management System's electronic Distribution List.

FILED

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PUBLIC UTILITIES

COMMISSION

F-315564

2024-0304

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