

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23D-0591E

IN THE MATTER OF THE COLORADO COMMUNICATION AND UTILITIES ALLIANCE,
THE TOWN OF MORRISON, AND THE CITIES OF ARVADA, AURORA, CENTENNIAL,
NORTHGLENN, AND WHEAT RIDGE'S PETITION FOR A DECLARATORY ORDER
REGARDING PUBLIC SERVICE COMPANY OF COLORADO'S CUSTOMER OWNED
LIGHTING TARIFF AND PAYMENT RESPONSIBILITY FOR STATE AND INTERSTATE
HIGHWAY STREETLIGHTING.

**INTERIM DECISION DENYING MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER**

Issued Date: December 31, 2024

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I. PROCEDURAL BACKGROUND¹

1. On December 4, 2023, the Colorado Communication and Utilities Alliance, the Town of Morrison, and the Cities of Arvada, Aurora, Centennial, Northglenn, and Wheat Ridge (“Local Governments”) filed a Petition for Declaratory Order (“Petition”) initiating this Proceeding. In the Petition, the Local Governments request that the Colorado Public Utilities Commission (“Commission” or “PUC”) clarify certain provisions relating to the payment responsibility for interstate and state highway streetlighting.

2. On December 21, 2023, the Public Service Company of Colorado’s Notice of Intervention as of Right, Unopposed Alternative Motion for Permissive Intervention, and Request for Waiver of Response Time was filed by Public Service Company of Colorado (“Public Service” or “the Company” or “PSCo”).

3. On December 29, 2023, the Colorado Department of Transportation’s Notice of Intervention as of Right and Alternative Motion for Permissive Intervention was filed by the Colorado Department of Transportation (“CDOT”).

4. On January 3, 2024, the Colorado Department of Transportation’s Motion in Opposition to Local Governments’ Petition for Declaratory Order and Partial Motion to Dismiss was filed by CDOT (“First Motion to Dismiss”).

5. On January 3, 2024, Public Service Company of Colorado’s Response Concerning Whether the Colorado Public Utilities Commission Should Accept or Reject the Petition was filed by Public Service (“Public Service’s Response Concerning the First Motion to Dismiss”).

6. On January 10, 2024, the Reply of the Colorado Communication and Utilities Alliance, the Town of Morrison, and the Cities of Arvada, Aurora, Centennial, Northglenn, and

¹ Only the procedural history necessary to understand this Decision is included.

Wheat Ridge was filed by the Local Governments (“The Local Government’s Reply to the First Motion to Dismiss”).

7. By Decision No. R24-0079-I, mailed February 7, 2024, the Commission: accepted the Petition, acknowledged PSCo as an intervenor of right in this Proceeding, granted CDOT’s permissive intervention, denied the First Motion to Dismiss, and extended the notice period for interventions in this Proceeding, and assigned this matter to an Administrative Law Judge (“ALJ”).

8. By Decision No. R24-0585-I, issued August 14, 2024, an ALJ, among other things, waived the prohibition against filing replies and/or reply briefs codified in Rule 1400(e) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (“CCR”) 723-1 and set briefing schedules for two issues: (1) subject matter jurisdiction; and (2) the merits of the Petition.

9. On September 13, 2024, the Colorado Department of Transportation’s Renewed Motion for Partial Dismissal for Lack of Subject Matter Jurisdiction (“Motion”) was filed by CDOT.

10. On September 27, 2024, Public Service Company of Colorado’s Response to the Colorado Department of Transportation’s Renewed Motion for Partial Dismissal for Lack of Subject Matter Jurisdiction (“PSCo’s Response to the Motion”) was filed by PSCo.

11. On September 27, 2024, the Responsive Brief of the Colorado Communications and Utilities Alliance, the Town of Morrison, and the Cities of Arvada, Aurora, Centennial, Northglenn, and Wheat Ridge to the Colorado Department of Transportation’s Renewed Motion for Partial Dismissal for Lack of Subject Matter Jurisdiction (“The Local Governments’ Response to the Motion”).

12. On October 11, 2024, the Colorado Department of Transportation's Reply in Support of Its Renewed Motion for Partial Dismissal for Lack of Subject Matter Jurisdiction was filed by CDOT ("CDOT's Reply in Support of the Motion").

13. On October 11, 2024, the Joint Motion to Amend Briefing on the Merits Schedule ("Motion to Amend Briefing Schedule") was filed by the three parties in this Proceeding. The Motion to Amend Briefing Schedule requested to amend the briefing schedule on the merits of the Application based on the date a decision on the Motion is entered by the Commission.

14. In Decision No. R24-0866-I, issued November 22, 2024, the undersigned ALJ stated that "[t]he [Motion] will be addressed by a separate Decision."²

II. PETITION

15. In the Petition, the Local Governments seek:

a declaratory order from the Commission clarifying that, consistent with the terms of state law and the COL Tariff, the payment responsibility for interstate and state highway streetlighting shall remain with CDOT unless 1) the state or interstate highway where the street light resides has been accepted into municipal street system; 2) the municipal customer has ownership of the street light or has agreed to the payment responsibility for that street light; and 3) prior to that street light being transferred to the SL Tariff, the transfer procedures of the COL Tariff are followed including a request from the municipal owner of the street light that the street light be transferred to the SL Tariff and payment of the then applicable constriction allowance.³

III. FIRST MOTION TO DISMISS

16. In the First Motion to Dismiss, CDOT requested that "the Commission decline to consider all portions of the petition for declaratory order filed by the Local Governments that require statutory interpretation of statutes that are not Utility Law under and thus under the purview

² Decision No. R24-0866-I at ¶ 13.

³ Petition at p. 13. The term "COL Tariff," as used in the Petition, refers to Public Service's Customer-Owner Tariff in question in this Proceeding (hereinafter "COL Tariff"). *See generally*, Petition.

of the Commission or that will act to bind CDOT because the Commission does not have jurisdiction over CDOT.”⁴ Alternatively, CDOT requested “that the Commission dismiss all portions of the petition that apply to CDOT for lack of subject matter jurisdiction or that the Commission exercise its discretion pursuant to Rule 1304(f)(III) to dismiss or otherwise not accept the petition seeking a declaratory order.”⁵ In support of its requests, CDOT stated “[w]hile the Commission has authority to issue a declaratory order resolving disputes arising out of utility tariffs, the Local Governments’ reliance on this authority to confer jurisdiction over this dispute is misplaced because interpretation of non-utility related statutes lies at the core of the stated controversy.”⁶ CDOT explained “the overriding statutory mandate between CDOT and local governments on streetlighting is contained in the “Division of authority over streets” statute, C.R.S. § 43-2-135.”⁷

17. In Public Service’s Response Concerning the First Motion to Dismiss, PSCo stated that the Commission should reject the Petition if the Commission were to determine that it lacks the necessary jurisdiction to adjudicate it.⁸ PSCo further recommended that “the Commission determine whether it has the requisite jurisdiction to address the Petition before considering whether to adopt the [Company’s] recommendations...”⁹ The Company further stated, that to the extent the Commission were to determine that it had jurisdiction over this Proceeding, the

⁴ First Motion to Dismiss at p. 6-7.

⁵ *Id.* at p. 7.

⁶ *Id.* at ¶ 7.

⁷ *Id.* at ¶ 8.

⁸ Public Service’s Response Concerning the First Motion to Dismiss at p. 6.

⁹ *Id.*

Commission should resolve the dispute concerning the specific dispute at hand¹⁰ rather than attempt to interpret statutory provisions that fall within CDOT's purview.¹¹

18. In the Local Governments' argument in opposition to the First Motion to Dismiss, the Local Governments stated:

While the background to the dispute may be complicated, the question asked by the Petition is simple: if, when, and how may PSCo transfer payment responsibility for state and interstate highway street lights to local government responsibility under the terms and conditions of the COL Tariff? CDOT and PSCo's Responses misconstrue and attempt to broaden the Petition to create the illusion of jurisdictional issues where none actually exist.¹²

¹⁰ *I.e.*, the payment responsibility involving the streetlights at the Morrison section of the C470 Highway. See *id.*

¹¹ Public Service's Response Concerning the First Motion to Dismiss at p. 6.

¹² The Local Government's Reply to the First Motion to Dismiss at ¶ 6.

19. As pertinent herein, in Decision No. C24-0079-I the Commission stated:

24. We find that there is a controversy concerning payment responsibility for certain state and interstate streetlights under Public Service's street lighting tariffs. We further find that the Commission evaluating the questions presented in the Petition, as clarified by the Local Governments' Reply, may remove uncertainty regarding Public Service's ability to transfer payment for state and interstate highway streetlights to local government responsibility under the terms and conditions of the Company's street lighting tariffs. We therefore accept the Petition and issue notice of the Petition to interested persons, firms, and corporations by service of this Decision.

25. While we recognize the preliminary concerns raised by CDOT, we reject CDOT's requests that the Commission decline to hear or dismiss portions of the Petition at this time. This Proceeding has the potential to impact CDOT, but we do not agree that evaluating the questions raised by the Petition will necessarily result in the Commission regulating or governing CDOT. As stated in the Petition and Reply, the Local Governments request the Commission clarify what *Public Service* may do under its tariffs. Further, the Commission has broad statutory and constitutional authority to regulate public utilities operating in Colorado and their facilities, services, and rates. This authority extends to incidental powers which are necessary to regulate public utilities and may, in some cases, include analysis of statute codified outside of the Public Utilities Law or Title 40 when that statute affects a public utility. In consideration of this role as state regulator of public utilities, we decline at this early stage in the Proceeding to strictly limit the issues that may be analyzed, as CDOT requests. We expect that, to the extent necessary, the ALJ assigned to this matter will determine which statutory interpretations are required by the Commission to clarify Public Service's ability to transfer payment responsibility, and whether it is appropriate for the Commission to opine on such interpretations in the context of this Petition.

26. We also reject Public Service's request to limit application of the Petition to the payment responsibility dispute between the Company and Morrison. As Public Service states, a decision regarding payment responsibility for streetlights located in Morrison could inform any additional or future controversies. The Local Governments state each jurisdiction that filed the Petition has streetlights served under Public Service's street lighting tariffs, and jointly request clarification under these tariffs. To hear separate controversies, when the municipalities present a collective argument, would be inefficient and present issues of fairness.¹³

¹³ Decision No. C24-0079-I at ¶¶ 24-26 (footnotes omitted).

IV. MOTION, RESPONSES, AND REPLY

20. In the Motion, CDOT argues that the Commission lacks subject matter jurisdiction to determine payment responsibility pursuant to 43-2-135, Colo. Rev. Stat. (“C.R.S.”) (“Division of Authority Statute”).¹⁴ In support of this argument, CDOT states that payment responsibility pursuant to the Division of Authority Statute is a separate and distinct issue from interpreting PSCos’s tariffs, and that Petitioner’s requested interpretation of transportation statutes extends well beyond the utility’s and the Commission’s authority. CDOT explains that street illumination responsibilities under the Division of Authority Statute “depend on the interpretation of the initial clause of the Division of Authority Statute: ‘[t]he jurisdiction, control, and duty of the state, cities, cities and counties, and incorporated towns with respect to streets which are a part of the state highway system is as follows[.]’”¹⁵ which the Commission lacks authority to interpret.¹⁶ CDOT further states that “the Division of Authority Statute cannot be interpreted in a manner that only impacts who pays for streetlight illumination... [thereby] turning decades of operational precedent on its head.”¹⁷ Based on this, CDOT requests that the “Commission dismiss the requests for relief that require a ruling regarding what constitutes “streets which are part of the state highway system” pursuant to the Division of Authority Statute[, or in the alternative], if the commission determines it cannot grant any of the relief requested without interpreting statutes outside of its jurisdiction... dismiss the action in its entirety.”¹⁸

21. In Public Service’s Response to the Motion, Public Service states that it “agrees with CDOT that the Commission unquestionably has the authority to interpret the Company’s

¹⁴ See Motion at pp. 3-7

¹⁵ *Id.* at p. 6, citing § 43-2-135(1), C.R.S.

¹⁶ *Id.* at pp. 6-7.

¹⁷ *Id.* at p. 6.

¹⁸ *Id.* at p. 7.

electric tariff, but this controversy cannot be meaningfully resolved without addressing the threshold statutory question of which entity is financially responsible for the illumination of highway streetlighting within the Local Governments' jurisdictional boundaries."¹⁹ Based on this, the Company "requests that the Commission dismiss the Petition in its entirety if the Commission determines that it lacks the necessary subject matter jurisdiction to interpret the Division of Authority Statute."²⁰

22. In the Local Governments' Response to the Motion, the Local Governments argue that the Petition asks the Commission to resolve a dispute primarily concerning the terms and conditions of the COL Tariff.²¹ In support of this argument, the Local Governments explain that "[t]o answer the question presented... [in the] Petition, the Commission's primary task is to interpret the transfer terms and conditions of the COL Tariff, not to interpret the Division of Authority Statute."²² The Local Governments also argue that in the Petition asks the Commission to interpret the Division of Authority Statute only as necessary to understand the terms and conditions of the COL Tariff. In support of this argument, the Local Governments explain that "the Local Governments are not asking the Commission for a binding interpretation on the entirety of the Division of Authority Statute, or any of other the 'four other Transportation statutes' referenced in their Motion."²³ The Local Governments further explain that the Division of Authority Statute "can provide important context" but its interpretation "may not be necessary at all" for purposes of addressing the relief sought in the Petition.²⁴

¹⁹ Public Service's Response to the Motion at p. 3.

²⁰ *Id.*

²¹ The Local Governments' Response to the Motion at pp. 3-5.

²² *Id.* at p. 4.

²³ *Id.* at p. 5, *citing* the Motion at p. 6.

²⁴ *Id.* at p. 6.

23. In CDOT's Reply in Support of the Motion, CDOT argues that the fundamental purpose of the Petition is "to obtain an Order from the PUC declaring the obligations of CDOT and cities, cities and counties, and incorporated towns... regarding the payment responsibility for illumination of streets which are a part of the state highway system, which includes both interstate highways and non-interstate highways."²⁵ CDOT further reiterates that "[b]efore the PUC can interpret *one* PCSO Tariff, the Local Governments ask the PUC to first interpret *ten* different state statutes, nine of which are located within either the State Highway Act or Colorado's Highway Law."²⁶ Lastly, CDOT states that "CDOT stands to be the most impacted by the Local Governments' requested relief – in a forum where CDOT is not regulated and in a proceeding where CDOT was not named as a party."²⁷

V. ANALYSIS

A. Legal Standard

24. The Commission derives its authority to regulate public utilities, and their facilities, service, and rates from article XXV of the Colorado Constitution²⁸ and from articles 1 through 7 of title 40, C.R.S. (the "Public Utilities Law").²⁹ The Commission has broad authority to regulate

²⁵ CDOT's Reply in Support of the Motion at p. 2.

²⁶ *Id.* at p. 3 (footnotes omitted, italicization in the original).

²⁷ *Id.* at pp. 4-5.

²⁸ See Colo. Const. art. XXV (prescribing that until such time as the Colorado General Assembly may otherwise designate, the Commission shall have the powers to "regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility...").

²⁹ See generally, articles 1 through 7 of title 40, C.R.S.; see also *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 26 P.3d 1198, 1205 (Colo. 2001) (holding the Commission "has broadly based authority to do whatever it deems necessary to accomplish the legislative functions delegated to it."); see also *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 576 P.2d 544, 547 (Colo. 1978) ("It can therefore be said that the PUC in the area of utility regulation, including rate making, has broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it.").

public utilities.³⁰ “[T]he PUC’s authority under article XXV is not narrowly confined but extends to incidental powers which are necessary to enable it to regulate public utilities.”³¹

25. Under Rule 12(b)(1) of the *Colorado Rules of Civil Procedure* (“C.R.C.P.”), the plaintiff has the burden of proving subject matter jurisdiction. A complainant may meet this burden by making a *prima facie* showing of threshold jurisdiction.³² A finding that a litigant made a *prima facie* showing of subject matter jurisdiction may be based on the allegations made in a complaint.³³

26. C.R.C.P. 12(b)(1) allows the trier of fact to make appropriate factual findings, rather than accepting all facts alleged by the non-moving party as true, as would be the case under C.R.C.P. 12(b)(5).³⁴ “[The Commission] has subject matter jurisdiction if the case is one of the type of cases that the [Commission] has been empowered to entertain by the sovereign from which the [Commission] derives its authority.”³⁵

B. Discussion, Findings, and Conclusions

27. The procedural and evidentiary record in this Proceeding, as it pertains to the Motion, is nearly identical to the procedural and evidentiary record when Decision No. C24-0079-I was issued. Nonetheless, the parties request that the issue of subject matter jurisdiction be resolved in advance of the parties’ submission of any arguments on the merits of the Petition.³⁶

³⁰ *City of Montrose v. Pub. Utils. Comm’n*, 629 P.2d 619 (Colo. 1981); see also § 40-3-102, C.R.S.

³¹ *Mountain States Tel. & Tel. Co. v. Pub. Utils. Com.*, 763 P.2d 1020, 1025 (Colo. 1988).

³² *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (Colo. 1977).

³³ *Id.*, citing *Texair Flyers, Inc. v. Dist. Court, First Judicial Dist.*, 506 P.2d 367, 369 (Colo. 1973). The ALJ notes that while *Pioneer Astro Industries* and *Texair Flyers* address complaint proceedings (rather than petition proceedings) for purposes of the Motion, a Formal Complaint proceeding is analogous to a petition proceeding in that both are “adjudicatory proceedings” under Rule 1004 of the Rules of Practice and Procedure, 4 CCR 723-1.

³⁴ *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

³⁵ *Brown v. Silvern*, 141 P.3d 871, 873 (Colo. App. 2005) (internal quotations and citations omitted).

³⁶ See generally, Motion to Amend Briefing Schedule.

Consistent with C.R.C.P. 12(b)(1), Decision No. C24-0079-I, and the parties' request, the undersigned ALJ is issuing this decision to address the Motion.

28. It is undisputed that the Commission has authority to interpret the COL Tariff.³⁷ The COL Tariff sets forth certain conditions, subject to the satisfaction of which, payment responsibilities would shift from those set forth in the COL Tariff to those set forth in the Street Light Service Tariff ("SL Tariff"). The entity to be billed pursuant to each of these two tariffs, depends on whether certain conditions that are set forth in the COL Tariff have been satisfied.³⁸ Therefore, the ALJ finds and concludes that the COL Tariff, the SL Tariff, and by extension the Petition, do, in fact, address the question of *who* should be liable for payment.

29. In the Petition, Petitioner enumerates three conditions precedent, which according to Petitioner, but for the satisfaction of each such condition, payment responsibility for interstate and state highway streetlighting shall remain with CDOT.³⁹ As further discussed below, the undersigned ALJ finds and concludes that the declaratory relief sought by Petitioner, with respect to each of Petitioner's three enumerated conditions, falls within Commission's authority.

30. Petitioner's request for declaratory relief regarding the first enumerated condition precedent seeks an order from the Commission "clarifying that, consistent with the terms of state law and the COL Tariff, the payment responsibility for interstate and state highway streetlighting shall remain with CDOT unless... the state or interstate highway where the street light resides has been accepted into municipal street system..."⁴⁰ The Petition sets forth language from the COL Tariff, the accuracy of which no party contested, referencing "street lights" located within

³⁷ See generally, the Petition; Motion at pp. 1, 2; and Public Service's Response to the Motion at p. 3.

³⁸ See Petition at ¶ 17.

³⁹ See *id.* at p. 13.

⁴⁰ *Id.* at p. 13.

“municipal boundaries” and the location of highway lights “within municipalities,” thereby ostensibly implicating the municipal street system. The ALJ therefore finds and concludes that Petitioner made a *prima facie* showing of threshold jurisdiction regarding Petitioner’s request for declaratory relief pertaining to Petitioner’s first enumerated condition precedent.

31. Similarly, Petitioner’s request for declaratory relief regarding the second enumerated condition precedent seeks an order from the Commission “clarifying that, consistent with the terms of state law and the COL Tariff, the payment responsibility for interstate and state highway streetlighting shall remain with CDOT unless... the municipal customer has ownership of the street light or has agreed to the payment responsibility for that street light...”⁴¹ The Petition sets forth language from the COL Tariff referencing the terms “customer-owned lighting service” and “street lights owned by CDOT,” thereby putting at issue the ownership status of street lights as one of the conditions for payment under the COL Tariff. The ALJ therefore finds and concludes that Petitioner made a *prima facie* showing of threshold jurisdiction with respect to Petitioner’s request for declaratory relief pertaining to Petitioner’s second enumerated condition precedent.

32. Petitioner’s request for declaratory relief regarding Respondent’s third enumerated condition precedent seeks an order from the Commission “clarifying that, consistent with the terms of state law and the COL Tariff, the payment responsibility for interstate and state highway streetlighting shall remain with CDOT unless... prior to [a] street light being transferred to the SL Tariff, the transfer procedures of the COL Tariff are followed including a request from the municipal owner of the street light that the street light be transferred to the SL Tariff and payment of the then applicable constriction [sic] allowance.”⁴² The Petition sets forth language from the

⁴¹ *Id.* at p. 13.

⁴² Petition at p. 13.

COL Tariff stating, in part: “... the municipality requests that such lights be billed under Street Light Service, payment of the current effective Lighting Equipment Portion of the Construction Allowance applicable to Street Lighting Service will be made to the appropriate municipal Customer for such lights.”⁴³ This language from the COL Tariff directly implicates the very language of Petitioner’s request for declaratory relief regarding Petitioner’s third enumerated condition precedent. The ALJ therefore finds and concludes that Petitioner made a *prima facie* showing of threshold jurisdiction with respect to Petitioner’s request for declaratory relief pertaining to Petitioner’s third enumerated condition precedent.

33. Lastly, the ALJ notes that the mere exercise of examining statutory provisions outside of the Public Utilities Law⁴⁴ for purposes of interpreting the language of a Commission’s tariff, such as the COL Tariff, does not preclude the Commission from entertaining matters such as those raised in the Petition.

34. Based on the foregoing, the ALJ will dismiss the Motion, as ordered below.

VI. ORDER

It is Ordered That:

1. Consistent with the discussion above, the Colorado Department of Transportation’s Renewed Motion for Partial Dismissal for Lack of Subject Matter Jurisdiction, filed by the Colorado Department of Transportation on September 13, 2024, is denied.

⁴³ *Id.* at ¶ 17.

⁴⁴ *See supra*, footnote 28.

2. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge