Decision No. R14-1190

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14R-0419ALL

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

RECOMMENDED DECISION
OF ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
ADOPTING RULES

Mailed Date: October 1, 2014

I. STATEMENT

A. Background

1. The Colorado Public Utilities Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) on May 8, 2014 by Decision No. C14-0479, regarding proposed Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

2. The Commission proposed rule amendments to correct omissions from Proceeding No. 12R-500ALL; to draw a distinction between attachments included in pre-filed testimony and exhibits in a hearing; to clarify captions to a proceeding and titles to a pleading; to clarify procedures for immediate review of interim decisions; to clarify the timing of certain filings in proceedings where no statutory period for decision exists; to eliminate an inconsistency in the timing of motions to dismiss; and to make certain formatting, non-substantive changes.

3. The proposed rule changes were attached to the NOPR in legislative format as Attachment A and in final format as Attachment B. The statutory authority for the proposed rules is found in §§ 40-2-108, 40-4-101, and 40-3-110, C.R.S.

4. The NOPR, with the attached proposed rules, invited written comments from interested parties, and scheduled an initial public comment hearing on the proposed rules for July 10, 2014. The Commission referred the rulemaking to an Administrative Law Judge (ALJ). The matter was subsequently assigned to the undersigned ALJ.

5. Written comments to the proposed rules were filed by Public Service Company of Colorado (Public Service); Western Resource Advocates (WRA); Black Hills/Colorado Gas Utility Company, LP (Black Hills); the Regional Transportation District (RTD); and, SourceGas Distribution, LLC and Rocky Mountain Natural Gas, LLC (collectively, the Gas Companies).

6. At the scheduled date and time, the rulemaking public hearing was held. Comments were provided at the hearing by Public Service; Black Hills; WRA; the Gas Companies; the Colorado Telecommunications Association (CTA); the Colorado Office of Consumer Counsel (OCC); and Tri-State Generation and Transmission Association (Tri-State).

7. At the conclusion of the rulemaking hearing, the ALJ took the matter under advisement. Pursuant to §40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, as well as a written recommended decision.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

8. Proposed Rules 1100, 1101, 1104, and 1105 incorporate non-substantive changes in order for the rules to read more clearly. In addition, proposed Rules 1100(e), 1101(a),(III),(D) and (e) replace the term "exhibit(s)" with the term "attachment(s)" in order to specify a distinction between attachments to pleadings and exhibits offered at hearing.

9. Proposed Rule 1202(b) changes the term "title" to the term "caption" in several locations in order to clarify the distinction between captions to a proceeding and titles to a pleading. Subsections (e) and (g) also continue the proposal of replacing "exhibit" with

"attachment" to also make the distinction between pre-filed testimony in a proceeding and exhibits offered at hearing.

10. Proposed Rule 1206 removes the term "exhibit(s)" from several locations in subsection (b).

11. Proposed Rule 1208 removes the term "Generally" from the rule.

12. Proposed Rule 1210 again removes the term "exhibits" and replaces it with the term "attachments."

13. No party filed written comments or offered comments at the public hearing on the above proposals. The proposed amendments to the above rules are clear and unambiguous. Therefore, the proposed amendments to Rules 1100, 1101, 1104, 1105, 1202, 1206, 1208, and 1210 will be adopted as noticed, without further amendment as indicated in Attachment A to this Decision.

14. Proposed Rule 1301 makes non-substantive changes in order to improve the readability of the rule.

15. While Public Service indicated that it had no concern with the proposed changes to Rule 1301, it nonetheless suggested that language in 1301(d) that addresses mediation be added also to Rule 1302, which addresses formal complaints. As part of its comments at hearing, Tri-State indicated it did not oppose Public Service's proposal regarding Rule 1302.

16. As a matter of course, Commission Staff typically provide documents to parties to informal as well as formal complaint proceedings notifying them that mediation is available should both parties agree. The documents provided to parties to formal complaints also set out the procedures to move the matter to mediation. Since mediations information is already provided to parties to formal complaint proceedings, it is found that the additional language

proposed by Public Service to Rule 1302 is unnecessary and no amendments will be made to that rule.

17. The amendments proposed for Rule 1308(e) correspond to the amendments proposed to Rule 1400(f). Those rules were revised to eliminate an inconsistency regarding the timing of filing motions to dismiss in a complaint proceeding. Rule 1308(e) provided that a motion to dismiss a complaint was to be filed within 14 days of service and prior to filing an answer. Rule 1400(f) provided that a motion to dismiss could be made in accordance with C.R.C.P. 12, which provides for 21 days after service of a claim to file a motion, including a motion to dismiss.

18. The inconsistency was proposed to be remedied by deleting language in Rule 1308(e) requiring a motion to dismiss a complaint to be filed within 14 days of service of the complaint. In addition, the reference to filing a motion to dismiss in accordance with C.R.C.P. 12 in Rule 1400(f) was also deleted.

19. Public Service was concerned that removing the term "lack of standing" as grounds for filing a motion to dismiss would not permit a utility to file a motion to dismiss based on a defect in complying with the requirements contained in § 40-6-108(b), C.R.S., which sets out the requirements for filing a complaint alleging a rate or charge of a utility is unreasonable.

20. Tri-State, while sharing Public Service's concern with removing the term "lack of standing" as grounds for filing a motion to dismiss, nonetheless agreed to the proposed rule changes since the new rule would more closely track C.R.C.P. 12. Tri-State did request that the final decision should make clear that the proposed language was not intended to remove challenges based on standing.

21. RTD filed written comments concerning the proposed changes to Rule 1308(e) and 1400(f). According to RTD's rationale, the removal of the language in Rule 1400(f) regarding motions to dismiss has unintended consequences. RTD took the position that removing the language of Rule 1400(f) would remove its ability to seek a motion to dismiss a motion for permissive intervention.

22. As was discussed during the public comment hearing, the purpose of the proposed language changes to Rules 1308(e) and 1400(f) was to remove a discrepancy between the two rules regarding the appropriate time frame to file a motion to dismiss. In order to remedy the inconsistency between the two rules, the reference to C.R.C.P. 12 was removed from Rule 1400(f) and Rule 1308(e) was amended to include all the available defenses under C.R.C.P. 12. This resolves the inconsistency.

23. It is noted that Rule 1308(e) is specifically directed at responses to complaints. As stated previously, the addition of the term of "lack of jurisdiction [over the person]" and the removal of the term "lack of standing" was incorporated in order to more closely track the language of C.R.C.P. 12. The issue of standing is subsumed within the defense of "lack of jurisdiction." However, the proposed amendments to Rule 1308(e) should in no way be read to mean that it was the Commission's intent to take away any party's ability to make challenge based on standing. That was not the intent of the proposed rule amendments.

24. Therefore, the amendments to Rule 1308 as indicated in Attachment A to this Decision will be adopted.

25. Proposed Rule 1400(a) amends language in order to make it mandatory for attorneys to confer prior to filing a motion and report when the requested relief is unopposed.

26. Public Service opposed the proposed amendments as being burdensome and unworkable. Public Service argues that in large proceedings which typically contain many parties, it is not practical to confer with all parties prior to filing every motion. Rather, Public Service stated the current rule, which merely encourages parties to confer about motions was sufficient.

27. CTA and OCC agreed with Public Service's comments that it is sometimes not practical to confer on every motion with every party. CTA seeks some balance to the rule which would not make conferral mandatory.

28. On the other hand, Black Hills commented that from its perspective, it did not find conferral prior to filing motions to be onerous as represented by the other parties. Rather, Black Hills stated that in large proceedings, motions are typically directed to a certain party or parties and therefore, it is not necessary to confer with all parties to the proceeding. As for procedural matters, conferral is necessary in the first place, so requiring conferral regarding motions in procedural matters does not seem onerous either.

29. Black Hills did propose several changes to the proposed Rule 1400(a) in order to track the language more closely to C.R.C.P. 121 § 1-15(8) and the Federal Rule of Procedure in the U.S. District Court for the District of Colorado at D.C.Colo.LCivR 7.1. Black Hills' proposed changes included providing exceptions to the duty to confer and a statement that when a motion is unopposed, it is to be entitled "Unopposed Motion for _____." In addition, Black Hills proposed setting a mandatory three-day response time for counsel to respond to attempts to confer.

30. Tri-State agrees with Black Hills that some sort of balance should be incorporated in the rule language. Tri-State does not take issue with requiring parties to confer, but proposes

additional language that the requesting party made reasonable attempts to confer and for the motion to state whether it is unopposed or opposed, as well as describing the moving party's efforts to confer.

31. Tri-State does not agree with the imposition of a three-day deadline for opposing counsel to respond to a moving party. Tri-State argues that imposition of such a deadline would result in the opposing party taking the full three days to respond rather than responding in a more timely fashion.

32. The Gas Companies propose that the word "communicate" be substituted for the word "confer" in the rule in order to shift the emphasis from the opposing party to the moving party.

33. It is agreed that additional language is necessary in order to provide more procedural certainty to Rule 1400(a). The concerns raised by Public Service and CTA regarding the onerous nature of the proposed rule changes are not convincing. As Black Hills pointed out, conferral among all parties regarding procedural matters is necessary anyway, so it is not a stretch to require conferral among all parties to determine whether a motion is unopposed. Secondly, other motions such as motions *in limine*, motions to compel discovery or objecting to discovery and other typical motions are not directed to all parties to a proceeding. As a result, conferral with all parties is not typically required and would not be onerous.

34. There was simply no substantive evidence provided by those parties opposing the proposed rule amendments that requiring a duty to confer prior to filing a motion is oppressive or requires too much time to accomplish. Certainly such a duty to confer in federal and state courts of record has not caused the havoc envisioned by the parties here opposing the amendments to Rule 1400(a).

35. Black Hills and Tri-State raised reasonable concerns regarding the proposed rule. Black Hills proposed additional language to include in the rule. It is found that the addition of language to Rule 1400(a) will provide additional direction to the parties regarding the duty to confer.

36. Language will be included in Rule 1400(a) (as provided in Attachment A to this Decision) which addresses many of the parties' concerns raised at the public comment hearing. For example, the language will be amended to provide that "moving counsel shall make a reasonable good faith effort to confer will all parties about the motion and report when the requested relief is unopposed." This requires a duty to confer to be mandatory. However, if no conference occurs prior to filing the motion, moving counsel will also be required to state the reason why the conference failed. Therefore, if opposing counsel fails to respond to moving counsel in a timely fashion or fails to respond at all, moving counsel will so state in the motion. The presiding ALJ, Hearing Commissioner, or Commission *en banc* will take such reasons for the failure to confer under advisement and take appropriate action when necessary.

37. In addition, subsections (a)(I) and (II) will also be added. Subsection (a)(I) provides that conferral is not required for motions made in accordance with C.R.C.P. 56, motions made in accordance with Commission Rule 1308(e) (which now mirrors C.R.C.P. 12) and motions for an attorney to withdraw from a proceeding. Motions made pursuant to Rule 1308(e) and C.R.C.P. 56 are dispositive motions which allow opposing counsel to respond with counter-declarations and legal arguments to show that triable issues of fact exist. Motions for an attorney to withdraw from a proceeding, while requiring certain requirements involving the moving attorney's client, do not require conferral with opposing counsel.

38. Finally subsection (a)(II) requires that when a motion is unopposed, it is to be titled as "Unopposed Motion for _____," thus removing the suspense when reading a motion to determine whether it is opposed or unopposed. The requirement to use such a caption will immediately cue the ALJ or Commission that it is not necessary to wait 14-days for a response to the motion.

39. Proposed Rule 1400(f) removed the language regarding filing motions to dismiss in accord with C.R.C.P. 12. As discussed in more detail above, Rule 1308(e) now provides the requirements for filing motions to dismiss. In addition, the last sentence of Rule 1400(f) which referred to unopposed motions to dismiss is now incorporated in Rule 1400(a).

40. Therefore, the amendments to Rule 1400 as indicated in Attachment A to this Decision will be adopted.

41. Non-substantive amendments were made to Rules 1401(c) and 1405(a).

42. Proposed Rule 1405(c) clarifies that the default time for serving discovery responses and objections application proceedings where no statutory period for Commission decision exists is 20 days from service of a discovery request.

43. Proposed Rules 1405(d) and (g) delete the reference to the term "exhibits." Rule 1405(h) replaces "exhibit" with "attachment."

44. Proposed Rule 1405(j) adds complaint proceedings to the type of proceedings in which parties are to file and serve testimony as ordered by the Commission.

45. Public Service was the only party that commented on the proposed amendments to Rule 1405. It recommended that the discovery rules be modified so that they reflect current Commission practice and the Colorado Administrative Procedure Act § 24-4-105, C.R.S. of providing discovery in all adjudicatory proceedings, however commenced.

46. The proposed amendments to Rule 1405(c) which amends the term "application" proceedings to "adjudicatory" proceedings, as well as proceedings where no statutory period exists for a Commission decision when addressing discovery address the issues raised by Public Service. Rule 1405 as amended reflect current Commission practice and the Colorado Administrative Procedures Act.

47. Therefore, the amendments to Rule 1405 as indicated in Attachment A to this Decision will be adopted.

48. Proposed Rule 1502(b),(c), and (e) clarify the procedures for immediate review of interim decisions. The proposed rules list the circumstances where parties in adjudicatory proceedings and participants in rulemakings or other non-adjudicatory proceedings may seek a modification of interim decisions. The proposed rules are not to apply to *amici curiae* or commenters.

49. WRA proposed several edits to the proposed language of Rule 1502(b). WRA noted that the term "person" appears in rule 1502(b); however, in the NOPR issued with this rulemaking, the Commission expressed its intent that Rule 1502 would not apply to *amici curiae* or commenters. Use of the term "person," according to WRA would entitle commenters, *amici curiae*, and other members of the public to file a motion seeking review of an interim Commission Decision. Consequently, WRA recommended that the term "person" be replaced with "party" as defined by Commission Rules 1004(v) and 1200. WRA also recommended including the phrase "or rulemaking participant" which would parallel the language of Rule 1306.

50. WRA additionally, recommended removing the reference to "*en banc*" from subsection 1502(b) and deleting subsection 1502(c) as duplicative since it appeared that a party

must demonstrate good cause in order to obtain review of an *en banc* Commission Decision under Rule 1502(b), but need only file a written motion for a presiding officer Interim Decision under Rule 1502(c). Removing the term *en banc* from Rule 1502(b) would be simpler and then utilizing the same standard for review of all Interim Decisions, according to WRA. In addition, WRA recommended deleting the word "including" and creating a new sentence providing a non-exclusive list of situations where good cause would exist since WRA found the current wording confusing.

51. Finally, WRA recommended that Rule 1502(b) state that a person who submits a petition for leave to intervene may file a motion seeking modification of any decision denying that petition for intervention. WRA included proposed language with its recommendations.

52. Public Service found the proposed amendments to Rule 1502(b) confusing because they mix separate concepts in one sentence. In addition, Public Service took issue with the phrase "practical denial" as being subjective. Public Service proposed several changes to the language of the rule.

53. Black Hills proposed removing the term "*en banc*" from Rule 1502(b) since two Commissioners may issue an Interim Decision. Black Hills also proposed additional language to make the rule clearer.

54. Tri-State disagreed with WRA's proposal to delete Rule 1502(c). Tri-State was concerned that deleting the subsection could substantively limit the relief that is available under the rule which presently allow a request that an Interim Decision be set aside, stayed or modified.

55. Rule 1502 will be modified somewhat from the proposed rule attached to the Commission's NOPR. For example, subsection (b) will be modified in several regards.

The word "person" will be amended to read "party or rulemaking participant" to more accurately reflect who may seek redress from an Interim Decision.

56. Additionally, the language regarding when a party may file a motion for modification of an Interim Decision upon good cause shown will be modified to more accurately reflect examples of what may constitute "good cause." Further, the term "*en banc*" will be removed from Rule 1502(b) as well, in order to make the rule more consistent with Rule 1502(c).

57. It is agreed with Tri-State that striking Rule 1502(c) would have the unintended consequence of limiting the relief available under the rule which provides for Interim Decisions to be set aside, modified or stayed. As a result, the language of Rule 1502(c) will remain. The term "person" contained in rule 1502(c) will be amended to "party."

58. Therefore, the amendments to Rule 1502 as indicated in Attachment A to this Decision will be adopted.

59. Proposed Rule 1505(a) clarifies that, in proceedings where no statutory period for Commission decisions exists, parties may respond to exceptions within 14 days following service of the exceptions.

60. Public Service complained that the proposed rule amendments leave the impression that responses to exceptions may only be filed in application proceedings. Public Service proposed amendments to the Rule 1505(a) consistent with its concerns.

61. The language of Rule 1505(a) sets out the procedural requirements for filing exceptions to Recommended Decisions. The complained of language sets out the instances when responses to exceptions are due within 14 days and when responses are due within 7 days. Nothing can be discerned from the language of the rule to imply that responses to exceptions may only be filed in application proceedings.

62. Therefore, the amendments to Rule 1505 as indicated in Attachment A to this Decision will be adopted.

63. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. It is Ordered That:

1. Commission Rules pursuant to 4 *Code of Colorado Regulations* 723-1-1100, 1101, 1104, 1105, 1202, 1206, 1208, 1210, 1301, 1308, 1400, 1401, 1405, 1502, and 1505, Commission's Rules of Practice and Procedure, contained in Attachment A to this Order are adopted consistent with the discussion above.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set

out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director