Decision No. C13-0442

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 12R-500ALL

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IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1.

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**DECISION ON EXCEPTIONS**

Mailed Date: April 16, 2013
Adopted Date: March 13, 2013

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## I. BY THE COMMISSION

### A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R12-1466 (Recommended Decision) filed on January 24, 2013, by Atmos Energy Corporation and Colorado Natural Gas, Inc.(Atmos and CNG);

SourceGas Distribution, LLC and Rocky Mountain Natural Gas, LLC (SourceGas); Ms. Leslie Glustrom, Colorado Office of Consumer Counsel (OCC), Black Hills/Colorado Electric Utility Company, LP (Black Hills); Noble Energy, Inc. and EnCana Oil and Gas (USA), Inc. (collectively, Gas Producers), and Public Service Company of Colorado (Public Service). Public Service and the City of Boulder (Boulder) filed responses to the exceptions filed by other interested participants on February 7, 2013. Being fully advised in the matter, we address the exceptions below.

### B. Procedural History

2. The Commission issued the Notice of Proposed Rulemaking (NOPR) on May 15, 2012, in Decision No. C12-0511. The purpose of this rulemaking is to make the rules of practice and procedure more effective, efficient and to serve the public interest. *Id.*, at ¶ 1.

3. The Commission referred this rulemaking to an Administrative Law Judge (ALJ), who solicited written comments from interested participants and held a series of public hearings, the latest being on October 26, 2012. The ALJ issued the Recommended Decision, which contained proposed rule amendments, on December 21, 2012. Several of the interested participants timely filed exceptions on January 24, 2013.[1]

### C. Personal Information

4. Rather than discussing each party's exceptions to the personal information rules separately, we address the exceptions by topic. First, we address general clarification and revision of these rules raised on the Commission's own motion. Then we discuss the definition

[1] By Decision No. C13-0058, mailed January 10, 2013, the Commission granted a motion for extension of time to file exceptions filed by Public Service on January 8, 2013. The Commission extended the deadline for filing exceptions to the Recommended Decision to January 24, 2013, and the deadline for filing Responses to exceptions to February 7, 2013.

of personal information in Rule 1004(x); collection of personal information pursuant to Rule 1104; and distribution of personal information pursuant to Rule 1105.

### 1. General Clarification and Revision

5. On our own motion, we revise rule language related to personal information in rules 1004(x), 1104, and 1105, for consistency and clarity as attached in Attachments A and B hereto. Specifically, we find that it is in the public interest for these rules to be generally applicable to all regulated entities. Therefore, where appropriate, we revise the use of "utility" to "regulated entity" and "utility service" to "regulated service." Additionally, we remove reference to "account data" in Rule 1105(d). This term was discussed throughout these proceedings, yet not adopted or defined and therefore should be deleted to avoid potential confusion.

6. Further, we find that personal information pursuant to Rule 1105(a) should not be disclosed unless permitted pursuant to Commission rule[2] or as required by state or federal law. While such disclosure must be "in compliance" with state or federal law, we note that it is only when such disclosure is compelled as required by law that disclosure by a regulated entity is permitted. As discussed in the Recommended Decision, heightened protection of personal information is necessary, in part, due to the fact that customers often do not have readily viable alternatives to regulated services and therefore *must* disclose certain information or go without services, including fundamental utility services.[3]

### 2. Definition of "Personal Information" – Rule 1104(x)

7. The public interest to protect personal information is significant and is given due consideration in the Recommended Decision, including in the revision of the definition.

[2] As discussed below, "Commission rule" indicates both these Rules of Practice and Procedure and the Commission's industry-specific, subject matter rules.

[3] Recommended Decision, at 69-72.

8. In exceptions, Black Hills requests that the Commission reject the changes to Rule 1004(x) defining "personal information." Instead, Black Hills recommends that the currently effective rule stay in place, with the addition of a sentence that indicates there are other definitions within the rest of the Commission rules that may modify, change, or add to the definition.

9. In its response to exceptions, Public Service objects to the request of Black Hills to reject the updated rules. However, Public Service requests that clear separation between the definition of "personal information" and "customer data" be included in the Commission's Rules of Practice and Procedure. It asks that the Commission decide that statements in the Recommended Decision referencing any overlap of personal information and customer data shall have no force or effect.[4] Additionally, Public Service requests that personal information should not include "information proprietary to the utility" such as tracking numbers uniquely assigned to the utility's equipment (*i.e.,* meter number).[5] Public Service further argues that the rules should be revised to clarify that personal information must *always* include a customer's name and at least one of the enumerated items in Rule 1004(x)(II)-(VI).[6]

10. Boulder agrees with Public Service that "customer data" should be differentiated from "personal information." However, it rejects Public Service's contention that "information proprietary to the utility" should be excluded from the definition arguing that, if information created by the utility is assigned to a specific customer, it would seem *more* protective of a customer's privacy for that information to be considered confidential.[7] Further, Boulder rejects

[4] Public Service exceptions, at 5.
[5] *Id.*, at 3.
[6] *Id.*
[7] Boulder response to exceptions, at 4.

Public Service's assertion that the enumerated items in 1004(x)(II)-(VI) must be accompanied by a customer's name to be protected as personal information.[8] Both Boulder and Public Service suggest changes to subparagraph (VI) regarding the definition of "individually identifiable information," specifically noting confusion with the ALJ's "*i.e.*" statement included within that subpart.[9] Boulder also suggests that the Commission revisit the Data Privacy Rules, 4 CCR 723-3-3026 through 3031 in the near future.

11. We agree with the ALJ that there will be circumstances when information falls under both definitions, and attempting to develop definitions, for the Rules of Practice and Procedure, that are at all times distinct is impossible. We agree with the ALJ's general framework that allows information that meets both the definition of personal information and the definition of customer data to be disclosed only pursuant to informed customer consent as required in the industry-specific rules. This framework will provide broad protection of data defined as "personal information," yet allow for narrow disclosure procedures upon informed customer consent that are specific to an industry's needs. Finally, we also agree with the ALJ and participants that industry-specific rules, including specifically the Data Privacy Rules, will need to be revisited in the near future to address this updated framework.

12. We deny Black Hills' request to reject entirely the new definition of personal information. We also reject Public Service and Boulder's requests to separate personal information from customer data; however, we note that we will revisit the Data Privacy Rules in the near future. Further, we reject Public Service's objection to language relating to the overlap of personal information and customer data in the Recommended Decision.

[8] *Id.*, at 3.

[9] Subparagraph (VI) of Rule 1004(x) and the "i.e." statement include the following as protected personal information: "other individually identifiable information in the utility's possession or control (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information)."

13. We reject Public Service's suggestion to clarify that personal information must always include a customer's name. We agree with Boulder that the enumerated data described in subparagraphs 1004(x)(II) through (VI), when provided alone or in combination, is personal information; *e.g.*, a customer's social security number is personal information regardless of whether the customer's name is combined with that social security number.

14. We find that revision of subparagraph 1004(x)(VI) is appropriate not only to address issues raised through exceptions, but also to make clarifications raised on the Commission's own motion. Specifically, we strike the ALJ's "*i.e.*" statement that attempts to clarify "individually identifiable information." We find that this statement only reiterates and potentially confuses the meaning of "individually identifiable." Additionally, we address the following:

a. We reject Public Service's request in its exceptions to strike the phrase "possession or control." We agree that this language broadly identifies information classified as personal information; however, this information should be protected pursuant to Commission rules to the extent a regulated entity possesses or has control over this personal information.

b. We reject Public Service's request in its exceptions to exclude all "information proprietary to the utility" from the definition of personal information (*e.g.*, meter number). We agree with Boulder that information that identifies the individual is properly subject to the provisions regarding personal information if it is within the entity's possession or control, regardless of where such information originates from, even if developed by the regulated entity.

c. We clarify that "information" in subparagraph 1004(x)(VI) could be provided alone or in combination to be individually identifiable. For example, an individual *date* may not be individually identifiable; however, if that date is combined with a surname and town, such information could identify an individual by its correlation to a specific customer's birth date, mother's maiden name, and place of birth.

d. We find that language relating to the public and lawful availability of data should not apply to subparagraphs 1004(x)(I) through (V). For example, even if a customer's social security number, credit card information, account numbers, or other information identified in subparagraphs 1004(x)(I) through (V), become widely available, that information is no less personal to the customer.

> Regulated entities must not disclose this information, despite the availability of the information elsewhere. We therefore revise the rule to allow disclosure of information that is "public and lawfully available for only "other individually identifiable information" set forth in subparagraph 1004(x)(VI).

15. Consistent with the above discussion we revise the definition of personal information as attached.

### 3. Collection of Personal Information – Rule 1104

16. Participants, including SourceGas and Boulder, argue that not all information regarding creditworthiness is always personal information and suggest updates to clarify that information regarding creditworthiness might not be included within the meaning of personal information. In its response to exceptions, Public Service disagrees with these suggested revisions, arguing that it believes information regarding creditworthiness *is* personal information.[10] It argues that, like social security numbers, information regarding creditworthiness is highly sensitive information that is specific to individuals and can be used to perpetrate identity theft.

17. We agree with Public Service that, as listed in the revised Rule 1104, information regarding creditworthiness is individually identifiable information and should be afforded treatment consistent with the rules applicable to personal information. We therefore find that revision of the rule is not necessary and deny exceptions to this point.

### 4. Customer Request of Personal Information – Rule 1104

18. Pursuant to Commission Rule 1004(b), a customer may request his or her personal information that is held by a regulated entity. In its exceptions, Public Service suggests limiting customer requests of personal information to that information designated in

[10] Public Service response to exceptions, at 11.

subparagraphs 1004(x)(I) through (IV).[11] It argues that not limiting this language would be burdensome and would require the utility to identify all possible information associated with the customer. It further notes that such information may be maintained in multiple systems and in aggregated formats. In response to exceptions, Boulder disagrees with any change to the proposed rule. In addition to arguing that the Commission should not make it more difficult for customers to have their own information released, Boulder also notes that Public Service does not explain why customers should not be able to correct personal information held by the company that falls within the category of individually identifiable information.

19. We agree with Boulder that a customer should have access to his or her personal information held by a regulated entity. The potential burdens on the regulated entity described by Public Service are speculative and outweighed by the interest of the customer to access his or her personal information and make corrections pursuant to Rule 1004(c) if necessary. We therefore deny Public Service's request to limit the request for personal information upon customer request in Rule 1104(b).

### 5. Form of Request for Personal Information – Rule 1105

20. Public Service argues that requests for personal information pursuant to Rule 1105(d) should be limited to those in writing. It contends that written requests would promote the utility's and the Commission's ability to track disclosure and determine if disclosure was appropriate in a particular instance. In response to exceptions, Boulder asks that the Commission affirm Rule 1105 as it appears in Attachment A to the Recommended Decision and not make it more difficult for customers to have their own information released.

[11] Public Service exceptions, at 6.

21. Although we agree with Public Service, on the one hand, that written requests would document the disclosure process and promote compliance with our rules, customers should have reasonable access to their own information. In order to meet both concerns, we revise language to require that all requests for a customer's personal information be in writing, unless the request is from the customer regarding his or her own personal information, or from an entity facilitating energy assistance to that customer pursuant to Rule 1105(d). In the event the request is from an individual customer or an entity facilitating energy assistance and the request is not in writing, the regulated entity shall verify the requestor's identity as required by the rule.

### 6. Information Requested to Facilitate Energy Assistance – Rule 1105

22. Rule 1105(d) lists information that utilities are authorized to provide to agencies that provide energy assistance to consumers. Public Service and other commenters claim that these agencies request more information than what is listed currently in the revised rules and thus suggest that the rule be expanded to include all information requested by the agencies.

23. We agree that the rule language should be updated to encompass requests by agencies to facilitate energy assistance. We further note that, within Rule 1105, the Commission requires that a utility notify customers that their information may be disclosed to help facilitate energy assistance. On our own motion, we clarify in the rule that the utility shall notify the customer of the personal information that is or may be requested in accordance with Rule 1105(d) to facilitate in the energy assistance process.

### 7. Revisions Related to "Contracted Agent" – Rule 1105

24. Public Service requests clarification in relation to the use of "contracted agent" in Rules 1004 and 1105(e). It notes that a "contracted agent" is defined to be a "third-party";

however, a "third party" is defined to be a person who is not a contracted agent. Similarly, in Rule 1105(e), Public Service recommends consistent use of "contracted agent" and "third party contract," as opposed to "contracted third party" or "third party contract" in reference to contracted agents.

25. Atmos Energy and Colorado Natural Gas recommend updates to Rule 1105(e) to make explicit that treatment of personal information by contracted agents applies only after the effective date of the new Rules of Practice and Procedure. In its response to exceptions, Public Service agrees that the revisions to Rule 1105 should apply to contracts only after the rules are effective; however, it suggests a clarifying statement by order, as opposed to a rule change.

26. We agree with Public Service that revisions to the rules are necessary to clarify the inconsistent use of "contracted agent" and "third party." Additionally, we confirm that the rules are prospective, including with respect to rules related to the use of a contracted agent in Rule 1105, and will not be effective until the rules' effective date. However, we agree with Public Service that no rule change is necessary, and therefore deny Atmos Energy and Colorado Natural Gas' request for explicit revision.

27. In addition to revisions and clarifications related to a contracted agent raised by participants in exceptions, on the Commission's own motion we revise language in Rule 1105. Specifically, we make revisions to the rules related to the following:

a. Rule 1105(e)(II) states that "[t]he use of personal information for a secondary commercial purpose not related to the purpose of the contract *without first obtaining the customer's consent* is prohibited." (Emphasis added.) We add clarifying language in the rule to make explicit that the regulated entity must obtain approval if, for any reason, the purpose of the contract is altered.

We further note that any change in a contracted agent's use of personal information must be for purposes permitted by Commission rule.[12]

b. We add subparagraph 1105(e)(V) to indicate that any misuse of personal information by the contracted agent that would violate these rules or otherwise be impermissible by law shall be treated as a violation of these rules by the regulated entity.

### D. Amicus Curiae and Attorney Representation

28. The Gas Producers take exception to proposed Rule 1200(c), which would require an amicus curiae to file its brief within the time allowed the party whose position the amicus brief will support. The Gas Producers argue that an amicus curiae should not be required to support any position and is entitled to advocate its own viewpoints, which may or may not be identical or similar to that of a litigating party.

29. The ALJ mirrored proposed Rule 1200(c) on Rule 29 of the Colorado Appellate Rules (C.A.R.). Recommended Decision, at ¶ 96. C.A.R. 29 requires an amicus curiae to file its brief "within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party pay answer." In addition, C.A.R. 29 contemplates that an appellate court will consider only those questions properly raised by the parties and that any additional questions presented in a brief filed by an amicus curiae will not be considered. *Denver United States Nat'l Bank v. People ex Rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970).

[12] For example, consider a situation where the contracted agent initially uses personal information that is also customer data for the sole purpose of assisting the utility in providing service. Subsequently, the same contracted agent proposes to use the information for other purposes as permitted by the Data Privacy Rules. Prior to using the data for an alternate purpose, the regulated entity must first obtain customer consent in compliance with Commission rules.

30. We agree with the Gas Producers that amici curiae in a Commission proceeding may raise legal issues without regard to whether the same issues have been raised by a litigating party. The Commission often decides multi-faceted matters that affect a diversity of interests, in contrast to more narrow issues of affirmance or reversal presented before appellate courts. We therefore grant the exceptions filed by the Gas Producers on this ground and delete the reference to "the party whose position the amicus brief will support" from the rule. Further, in regards to the filing deadlines for amicus briefs, we will add language stating that the deadlines will correspond to the deadlines applicable to the parties' opening statements of positions, legal briefs, or responses to motions. We therefore adopt the following language to Rule 1200(c):

**1200. Parties, Amicus Curiae, Non-Parties.**

(c) A non-party who desires to present legal argument to assist the Commission in arriving at a just and reasonable determination of a proceeding may move to participate as an amicus curiae. The motion shall identify why the non-party has an interest in the proceeding, shall identify the issues that the non-party will address through argument, and shall explain why the legal argument may be useful to the Commission. An amicus curiae is not a party, and may present a legal argument only as permitted by the Commission. The arguments of amicus curiae shall not be considered as evidence in the proceeding and shall not become part of the evidentiary record. All requests for amicus curiae may be accepted or declined at the Commission discretion. Unless ordered otherwise, ~~any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support~~ the filing deadlines governing amicus curiae shall correspond to the deadlines applicable to the parties' opening statements of position, legal briefs, or responses to motions.

31. The Gas Producers also take exception to proposed Rule 1201(b)(V), which states that an individual may represent a partnership, corporation, association or any other entity, solely to provide public, academic or policy comments. That proposed rule also clarifies that non-attorney representatives may not take actions that constitute the practice of law. The Gas Producers argue that broadening the ability of non-parties to provide academic or policy comments will incent inappropriate expert advocacy and analysis, without the ability of parties to confront and cross-examine. They contend that the rules, as proposed, would violate the Sixth Amendment and would invite any advocacy or interest group to interpose itself and its opinions into Commission proceedings without the accountability of party status.

32. The Sixth Amendment of the U.S. Constitution is explicitly confined to criminal prosecutions. *Sparks v. Foster*, 241 Fed. Appx. 467, 471 (10th Cir. 2007) (finding that the Sixth Amendment did not apply to an administrative decision made by the Department of Corrections which was not part of a criminal prosecution). Therefore, the Sixth Amendment does not apply to Commission proceedings. In addition, while academic and policy comments are part of an administrative record in a proceeding, they are not considered evidence, much like other types of public comments. We grant the exceptions filed by the Gas Producers, in part, and insert a reference to Rule 1509 into Rule 1201(b)(V) as follows:

**Rule 1201(b)(V) Attorney representation**

(b) Notwithstanding paragraph (a) of this rule, an individual may represent:

(V) a partnership, corporation, association or any other entity, solely to provide public, academic or policy comments, pursuant to rule 1509. However, in no event shall a non-attorney representative take actions that constitute the practice of law.

### E. Interventions

#### 1. Glustrom

##### a. Procedural Arguments

33. In her exceptions, Ms. Glustrom focuses on proposed Rule 1401(c), in particular the language that would require residential, agricultural, or small business consumers petitioning to intervene by permission in a natural gas, electric or telephone proceeding to demonstrate that the OCC does not adequately represent their unique interests. Proposed Rule 1401(c) also states that subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Ms. Glustrom contends that the above-mentioned amendments to Rule 1401(c) have not been noticed and thus due process has not been provided. She states that the NOPR did not mention Rule 1401 and only briefly mentioned interventions in the context of another rule. Ms. Glustrom argues that, without proper notice, interested parties could not have known that changes to Rule 1401 would be made in this docket.

34. The Colorado Administrative Procedure Act (APA), § 24-4-101 et seq., C.R.S., requires agencies initiating a rulemaking to provide a notice of proposed rulemaking stating "either the terms or the substance of the proposed rule or a description of the subjects and issues involved." Section 24-4-103(3)(a), C.R.S. The APA also requires the rules, as finally adopted, to be consistent with the subject matter as set forth in the notice of proposed rulemaking. Section 24-4-103(4)(c), C.R.S. However, the notice does not need to provide the interested parties with *precise* notice of each aspect of regulations eventually adopted. *See, e.g., Forester v. Consumer Product Safety Comm'n*, 559 F.2d 774, 787 (D.C.Cir. 1977) (emphasis added).

35. In this case, it is true that the body of the NOPR itself did not mention proposed amendments to Rule 1401(c). However, the caption of this docket clearly referred to the Rules of Practice and Procedure, and the NOPR advised the parties of a comprehensive rulemaking pertaining to these rules. Rule 1401(c) is part of the Rules of Practice and Procedure. Further, the attachments to the NOPR listed proposed amendments to Rule 1401(c), although these were not the amendments ultimately adopted by the ALJ.

36. We find that the references to Rule 1401(c) in the attachments to the NOPR were sufficient and that a reference in the body of the NOPR itself was not required to comply with the APA. The federal APA, at 5 U.S.C. § 553(b)(3) contains the language *identical* to the one in the Colorado APA. In *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 776 F.2d 355, 361 (D.C. Cir. 1985), the court considered an argument that an agency's failure to include proposed rule amendments in the body of the notice of the proposed rulemaking (the proposals were included in an appendix to the notice) did not provide sufficient notice and a reasonable opportunity to interested parties to participate in the rulemaking. The court rejected this claim and found that petitioners had a full opportunity to address the proposed rule amendments. The *Illinois Commerce Comm'n* holding applies with equal force here.

37. Further, it is irrelevant that the NOPR contained proposed amendments to Rule 1401(c) different from the ones later adopted by the ALJ. The Commission is not limited only to adopting or rejecting proposed changes listed in the NOPR and can adopt the proposals of the interested parties even if they were not initially included in the NOPR. Indeed, this is typical of the Commission's consideration of comments and proposed revisions from participants in the rulemaking process.

38. Finally, we note that Ms. Glustrom herself evidently received sufficient notice of the amendments to Rule 1401(c), as she filed written comments and addressed this issue at the October 26, 2012 hearing. For these reasons, we deny the exceptions filed by Ms. Glustrom on this ground.

**b. Substantive Arguments**

39. Ms. Glustrom argues that the existing law is clear that intervention by the OCC in a particular Commission proceeding cannot be used to limit other parties from intervening in the same proceeding. Ms. Glustrom cites to § 40-6.5-104(2), C.R.S., which states:

> (2) In exercising his discretion whether or not to appear in a proceeding, the consumer counsel shall consider the importance and the extent of the public interest involved. In evaluating the public interest, the consumer counsel shall give due consideration to the short- and long-term impact of the proceedings upon various classes of consumers, so as not to jeopardize the interest of one class in an action by another. If the consumer counsel determines that there may be inconsistent interests among the various classes of the consumers he represents in a particular matter, he may choose to represent one of the interests or to represent no interest. Nothing in this section shall be construed to limit the right of any person, firm, or corporation to petition or make complaint to the commission or otherwise intervene in proceedings or other matters before the commission.

40. Ms. Glustrom further argues that Rule 1401(c), as proposed by the ALJ, is not good public policy. She states that many residential, agricultural, and small business consumers can have a host of varying interests in Commission proceedings. The OCC, on the other hand, has a very limited budget and cannot possibly represent all of these interests fully. This is why the legislature included the above-mentioned language in § 40-6.5-104(2), C.R.S., according to Ms. Glustrom.

41. In its response to exceptions, Boulder generally agrees with Ms. Glustrom, while Public Service urges the Commission to deny her exceptions.

42. As an initial matter, § 40-6-109(1), C.R.S., creates two classes of intervenors that may participate in the Commission proceedings: intervenors as a matter of right and permissive intervenors. *See, e.g., RAM Broad. of Colo. v. Public Utils. Comm'n*, 702 P.2d 746, 749 (Colo. 1985). Ms. Glustrom challenges the rule addressing only permissive interventions; she does not object to the rules authorizing intervention as a matter of right.

43. There are several requirements for permissive intervention. First, the Colorado Supreme Court interpreted the "will be interested in or affected by" language of § 40-6-109(1), C.R.S., to mean that a "substantial interest in the subject matter of the proceeding" is required. *Id.*, at 749. Accordingly, not every person, firm, or corporation that has any type of an interest in a Commission proceeding or will be affected in any way by a Commission order has a right to intervene. Second, even if the person or entity seeking intervention has an otherwise sufficient interest in a matter, courts and administrative agencies have discretion to deny intervention if that interest is represented adequately. This is the case even where the person or entity seeking intervention will be bound by the judgment of the case. *Denver Chapter of the Colo. Motel Ass'n v. City and County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming a trial court's denial of an intervention by certain taxpayers, under C.R.C.P. 24(a), in a lawsuit filed by the City and County of Denver against its auditor—because the interests of these taxpayers were represented by the city).[13] The test of adequate representation is whether or not there is an identity of interests, not discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*, *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

[13] The Commission is not strictly bound by the C.R.C.P., but they are useful for purposes of analysis. Rule 1001 provides the Commission may seek guidance from the C.R.C.P.

44. Reading §§ 40-6.5-104(2) and 40-6-109(1), C.R.S., together leads to a conclusion that presence of the OCC in a Commission proceeding, in and of itself, does not limit the right of persons, firms, or corporations to intervene in that proceeding, but it does not relieve them from meeting the requirements found in other statutes. These include a showing that the interest will not be represented adequately in a Commission docket and that the interest must be substantial. This interpretation harmonizes the two statutes.[14]

45. We find that the Commission is well within its authority to adopt a rule requiring residential, agricultural, and small business consumers to show that the OCC does not represent their interests adequately. The OCC's status as a governmental entity that is required under § 40-6.5-104(1), C.R.S., to represent these interests (as opposed to a private party) is another factor that supports the presumption of adequate representation. Indeed, the courts have relied on this factor in both *Denver Chapter* and *Feigin v. Alexa Group, Ltd.*, 19 P.2d 23, 31-32 (Colo. 2001).

46. Finally, we disagree with Ms. Glustrom that proposed Rule 1401(c) is not good public policy. To the contrary, a more disciplined approach to interventions results in more streamlined and efficient Commission proceedings. Further, the Commission is able to address the issues common to all consumers represented by the OCC. It is important to note that residential, agricultural, and small business consumers can participate without becoming parties by filing public comments, including academic and policy comments, and by providing public input to the OCC.

[14] If possible, the courts and administrative agencies must interpret statutes in a manner that harmonizes the statutory scheme as opposed to a manner that would leave statutory provisions antagonistic to each other. *See, e.g., Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005).

47. Even though we deny the exceptions filed by Ms. Glustrom, we find good cause to make a few modifications to proposed Rule 1401(c) on our own motion. First, we replace the word "unique" with the word "distinct." The term "unique" connotes that no other consumer in Colorado shares that interest, which is a much higher burden than showing that the interest is not represented adequately by the OCC. We find that Rule 1401(c) should require consumers to demonstrate only that their interest is distinct from the OCC and that the OCC does not represent that interest adequately. Second, we replace the word "individuals" with the word "consumers," because "individuals" may not describe commercial or corporate customers. Third, we insert the language that parallels § 40-6.5-104(2), C.R.S. That statute recognizes that "there may be inconsistent interests among the various classes of the consumers [that the OCC] represents in a particular matter, [and the OCC] may choose to represent one of the interests or to represent no interest." Finally, we clarify that the Commission retains its discretion to grant a motion for permissive intervention, even if there is adequate representation by the OCC. In sum, we amend Rule 1401(c) as follows:

**1401. Intervention**.

(c) * * *

The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. If a motion to permissively intervene is filed in a natural gas, electric or telephone proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must ~~demonstrate that the unique~~ discuss whether the distinct interest of the ~~individual~~ consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. The Commission will consider these factors in determining whether permissive intervention should be granted. Motions to intervene by permission will not be decided prior to expiration of the notice period.

### 2. Gas Producers

48. The Gas Producers object to proposed Rule 1401(c), in particular the language that would require an entity seeking to intervene permissively to explain why it is in the "best position" to represent a relevant interest. They contend that parties should not be required to let unaffiliated entities to assert their position and that no two entities have exactly the same position. The Gas Producers add that it is not possible for a potential intervenor to detail its evidence before intervening or to determine which party is in the best position to represent an interest. In its response to exceptions, Boulder supports the Gas Producers on this issue.

49. We agree with the Gas Producers and therefore grant their exceptions. Hence, rather than requiring a potential intervenor to demonstrate why it is "in the best position" to represent a particular interest, we will require an entity to demonstrate only that it is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. In addition, we will delete the requirement that a potential intervenor set forth the nature and the quality of evidence it anticipates presenting in the docket. We agree with the Gas Producers that it is difficult to know the nature and quality of the evidence to be presented at the outset of the proceeding. Further, a party is not required to present any evidence and may represent its interests through cross-examination of evidence presented by others or through legal briefing and argument. In sum, we amend Rule 1401(c) as follows:

**1401. Intervention**.

(c) A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer ~~contends they are in the best position to represent that interest~~ is positioned to represent that interest in a manner that will advance the just resolution of the proceeding~~, and the nature and quantity of evidence anticipated to be presented if intervention is granted~~.

* * *

## F. Show Cause Proceedings

### 1. Notice to Regulated Entity

50. The proposed rules revise the process by which the Commission conducts show cause proceedings against a regulated entity for violations of statutes, rules, tariffs, and other regulatory obligations under the Commission's jurisdiction. Rule 1302(h)(I)(A) addresses the Commission Staff's preparation of a proposed decision ordering a regulated entity to show cause. Rule 1302(h)(I)(B), which is the subject of exceptions, delineates how the Commission considers the Staff's proposed decision and provides notice of the proposed order to the regulated entity. At issue is the highlighted language in proposed Rule 1302(h)(II)(B):

> Commission staff shall submit the proposed decision ordering a regulated entity to show cause to the Commission at its regular weekly meeting for approval to advise the regulated entity of the proposed proceeding. ***The Commission shall decide whether to give the regulated entity notice of the content of the proposed decision based on the supporting information presented. If the Commission decides to give notice, then the proposed decision presented by Commission staff shall be served on the regulated entity and shall be attached to a notice of proposed order to show cause over the Director's signature.*** The regulated entity shall have 20 days to cure or satisfy the allegations set forth in the notice of proposed show cause.

51. Black Hills opposes this language asserting that it gives the Commission discretion over whether to give a regulated entity advance notice of the order to show cause. Black Hills believes that advance notice should be mandatory, because, if a utility is not given advance notice, then it may be impossible to cure any problems in the show cause order within the deadlines set forth in other parts of Rule 1302.[15]

[15] Black Hills exceptions, at 4.

52. Section 24-4-104(3), C.R.S., requires an agency instituting proceedings to revoke, suspend, annul, limit, or modify a license to give the licensee notice in writing and afford the licensee the opportunity to respond with data, views, and arguments and, absent a deliberate or willful violation or a substantial danger to public health and safety, the opportunity to comply with the regulatory requirement. As quoted above, Rule 1302(h)(II)(B) also grants the regulated entity an opportunity to cure the alleged violation before the commencement of show cause proceedings.

53. We believe the ALJ's proposed language was intended to address the Commission's decision to institute the show cause procedure upon review of the Staff's proposed decision, not to deprive regulated entities of notice and the opportunity to respond and cure. Thus, the issue raised by Black Hills is one of adopting language that best communicates these procedures.

54. We grant Black Hills's exceptions to the extent that the language in Rule 1302(h)(II)(B) should be clarified, and we amend this rule as follows:

> Commission staff shall submit the proposed decision ordering a regulated entity to show cause to the Commission at its regular weekly meeting for approval to advise the regulated entity of the proposed proceeding. ~~The Commission shall decide whether to give the regulated entity notice of the content of the proposed decision based on the supporting information presented. If the Commission decides to give notice~~ If the Commission approves the advisement, then the proposed decision presented by Commission staff shall be served on the regulated entity and shall be attached to a notice of proposed order to show cause over the Director's signature. The regulated entity shall have 20 days to submit written data, views, and arguments with respect to the facts or conduct and to cure or satisfy the allegations set forth in the notice of proposed show cause. If the Commission decides not to approve the advisement, then the matter shall be deemed closed.

### 2. Taking Administrative Notice of Evidence

55. Black Hills, Public Service, Atmos and CNG, and SourceGas take exception to proposed Rule 1302(h)(II)(C), which addresses the taking of administrative notice, the potential for establishing a prima facie case, and the burden of proof. The exceptions generally combine their discussion of these issues, arguing that the proposed rules allow the taking of administrative notice of evidence in the proposed decision, which in turn could result in the establishment of a prima facie case and an improper shifting of burdens to the regulated entity.[16] The Commission considers the issue of administrative notice to be separate from the issues of the establishment of a prima facie case and the burden of proof, and thus for clarity we will analyze them individually.

56. Proposed Rule 1302(h)(II)(C) states:

> ***The Commission may take administrative notice of evidence in a decision ordering a regulated entity to show cause in accordance with rule 1501(c)***. Based thereupon, the decision may include a finding that a prima facie case has been shown and shift the burden of going forward as to how any statute, rule, tariff, price list, time schedule, decision, or agreement accepted or approved by Commission decision is alleged to have been violated.

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[16] *See, for example*, Public Service Company of Colorado's Exceptions to Recommended Decision No. R12-1466, at 7-8:

> Recommended Rule 1302(h)(II)(C) and (F) would improperly place the burden of proof on the utility in a show cause proceeding. Public Service believes that the proposed Rule places the cart before the horse. That is, Rule 1302 improperly suggests that the Commission could make a finding that the Staff has already established a *prima facie* case before a formal case against the utility has been filed, such that the burden of proof and of going forward would be shifted to the utility respondent. This is clearly improper. Moreover, the proposed rule suggests that a finding of the establishment of a *prima facie* case against a utility can be made on the basis of administrative notice (again before the case is filed). That is fundamentally unfair, violates the provisions of the state Administrative Procedure Act (which states that the burden of proof is on the proponent of an order), and directly violates the provisions related to administrative notice set forth in Recommended Rule 1501(c), which both limits the evidence that can be admitted on the basis of administrative notice and affords a party the opportunity to controvert evidence admitted by administrative notice.
>
> It is fundamentally unfair and contrary to fundamental principles of due process of law to require the entity against whom essentially a "complaint" is filed to bear the burden of proving *from the very outset of a proceeding* that he or she is innocent. Yet that is what the Recommended Rule would do.

*See also*, Black Hills at 4-5; Atmos and CNG, at 3-4; SourceGas and Rocky Mountain, at 1-3.

Public Service contends that this language violates Rule 1501(c), which limits the taking of administrative notice and grants a party the opportunity to controvert such evidence.[17] SourceGas argues, as to the administrative notice issue only, that there is no need for Rule 1302(h)(II)(C) to repeat the authority to take administrative notice granted already in Rule 1501(c), and that Rule 1501(c) allows a party to controvert the fact to be noticed.[18]

57. To the extent the exceptions challenge the first sentence to Rule 1302(h)(II)(C) relating to the taking of administrative notice in show cause proceedings, they are denied. This rule says that the taking of administrative notice is in accordance with Rule 1501(c), which necessarily includes its evidentiary and procedural protections. Per Rule 1501(c), the facts admitted through administrative notice in a show cause proceeding under Rule 1302(h)(II)(C) are only of an undisputed nature and whose accuracy reasonably cannot be questioned.[19] The incorporation of Rule 1501(c) also grants show cause respondents the opportunity to controvert evidence admitted by administrative notice. The reference to Rule 1501(c) and its protections in Rule 1302(h)(II)(C) fulfill the procedural and evidentiary requisites raised by the exceptions.

58. We also disagree with SourceGas that a rule permitting administrative notice in show cause proceedings is needlessly repetitive; rather, we find that expressly empowering the Commission to take administrative notice at this stage of show cause proceedings provides clarity and efficiency to the process.

[17] Public Service exceptions, at 8.
[18] SourceGas exceptions, at 2.
[19] Rule 1501(c) states:

> The Commission may take administrative notice of general or undisputed technical or scientific facts; of state and federal constitutions, statutes, rules, and regulations; of tariffs, price lists, time schedules, rate schedules, and annual reports; of documents in its files; of matters of common knowledge, matters within the expertise of the Commission; and facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned….Every party shall have the opportunity on the record and by evidence, to controvert evidence admitted by administrative notice.

### 3. Burden of Proof

59. In their exceptions to Rule 1302(h)(II)(C), Black Hills, Public Service, Atmos and CNG, and SourceGas focus primarily upon the following highlighted language:

> The commission may take administrative notice of evidence in a decision ordering a regulated entity to show cause in accordance with rule 1501(c). Based thereupon, ***the decision may include a finding that a prima facie case has been shown and shift the burden of going forward as to how any statute, rule, tariff, price list, time schedule, decision, or agreement accepted or approved by Commission decision is alleged to have been violated.***

These participants object to a shifting of the burden of proof to the regulated entity if a prima facie case has been established. They do not challenge the language allowing the Commission to find that the Staff has made a prima facie showing of a violation. In fact, Public Service advocates that a prima facie showing should be a threshold condition to the issuance of an order to show cause.[20]

60. Participants filing exceptions cite § 24-4-105(7), C.R.S., as controlling the issue of which party shoulders the burden of proof in Commission show cause proceedings, and it states:

> Except as otherwise provided by statute, the proponent of an order shall have the burden of proof, and every party to the proceeding shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

They argue that, because the Staff is the proponent of an order finding the regulated entity to be in violation, the shifting of the burden of proof away from Staff and on to the regulated entity conflicts with the first clause in §24-4-105(7), C.R.S.[21]

[20] Public Service exceptions, at 10.

[21] Public Service exceptions, at 7-8; Black Hills exceptions, at 4-5; Atmos and CNG exceptions, at 3-4; SourceGas exceptions, at 1-3.

61. The participants are confusing the burden of going forward concept with the burden of proof concept. Contrary to the assertions made by the participants, the burden of proof does not shift during a show cause proceeding. It remains with the proponent of the relief requested. This is in contrast to the "burden of going forward" as that term is used in Rule 1302(h)(II)(C). When the Commission's records and other sources evidence a violation of a statute, rule, tariff, price list, approved agreement, or other obligation, the Commission may require the regulated entity to appear. By rule, the regulated entity may present its evidence, cross-examination, argument or position to cure the allegation. As the respondent in the show cause proceeding, the regulated entity may decide not to present any evidence. The respondent retains the ability to present argument as to why the Commission should not find the regulated entity has committed a violation.

62. We therefore deny the exceptions to remove or revise the language addressing the burden of going forward in proposed Rule 1302(h)(II)(C). Rule 1500 is amended to be consistent with the discussion above.

### G. Miscellaneous Rule Changes

#### 1. Separation of Commission Staff from Advisory Staff – Rule 1004(e)

63. Through its exceptions, Black Hills requests revision to Rule 1004(e) to ensure that an absolute separation exists between trial and advisory staff. Black Hills contends that allowing staff to serve as advisory staff in one matter and trial staff in another matter raises issues such as the risk that utilities inadvertently will engage in prohibited *ex parte* communications. Further, the impartial role of advisory staff may be blurred if staff members participate as both advisory and trial staff.

64. We find that § 40-6-123, C.R.S., provides the necessary protections advocated by Black Hills. Specifically, among other directives, this statute requires that members and staff of the Commission conduct themselves in a manner that prevents the appearance of impropriety or of conflict of interest. Therefore, we find that no rule change is necessary and Black Hills's exceptions on this matter are denied. Commission staff will continue to engage in advisory and trial advocacy roles consistent with statutory directives and Commission rule.

**2. 2011 Edition of C.R.S. and CRCP – Rules 1004(g) and 1406**

65. Rule 1004(g) incorporates by reference the 2011 edition of the Colorado Rules of Civil Procedure (CRCP). Public Service contends that the rule either should refer to the most current edition of the CRCP or incorporate the 2012 edition. The Gas Producers argue that referencing a version of CRCP that is two years old will lead to divergent practices between the courts and the Commission. Additionally, Boulder similarly suggests that, rather than referencing the 2012 edition of CRCP, Rule 1004(g) should remove the reference to any particular year from the definition of CRCP.

66. Pursuant to the Colorado Administrative Procedure Act (APA), § 24-4-103(12.5)(a)(II), C.R.S., permits agencies to incorporate "codes, standards, guidelines, or rules" adopted by other federal or state government entities; but, the incorporated code, standard, guideline, or rule must be identified by "citation and date." The APA does not permit later amendments or editions of the incorporated code, standard, guideline, or rule.

67. We find that the Commission may incorporate the 2012 edition of the CRCP into Rule 1004(g) pursuant to § 24-4-103(12.5)(a)(II), C.R.S., but it may not incorporate any future editions by these rules. Therefore, we grant the exceptions filed by Public Service and Gas Producers, in part, and change the reference in Rule 1004(g) from the 2011 edition of the CRCP to the 2012 edition.

### 3. Annual Reports – Rule 1100(n)(I)

68. Rule 1100(n)(I) states that, in accordance with the Colorado Open Records Act, annual reports required by Commission rules are presumed to be available for public inspection. Public Service agrees that this provision is generally acceptable, but argues that it should protect from disclosure information that the Commission already has deemed confidential.

69. We find that Public Service's proposed language that information is "already deemed confidential" is too broad to implement practically. If an entity believes that information in an annual report should be protected, the rule allows for the filing of a motion for extraordinary protection. We therefore deny the exception.

### 4. Highly Confidential Information – Rule 1101(e)

70. In exceptions, Black Hills argues that exhibits offered into evidence, admitted into evidence, and then withdrawn from evidence should not be filed as part of the administrative record. According to Black Hills, a party has the "right" to withdraw an exhibit, and thus should not have to include a withdrawn exhibit in the record. Thus, Black Hills contends that subparagraph (IV) of Rule 1101(e) should be modified to require the filing of highly confidential exhibits only if those exhibits are: a) admitted at hearing; or b) offered and rejected at hearing.

71. The current language, which requires that, "unless the Commission orders otherwise, a complete version of the document that contains the information which is subject to highly confidential protection shall be filed with the Commission … *if offered* as an exhibit at hearing," (emphasis added) covers the proper scope of documents to be made part of the administrative record. While the Commission may grant a party's motion to withdraw an exhibit, a party does not have the *right* to withdraw an exhibit already admitted into evidence; Black Hills cites no authority for its contention. Further, the record should reflect the situation in which an exhibit is offered, admitted into evidence, and then withdrawn. We therefore find the rule language appropriate and deny the exception.

**5. Confidential and Highly Confidential Information – Rule 1101(l)(I)**

72. Rule 1101(l)(I) requires that all documents and information subject to the rules related to confidential and highly confidential information shall be retrieved by the producing party or person, unless the filer indicates that such documents shall be destroyed. The Gas Producers assert that Rule 1101(l)(I) creates a difficult standard for disposition of confidential or highly confidential material that it receives from other parties. Specifically, the Gas Producers are concerned that these documents may be manipulated; therefore, the documents would contain work product that would be disclosed if the documents are returned to the filing party. The Gas Producers argued that they should be allowed to destroy confidential or highly confidential information rather than granting the producing party the ability to retrieve documents containing information that may be proprietary to the receiving party.

73. We find that, if a receiving party is handling confidential information subject to return, then the receiving party should handle the information accordingly. If analysis of confidential information necessarily results in an integration of the two parties' work product,

then the receiving party may petition the Commission for appropriate relief or work with the filer on another agreement. We therefore deny the exception.

### 6. Prohibited Communications – Rule 1106

74. Current Rule 1106 disallows communications less than 30 days prior to the commencement of a proceeding. The Gas Producers argue that this restriction creates an impossible standard, because persons other than the party commencing the case may not know when the thirty day clock begins to run. The Gas Producers believe that the clause setting forth this restriction should be stricken entirely or qualified by limiting the 30-day restriction to an "announced or disclosed filing."

75. We deny the Gas Producers' request to strike the 30-day provision, because it furthers the public interest by providing a definitive safe harbor for communications. We agree with Gas Producers that the 30-day timeline is not always known, grant the exception, in part, and revise Rule 1106 to clarify that prohibited communications are those in which the participants know, or should know, about the filing of the adjudication. We also clarify that the disputed issues subject to the prohibition are tied to a pending, adjudicatory proceeding. Further, on our own motion, we amend Rule 1106(b) such that the prohibition includes communications by amicus curiae or members of the public submitting comments per Rule 1509(a).

### 7. Prohibited Communications ("legislation") – Rule 1110(a)(IV)

76. The Gas Producers believe that "legislation" as used in Rule 1110(a)(IV) is undefined, too narrow, and uncertain of application. They assert that legislation be defined in Rule 1004 to include "analysis, input or advocacy related to interpretation or enactment of proposed or adopted legislation."

77. We note that § 40-6-122, C.R.S., requires that adjudicatory proceedings do not include discussions on "pending legislative proposals." We therefore grant the Gas Producers' exception, in part, to include this clarifying legislative language and revise the rule accordingly.

**8. Rulemaking Participants – Rule 1200(d)**

78. On our own motion, we find it necessary to clarify in Rule 1200(d) that a participant in a rulemaking proceeding is *not* subject to the rules addressing prohibited *ex parte* communications, which apply only to adjudications. We therefore make corresponding revisions to Rule 1200 to clarify that participants in non-adjudicatory proceedings (e.g., rulemaking proceedings and administrative proceedings) are subject to the rules governing confidentiality, but not subject to the Commission's rules related to prohibited communications.

**9. Uploading to E-Filings System – Rule 1204**

79. Black Hills asserts that Rule 1204 should be modified to require parties to file documents in a text-searchable format when the document is "readily available" in such format. As currently drafted, the rule requires documents to be text-searchable. Black Hills disagrees that a waiver should be required when text-searchable documents are not possible.

80. We agree that certain documents cannot be text-searchable, including, for example, some contracts and maps. We therefore grant Black Hills' exception, in part. We find that qualifying language "when possible" will require filers to format documents that are text-searchable, but will permit filing of documents that cannot formatted without the need for a waiver. Black Hills' suggested language, "when readily available," is unclear and could indicate that the filer need not reformat the document to be text searchable, even if such formatting is possible.

### 10. Discovery – Rules 1205 and 1405

81. The Gas Producers recommend that all discovery responses be served on all parties to a docket, not simply the party making the request. The Gas Producers argue that this revision will mirror the process used in judicial actions, increase the efficiency of proceedings, and reduce the expected volume of discovery requests. In addition, they argue the rule should require that a party opt-out of receiving discovery responses if the party does not wish to receive the responses.

82. Unlike many judicial actions, Commission proceedings often have a vast array of participants; furthermore, these participants may have limited interests in specific issues. In the event that a party is interested in receiving all discovery responses, a request from the party for these responses can be made early in the proceeding and is not burdensome. We therefore find that no rule change is necessary and deny the Gas Producers' exception.

### 11. Notice Period for Compliance Filings – Rule 1207(g)

83. As revised, Rule 1207(g) requires that tariffs complying with a Commission decision may be made "on not less than two business days' notice." SourceGas argues that, with the clarification in Rule 1203(c) requiring that the entire notice period must expire prior to the effective date of a tariff, the change in Rule 1207(g) to two business days' notice (from one business day) is not necessary.

84. Public Service also disagrees that the time required for notice of compliance tariffs should be changed to two business days. Public Service states that the complexity and procedural delays often make it difficult for the Commission to conclude proceedings within mandated statutory time frames, which, in turn, should permit short time frames for

Public Service to make compliance filings. Public Service believes that the one business days' notice period has worked well.

85. We note that the rule revision accommodates Administrative and Commission staff that often incur difficulties processing and reviewing compliance tariffs in one business day. For example, if the relevant filings raise issues, convening the Commission to address an issue on that same day is often impossible or impractical. Two business days' notice is a more reasonable timeframe for processing and review. In response to Public Service's concerns, when circumstances exist indicating that two business days' notice is not reasonable under the circumstances, the Commission may indicate a shorter allowance by order; however, no rule change is necessary. We therefore deny exceptions on this issue.

**12. Deeming Applications Complete – Rule 1303**

86. The OCC states a general concern about the compression of time during the Commission's adjudicated proceedings and recommends that the Commission adopt the civil court's "rule of 7" time calculation – in which multiples of 7 are stated in various CRCP and Colorado Appellate Rules (CAR) rule provisions for deadlines and other procedural issues. Specifically, the OCC contends that changes to Rule 1303 would provide better notice to parties regarding the deemed complete date so that interventions, discovery, and other procedures may begin sooner. The OCC suggests the rule require that, within seven days after an application has been deemed complete, the Commission issue an order identifying the deemed date.

87. We note that many of the Commission's timelines are dictated by statute, including the time for filing exceptions and rehearing, reargument, or reconsideration (RRR); the notice period for tariff proceedings; and the decision deadline for applications and suspended tariffs. Although the Commission does have control over certain timelines, because of the

lack of discretion on statutorily prescribed timeframes, the OCC's proposed adoption of the "rule of 7" is impractical. We therefore deny the OCC's suggested revisions.

### 13. Substantive Response Filings – Rules 1308, 1400(e), and 1506

88. The Gas Producers believe that, where the rules require Commission approval for the filing of a response or other document, the party should obtain Commission permission to file the response *before* the substantive response is actually filed. In addition, the Gas Producers state that movants should be held to a requirement to confer with other parties regarding requests to shorten response time.

89. Due to timing restrictions, we find that it is not practical in all circumstances for parties to file the request for approval before filing the substantive response (*e.g.*, requests for response to applications for RRR). We therefore deny the request.

### 14. Grounds for Responses – Rules 1308(b), 1400(e), and 1506(b)

90. Public Service states that the causes justifying a responsive pleading are unduly limiting and could curtail unnecessarily the Commission's discretion to allow response and replies that could assist the decision-making process. Public Service recommends additional language to allow for responses when new arguments are raised in a filing that the other parties had no opportunity to address.

91. By revisions to Rule 1308(b), a filing party must show, through its motion for leave to file a response, a material misrepresentation of a fact, an incorrect statement or error of law, or accident or surprise which ordinary prudence could not have guarded against. Further, Rule 1400(e) permits a response if the movant can demonstrate "newly discovered facts or issues" in its motion for leave to file a reply. We find that this rule language authorizes the

Commission to allow responses in the circumstances discussed by Public Service. We therefore find that no rule revision is necessary and deny exceptions on this matter.

**15. Intervention Timelines – Rule 1401(a) and (d)**

92. The OCC asserts that notices of intervention by right and motions for permissive interventions should be reduced to 14 days. Further, it argues that Staff's deadline for intervention by right likewise should be reduced to either 14 or 21 days.

93. Although there may be circumstances when a 14-day intervention period is appropriate, we do not agree that this timeframe should be the generally applicable rule. An applicant may request shortened notice and intervention periods if warranted. Therefore, we deny exceptions on this matter.

**16. Documentation of Administrative Notice in the Record – Rule 1501(c)**

94. SourceGas takes exceptions to proposed Rule 1501(c), which as revised requires any person requesting administrative notice of a certain fact to provide a *complete* copy of the document containing that fact as an exhibit to the proceeding. The current rule provides an exception where the subject documents are voluminous. The utilities argue that the exception makes sense, because having to provide a complete copy of voluminous documents at a hearing wastes resources and can be unwieldy.

95. We agree with the merits of the exceptions that, upon leave of the Commission, a party may file only the relevant portion of an unreasonably voluminous document. In the event a party fails to include all relevant documentation, the Commission may order supplementation of the record. We therefore grant the exceptions and revise the rule accordingly.

96. Further, on our own motion, we note that the sentence in Rule 1501(c) that begins "[i]f during hearing…" duplicates the previous sentence and is therefore unnecessary. We strike this sentence in the revised rules.

### 17. Filing Timelines – Rule 1503 and new rule suggestions

97. The OCC suggests that, if the Commission requests briefs or statements of position, the parties may request, or the Commission on its own motion may determine, that it is necessary to use the "extraordinary conditions" provisions of § 40-6-109.5, C.R.S., to extend the date for decision another 90 days. Further, the OCC proposes four additional ways to relieve the time compression issue:

a. More frequent use of Commission Initial Decisions;

b. More frequent use of "extraordinary conditions" pursuant to § 40-6-109.5, C.R.S.;

c. Elimination of pre-filed written rebuttal and cross-answer testimony; and

d. Modification of time frames for filing exceptions and a maximum timeframe for issuing a decision.

98. Additionally, the OCC proposes a new rule on deadlines for filing dispositive motions. The OCC suggests that these motions should be due not later than 49 days before the hearing date, with a response time of 14 days, and order deadline of 14 days after responses.

99. Because these issues were not addressed fully in this rulemaking and are likely to raise issues specific to a parties' role in a proceeding, we find it appropriate to consider these proposals in a future rulemaking that specifically addresses timing issues in adjudicated proceedings. We deny the OCC's suggested changes at this time.

### 18. Public Comments – Rule 1509(c)

100. Black Hills takes issue with proposed Rule 1509(c), which states that entities providing academic or policy comments in adjudicatory proceedings must do so before the close

of the evidentiary record or the latest due date for filing statements of position. Black Hills argues that this rule could leave parties with little or no time to respond to these comments. Therefore, Black Hills requests that the proposed rule be modified to require any academic or policy comments be filed when direct or answer testimony is due to give all parties the chance to respond.

101. The Gas Producers argue that broadening the ability of non-parties to provide academic or policy comments will incent inappropriate expert advocacy and analysis, without the ability of the parties to confront and cross-examine. The Gas Producers argue that the proposed rules would violate the Sixth Amendment and invite any advocacy or interest group to interpose itself and its opinions into dockets without the accountability of party status.

102. The Sixth Amendment to the U.S. Constitution is inapplicable here, because it is confined to criminal prosecutions. *Sparks v. Foster*, 241 Fed. Appx. 467, 471 (10th Cir. 2007) (finding that the Sixth Amendment did not apply to an administrative decision made by the Department of Corrections, which was not part of a criminal prosecution).

103. Though public comments are part of an administrative record in a proceeding, they are not considered evidence. The same is true for academic or policy comments by the public (as opposed to testimony made by a party expert). We note that the current rules do not list a deadline by which members of the public must submit comment.

104. We further note that the Commission may permit briefing in response to certain public, academic, or policy comments that raise new issues. In establishing rules, however, it is difficult to differentiate among all the types of comments that may be submitted. We believe that the ALJ picked a reasonable deadline for submission of academic or policy comments that would

allow potential party discussion or briefing, if appropriate, including by Commission motion. We therefore deny the exceptions on this matter.

### 19. Other Clarification and Non-Substantive Corrections

105. By the Commission's own motion, we make additional clarifications of the rules and revise certain rules accordingly; and make non-substantive revisions, including correcting typographic errors and unnecessary repetition throughout the rules. Specifically, we revise the following rules as reflected in the attached rules adopted by this decision:

a) Addition of Rule 1103(e), authorizing the Commission to retain as confidential personal information inadvertently filed, including but not limited to, driver's license numbers, addresses, and medical information.

b) Revision of the Standards of Conduct to make clear that all information is public unless otherwise ordered.

c) Clarification in Rule 1201(c) requiring attorneys of record to update changes of address, telephone number or e-mail address if such change occurs during a proceeding.

d) Clarification in Rule 1211(c) to clarify the first sentence.

e) Clarification of the last sentence in Rule 1505(a) regarding the timing of the filing of responses to exceptions allowed "in all other proceedings."

f) Clarification of the first sentence in Rule 1509(b).

g) Other typographical corrections.

## II. ORDER

### A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R12-1466 (Recommended Decision) filed on January 24, 2013 by Atmos Energy Corporation and Colorado Natural Gas, Inc., are granted, in part, and denied, in part consistent with the above discussion.

2. The exceptions to the Recommended Decision filed by SourceGas Distribution, LLC, and Rocky Mountain Natural Gas, LLC are granted, in part, and denied, in part consistent with the above discussion.

3. The exceptions to the Recommended Decision filed on January 24, 2013 by Ms. Leslie Glustrom are denied.

4. The exceptions to the Recommended Decision filed on January 24, 2013 by the Colorado Office of Consumer Counsel are denied.

5. The exceptions to the Recommended Decision filed on January 24, 2013 by Black Hills/Colorado Electric Utility Company, LP, are granted, in part, and denied, in part consistent with the above discussion.

6. The exceptions to the Recommended Decision filed on January 24, 2013 by Noble Energy, Inc., and EnCana Oil and Gas (USA), Inc., are granted, in part, and denied, in part consistent with the above discussion.

7. The exceptions to the Recommended Decision filed on January 24, 2013 by Public Service Company of Colorado are granted, in part, and denied, in part consistent with the above discussion.

8. The adopted rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and in final format (Attachment B) are available through the Commission's Electronic Filings (E-Filings) system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=12R-500ALL.

9. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

10. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 13, 2013.**

(S E A L)


ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners