Decision No. R19-0943-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0409E

IN THE MATTER OF APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE ACQUISITION OF, AND APPROVAL OF COST RECOVERY FOR, THE MANCHIEF GENERATION FACILITY AND VALMONT 7 & 8.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN H. DENMAN DENYING MOTION REQUESTING MODIFICATION OF DECISION NO. R19-0801-I AND CERTIFYING THIS INTERIM DECISION AS IMMEDIATELY APPEALABLE TO THE COMMISSION

Mailed Date: November 20, 2019

TABLE OF CONTENTS

I. STATEMENT

1. This Interim Decision denies the Motion Requesting Modification of Decision No. R19-0801-I (Motion to Modify), filed on October 17, 2019 by Ms. Leslie Glustrom, *pro se*,

seeking reversal of the denial of her Petition for permissive intervention in this Proceeding. In the exercise of his sound discretion, the Administrative Law Judge (ALJ) also grants Ms. Glustrom's request to certify this Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

A. Procedural History

2. On July 23, 2019, Public Service Company of Colorado (Public Service or the Company) filed with the Public Utilities Commission (Commission) a Verified Application (Application) for Certificates of Public Convenience and Necessity (CPCNs) for the acquisition of: (1) the 301 MW Manchief generation facility (Manchief); and (2) the 82 MW Valmont generation facility (Valmont). With its Application, Public Service filed the supporting direct testimony and attachments of three witnesses. This filing commenced the above-styled Proceeding.

3. A detailed procedural history of this Proceeding is set forth in previous Decisions and is repeated here as necessary to put this Decision into context.

4. In the Application, Public Service observes that in Phase II of its 2016 Electric Resource Plan (ERP), the Commission approved the Company's Preferred Colorado Energy Plan Portfolio (Preferred CEP Portfolio), which was developed in collaboration with a diverse array of interested participants. Under the approved CEP Portfolio, Public Service will voluntarily retire 660 MW of coal-fired generation to allow for implementation of the CEP Portfolio. Public Service will then acquire approximately 1,100 MW of new wind resources (500 MW of which will be Company-owned), approximately 700 MW of new solar resources, 275 MW of new battery storage, and 383 MW of existing natural gas assets. The

383 MW of existing natural gas assets are the subject of this Application.[1] The Commission required Public Service to file a CPCN application to acquire the natural gas-fired resources and to address cost recovery requests for those resources in the required CPCN application filing.[2] Public Service filed this Application in compliance with that Commission directive.

5. In the Application, Public Service requests the following approvals:

a) Approval of a CPCN to acquire, own, and operate the existing 301 MW Manchief facility;

b) Approval of a CPCN to acquire, own, and operate the existing 82 MW Valmont facility;

c) Approval to exercise an Early Purchase Option afforded by the terms of its Purchase and Sale Agreement (PSA) with the owner of Valmont to bring that resource on-line in 2020, approximately two years earlier than the 2022 acquisition and in- service date of the facility contemplated in the approval of the CEP [Portfolio] (early acquisition is the Company's preferred alternative in this proceeding); and

d) Approval of the Company's cost recovery proposal for both the Manchief and Valmont facilities, which is described in the Application and includes acquisition adjustments for accounting purposes for both the Manchief and Valmont acquisitions.

6. On July 25, 2019, the Commission issued a Notice of Application Filed establishing deadlines for the filing of intervention pleadings.[3]

7. During the Commission's weekly meeting held on September 4, 2019, the Application was deemed complete for purposes of § 40-6-109.5, C.R.S., and was referred to an ALJ for disposition. The undersigned ALJ was subsequently assigned to preside over this Proceeding.

---

[1] Application at pages 1-2. *See* Decision No. C18-0761 (mailed September 10, 2018). ¶¶ 103 – 108 and 119 – 121 at pages 31 – 33 and 36, in Proceeding No. 16A-0396E.

[2] Decision No. C18-0761, ¶¶ 119 – 121 at page 36 and Ordering Paragraph No. 4 at page 42.

[3] Interested persons were required to file motions to intervene within 30 days, or no later than August 26, 2019. Because the 30-day deadline for interventions, fell on Saturday, August 24, 2019, the deadline was extended by operation of law until the next business day, or until Monday August 26, 2019. Section 40-6-121, C.R.S. Commission Staff had seven additional days to file a notice of intervention of right.

8. Pursuant to § 40-6-109.5(1), C.R.S., when supporting testimony is filed with an application, as in this Proceeding, the Commission's initial decision is due within 120 days after the application is deemed complete, or here no later than January 2, 2020. Moreover, a recent amendment to § 40-6-109.5(4), C.R.S. (2019),[4] now provides that: "If the commission finds that additional time is required, it may, by separate order, extend the time for decision by an additional period not to exceed *one hundred thirty days*." (Emphasis added.)

9. In Decision No. R19-0801-I (mailed on September 27, 2019), the ALJ determined that issuing a decision on the Application within 120 days would not be possible. Therefore, pursuant to § 40-6-109.5(4), C.R.S. (2019), the ALJ exercised his discretion to extend the decision deadline for an additional 130 days, that is for a maximum period of 250 days or until May 11, 2020.

10. On August 20, 2019, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention of Right, Entry of Appearance and Request for Hearing. On August 29, 2019, Trial Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention as of Right by Staff, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1401, and Request for Hearing. Both OCC and Staff request an evidentiary hearing on the Application. Decision No. R19-0801-I acknowledged the interventions as of right of the OCC and Staff.

11. Motions for permissive intervention were filed on August 26, 2019 by Southwest Generation Operating Company, LLC (SW Generation) and Western Resource Advocates

[4] Section 40-6-109(1), C.R.S., was amended, effective on May 30, 2019, to give the Commission the discretion to extend the 120-day decision deadline on applications by an additional 130 days, for a total of 250 days. *See* Senate Bill 19-235, Section 16, at page 31; signed into law by Governor Jared S. Polis and effective on May 30, 2019.

(WRA). Public Service did not object to these permissive interventions. Both SW Generation and WRA had been granted permissive interventions in both Phase I and Phase II of Proceeding No. 16A-0396E, Public Service's 2016 ERP.[5] In Decision No. R19-0801-I, the ALJ found that SW Generation and WRA, which do not represent residential, agricultural, or small business consumers, each demonstrated that this Proceeding may substantially affect their pecuniary or tangible interests, and that other parties would not otherwise adequately represent their interests. The ALJ concluded that SW Generation and WRA each satisfied the standards for permissive intervention required by Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, and granted their permissive interventions.[6]

12. On August 23, 2019, Ms. Glustrom filed a Petition to Intervene (Petition), seeking permissive intervention. She argued *inter alia* that, as an Xcel Energy ratepayer and "significant shareholder," she has a substantial pecuniary interest in this proceeding under Rule 1401, and that her interests cannot be adequately represented by any other party, including the OCC, because no other party has taken positions that have been significantly aligned with her positions on fossil fuel expenditures in Colorado.[7]

13. On August 30, 2019, Public Service filed its Response and Objection to the Petition to Intervene and Request for Hearing filed by Leslie Glustrom (Response), arguing on several factual and legal grounds that Ms. Glustrom's permissive intervention must be denied.[8]

[5] *See* Decision No. C16-0663-I (mailed July 15, 2016), ¶ 43 and Ordering Paragraph No. 11 at pages 11 and 18, and Decision No. C17-0796-I (mailed September 28, 2017), ¶ 32 at pages 11 and 12, in Proceeding No. 16A-0396E.

[6] Decision No. R19-0801-I, ¶¶ 21-24 at pages 8-9.

[7] Glustrom Petition, at pages 1, 2, and 3.

[8] Public Service Response, at pages 3 and 5 through 7.

14. On September 3, 2019, Ms. Glustrom filed, in one pleading, a Motion Requesting Leave to Reply and Reply to Public Service's Response (Motion and Reply), arguing that Public Service's Response contained incomplete and incorrect statements of law governing interventions.[9] The ALJ granted the Motion and Reply and considered Ms. Glustrom's additional arguments in ruling on her Petition.[10]

15. Based upon the authorities, facts, and legal analysis discussed in detail in Decision No. R19-0801-I, the ALJ denied Ms. Glustrom's Petition for permissive intervention.[11]

16. On October 17, 2019, pursuant to Rule 1502(c) of the Rules of Practice and Procedure, 4 CCR 723-1, Ms. Glustrom filed a Motion to Modify, arguing that Decision No. R19-0801-I should be modified in several aspects, and if denied, requesting that the ALJ certify his decision as immediately appealable to the full Commission.[12]

17. Pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, responses to the Motion to Modify were due 14 days after service of the motion, or by October 31, 2019. No responses were filed.[13]

B. The Public Service 2016 ERP.

18. The Commission's ERP process includes two phases. In Phase I, the Commission reviews and may approve, or approve with modifications, the utility's plan to acquire new utility resources. In Phase II, the Commission determines whether the utility should be granted a

[9] Motion and Reply, at pages 2 through 4.

[10] Decision No. R19-0801-I, ¶¶ 29-34 at pages 11-13.

[11] Decision No. R19-0801-I, ¶¶ 35-41 at pages 13-16.

[12] Rule 1502(c) provides that: "Any person aggrieved by an interim decision may file a written motion with the presiding officer entering the decision to set aside, modify, or stay the interim decision."

[13] Rule 1401(c) provides *inter alia* that: "Motions to intervene by permission will not be decided prior to expiration of the notice period." Hence, this Decision on the merits of the Motion to Modify could not have been issued until the deadline for filing responses had passed.

presumption of prudence for pursuing the acquisition of particular resources.[14] On May 27, 2016, pursuant to the ERP Rules, Public Service filed an Application for approval of its 2016 ERP. That filing initiated Phase I of the 2016 ERP proceeding.

19. It is important not to forget that the instant Application is intertwined with two past Commission proceedings –the 2016 Public Service ERP, Proceeding No. 16A-0396E, and related Proceeding No. 17A-0797E, the Accelerated Depreciation/Renewable Energy Standard Adjustment Reduction Application (Depreciation/RESA Proceeding).[15] In both Phase I and Phase II of the 2016 ERP proceeding, the Commission denied Ms. Glustrom's separate requests for permissive intervention. The Commission also denied her request for permissive intervention in the Depreciation/RESA Proceeding.[16]

20. In Phase I of Public Service's 2016 ERP, there were 21 intervenors.[17] In its Phase I Decision, Decision No. C17-0316 issued on April 28, 2017, the Commission approved Public Service's 2016 ERP with modifications. The Commission authorized Public Service to implement a competitive bidding process for acquiring cost-effective resources to meet its projected resource need during an eight-year resource acquisition period extending from 2016 through 2024. The Commission also approved a process for evaluating bids to the competitive

[14] The ERP process is conducted pursuant to the ERP Rules, found at 4 CCR 723-3-3600, *et seq*.

[15] Proceeding No. 17A-0797E concerned accelerated depreciation of Comanche Generating Units 1 and 2, as well as a reduction in the Renewable Energy Standard Adjustment (RESA).

[16] *See* Decision No. R19-0801-I, ¶ 27 at page 10. *See* Decision No. C16-0663-I, ¶ 49 and Ordering Paragraph No. 10 at pages 13 and 17 (Phase I); Decision No. C17-0796-I, ¶ 31 and Ordering Paragraph No. 11 at pages 11 and 21 (Phase II), both denying Ms. Glustrom's requests to intervene in the 2016 ERP. *See also* Decision No. C18-0117-I (mailed February 15, 2018), ¶ 19 and Ordering Paragraph No. 3 at page 8, in Proceeding No. 17A-0797E, denying Ms. Glustrom's request for permissive intervention in the Depreciation/RESA Proceeding.

[17] *See* Decision No. C16-0663-I, Ordering Paragraphs Nos. 4 through 21 at pages 17, 18, and 19.

solicitation and established the modeling parameters for the presentation and consideration of potential resource portfolios in compliance with this Decision.[18]

21. On August 29, 2017, Public Service filed a stipulation seeking an order permitting presentation of a Colorado Energy Plan Portfolio (CEP Portfolio) during the Phase II bid evaluation process (Stipulation). As proposed, the CEP Portfolio would be presented in addition to the portfolios required by the Phase I ERP Decision. As presented in the Stipulation, the CEP Portfolio would address an alternate resource need caused by the retirements of two coal-fired generation units at the Comanche station, Comanche 1 in 2022 (325 MW) and Comanche 2 in 2025 (335 MW). There were 16 Stipulating Parties, including Public Service and the OCC.[19]

22. In Phase II, there were 31 intervenors.[20] In its Phase II ERP Decision, issued on September 10, 2018, the Commission approved Public Service's preferred CEP Portfolio, which the Commission found:

> [R]esults in a balanced mix of utility resources acquired through a highly competitive solicitation process that garnered an exceptional number of diverse and low-cost bids. … [T]he CEP Portfolio includes Public Service's acquisition of existing gas-fired generation resources, as well as the development of new wind resources, new photovoltaic (PV) solar resources, and, for the first time in Colorado, utility-scale battery storage. While the CEP Portfolio entails the early retirement of Public Service's coal units 1 and 2 at its Comanche generation station in Pueblo, Colorado, it also entails the proposed expansion of the Company's generation fleet with additional PV solar and storage resources and the proposed development of new transmission infrastructure in the Pueblo area.[21]

[18] Decision No. C17-0316 (mailed on April 28, 2017) in Proceeding No. 16A-0396E (Phase I ERP Decision).

[19] Decision No. C17-0796-I, ¶ 29 at page 11.

[20] Decision No. C17-0796-I, ¶ 31 at page 11.

[21] Decision No. C18-0761, ¶¶ 2 and 3 at pages 1 and 2, in Proceeding No. 16A-0396E (Phase II ERP Decision).

23. The approved CEP Portfolio included the following resources: In addition to the 660 MW of coal-fired generation that will be voluntarily retired to allow for implementation of the CEP Portfolio, Public Service would acquire approximately 1,100 MW of new wind resources (500 MW of which will be Company-owned), approximately 700 MW of new solar resources, 275 MW of new battery storage, and 383 MW of existing natural gas assets. As noted previously, the 383 MW of existing natural gas assets are the subject of this Application.[22] The Commission required Public Service to file a CPCN application to acquire the natural gas-fired resources and to address cost recovery requests for those resources in the required CPCN application filing.[23] Public Service filed the instant Application in compliance with that Commission directive.

C. Permissive Intervention Standards.

24. Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, states the minimum standards for permissive intervention in Commission proceedings and requires that:

> *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 is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. 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.* … The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period.

(Emphasis added.)

[22] *See* Decision No. C18-0761, ¶¶ 103 – 108 and 119 – 121 at pages 31 – 33 and 36.

[23] Decision No. C18-0761, ¶¶ 119 – 121 at page 36 and Ordering Paragraph No. 4 at page 42.

25. Rule 1401(c) is similar to Colorado Rule of Civil Procedure 24(a), which provides that, even if a party seeking intervention has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties.[24] This principle is true even if the party seeking intervention will be bound by the case's judgment.[25] The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the 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.[26]

26. In addition, Rule 1401(c), 4 CCR 723-1, requires additional discussion for certain motions for permissive interventions:

> If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC.

Pursuant to § 40-6.5-104(1), C.R.S., the OCC has a statutory mandate to represent the interests of residential, agricultural, or small business ratepayers. "[I]f there is a party charged by law with representing [the individual's] interest, then a compelling showing should be required to demonstrate why this representation is not adequate."[27]

---

[24] *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n.*, 214 P.3d 451, 457 (Colo. App. 2008).

[25] *Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P.2d 494, 495-496 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city).

[26] *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

[27] *Feign v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

27. Pursuant to Rule 1500, 4 CCR 723-1, the person seeking leave for permissive intervention bears the burden of proof to demonstrate satisfaction of the requirements of Rule 1401(c).

D. Decision No. R19-0801-I.

28. Applying the foregoing legal standards for permissive intervention, in Decision No. R19-0801-I the ALJ carefully and fully considered the arguments made and authorities cited by Ms. Glustrom in her Petition and Motion and Reply and by Public Service in its Response. The ALJ concluded that Ms. Glustrom failed in her burden of proof to demonstrate that she satisfied all the requirements of Rule 1400(c), and therefore, the ALJ denied her Petition.[28] Summarized below are the salient rationales and reasons for the denial of Ms. Glustrom's Petition for permissive intervention.

29. First, in her Motion and Reply, Ms. Glustrom cited Decision No. C19-0621-I (mailed on July 23, 2019) in Proceeding No. 19AL-0268E, the pending Public Service Phase I electric rate case, arguing that she showed good cause to allow her to intervene in that case.[29] Ms. Glustrom's supposition appeared to be that, because the Commission recently granted an intervention in the electric rate case, her Petition must be granted in this Proceeding.

30. However, the Colorado Supreme Court (Court) has consistently held that the Commission's prior decisions cannot be applied as binding precedent in future proceedings, even in those involving the same utility. In other words, the doctrine of *stare decisis* does not apply to Commission decisions. The Commission's decision in each new proceeding must be based upon

[28] Ms. Glustrom did not argue that she has a substantial tangible interest in the outcome of this proceeding, and thus that aspect of Rule 1401(c) was not discussed in Decision No. R19-0801-I, nor is it discussed here.

[29] Motion and Reply, at page 3.

the record in the new case.[30] Therefore, the ALJ found that Decision No. C19-0621-I is not binding precedent and whether Ms. Glustrom's request to intervene in the electric rate case was granted does not compel the same result in the instant proceeding. Motions for permissive intervention in each case stand or fail on their own individual merits.[31]

31. In Decision No. R19-0801-I, moreover, the ALJ did review Decision No. C19-0621-I and found that its grant of permissive intervention to Ms. Glustrom in the electric rate case was conclusionary and thus not persuasive. Indeed, most of the discussion about Ms. Glustrom's request for permissive intervention concerned a pejorative remark she made about the OCC (alleging the OCC refused to collaborate with her) and the OCC's defense and clarification of the relevant facts.[32] After discussing Ms. Glustrom's arguments for and Public Service's arguments against her permissive intervention, as well as the claims and defenses regarding the OCC, Decision No. C19-0621-I merely concluded that:

> Despite the objections of Public Service to Ms. Glustrom's request to intervene, we find that she also states good cause to allow her to intervene. Ms. Glustrom is on notice that she will be held to the same duties and responsibilities as an attorney in this matter.[33]

Decision No. C19-0621-I sets forth no analysis or evaluation of Ms. Glustrom's arguments for permissive intervention or about whether or not she satisfied the legal requirements of Rule 1401(c).[34]

---

[30] *See Colorado Office of Consumer Counsel v. Public Service Company,* 877 P.2d 867, 876 (Colo. 1994); *Colorado-Ute Electric Ass'n. v. Public Util. Comm'n., supra,* 602 P.2d at 865 (Colo. 1979); *B&M Services, Inc. v. Public Util. Comm'n.,* 429 P.2d 293, 295 (Colo. 1967).

[31] Decision No. R19-0801-I, ¶ 33 at page 13.

[32] *See* Decision No. C19-0621-I ¶¶ 21 through 23 at pages 13 through 15.

[33] Decision No. C19-0621-I, ¶ 29 at page 18.

[34] Decision No. R19-0801-I, ¶ 35 at pages 13 and 14.

32. Second, in her Petition and Motion and Reply, Ms. Glustrom suggested she satisfies the language related to intervention in § 40-6-109, C.R.S., because she is both "interested in" and will be "affected by" the decision on the merits in this Proceeding.[35] The Court has held that § 40-6-109(1), C.R.S., creates two classes of intervenors that may participate in Commission proceedings: those who may intervene as of right and those whom the Commission permits to intervene.[36] The Court has also interpreted the language "will be interested in or affected by" in § 40-6-109(1), C.R.S., to mean "substantial interest in the subject matter of the proceeding" is required.[37] Rules 1401(b), interventions as of right, and 1401(c), permissive interventions, were promulgated to implement § 40-6-109, C.R.S.; Rule 1401(c) defines the meaning of "substantial interest."

33. Significantly, in *Glustrom v. Colorado Public Utilities Comm'n.*, Case No.11CV8131 (Order Dismissing Appeal, July 11, 2012), the Denver District Court affirmed Commission decisions that denied Ms. Glustrom's permissive intervention *inter alia* based on the Commission's interpretation of § 40-6-109(1), C.R.S.[38] The language of § 40-6-109(1), C.R.S., gives Ms. Glustrom no "right" to intervene in this Proceeding.

34. Third, the ALJ found that Ms. Glustrom failed to demonstrate that she has a substantial pecuniary interest in this proceeding, as required by Rule 1401(c). Ms. Glustrom

---

[35] Petition at page 2; and Motion and Reply at pages 2 and 3.

[36] *See, e.g., RAM Broadcasting of Colo. v. Public Utilities Comm'n*, 702 P.2d 746 (Colo. 1985).

[37] *Id.,* at 749.

[38] The District Court affirmed the Commission's rejection of the same statutory argument and its denial of Ms. Glustrom's permissive intervention in Decision No. C11-0987 (mailed September 14, 2011), denying exceptions; and in Decision No. C11-1163 (mailed October 31, 2011), denying rehearing, reargument, or reconsideration of Decision No. C11-0987 (mailed October 31, 2011), in Docket No. 11A-510E. *See also e.g.*, Decision No. C14-1247 (mailed October 16, 2014), in Proceeding No. 14AL-0660E (denying Ms. Glustrom's intervention, including that she does not have a right to intervene pursuant to statute); and Decision No. C18-0117-I, at ¶ 13, page 6, in Proceeding No. 17A-0797E (the same, and concluding that, "Ratepayers, including Ms. Glustrom, do not have a 'right' to intervene based on § 40-6-109, C.R.S.") *See* Decision No. R19-0801-I, ¶¶ 36 and 37 at pages 14 and 15.

argued that she satisfies the "substantial pecuniary interest" requirement by being an Xcel Energy ratepayer and a significant Xcel Energy stockholder. The ALJ was not persuaded by those arguments. The ALJ also found that Ms. Glustrom's interests as a stockholder are represented by Public Service, which has a fiduciary responsibility to its stockholders and is expected to represent its stockholders' interests.[39]

35. Fourth, the ALJ found that Ms. Glustrom failed to satisfy the requirement in Rule 1401(c) to "discuss whether the distinct interest of the consumer is either not adequately represented by OCC or inconsistent with other classes of consumers represented by the OCC." Ms. Glustrom failed to overcome the presumption of adequate representation of residential consumers by the OCC through identification of evidence of bad faith, collusion, or negligence on the part of the OCC.[40] The OCC is charged by law with representing Ms. Glustrom's interests as a residential customer, and the ALJ found that she failed to make a compelling showing of why OCC's representation was inadequate.[41]

36. For all of these reasons, the ALJ denied Ms. Glustrom's Petition for permissive intervention.

[39] Glustrom Petition, at pages 1, 2, and 3; Decision No. R19-0801-I, ¶¶ 38 and 40 at pages 15 and 16. Ms. Glustrom's Motion and Reply to Public Service's Response did not address the substantial pecuniary interest requirement of Rule 1401(c).

[40] *Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, *supra,* 374 P.2d at 496 (finding no intervention of right in the absence of such factors as fraud, collusion, and bad faith); *Estate of Scott v. Smith*, *supra,* 577 P.2d at 313-314 (finding adequate representation where no evidence of bad faith, collusion, or negligence on the part of the representative).

[41] Decision No. R19-0801-I, ¶ 39 at page 15. *See Feign v. Alexa Group, Ltd.*, *supra,* 19 P.3d at 26 (requiring a compelling showing to demonstrate why representation by the party charged by law with representing the individual's interest is not adequate).

E. The Motion to Modify.

37. In the Motion to Modify, Ms. Glustrom summarizes her argument, as follows:

> In short, the Office of Consumer Counsel ("OCC") will be unable to adequately represent Ms. Glustrom in this docket because in the 16A-0396E underlying docket the OCC signed the Stipulation and supported the acquisition of the Manchief and Valmont gas turbines and this is very likely to constrain the arguments the OCC will be able to make about whether the "public convenience and necessity" will be met by PSCo acquiring these gas turbines.[42]

Significantly, the Motion to Modify does not challenge any findings and conclusions related to the other three legal bases for denial of permissive intervention to Ms. Glustrom that were discussed in Decision No. R19-0801-I, particularly that she failed to demonstrate that this Proceeding will substantially affect her pecuniary interests.[43] The failure of proof by Ms. Glustrom, to demonstrate that this Proceeding will substantially affect her pecuniary interests, was an independent reason for denying her Petition. Significantly, since the Motion to Modify fails to challenge that independent finding and conclusion, the denial of her Petition was legally correct and should be affirmed.

38. Because Ms. Glustrom is likely to ask the Commission to review this Decision, however, the ALJ will evaluate and adjudicate the arguments in the Motion to Modify. Ms. Glustrom requests specific modifications to Decision No. R19-0801-I, as follows:

a) that Decision No. R19-0801-I "be modified to reflect the issues raised in this Motion including the reasons why Ms. Glustrom's interests can not [sic] be adequately represented by the OCC and to grant Ms. Glustrom's intervention in this docket;"

b) that Decision No. R19-0801-I "be modified to recognize the arguments made in Ms. Glustrom's Petition to Intervene regarding her unique position in this docket and the importance of considering the ability of alternatives

[42] Motion to Modify at page 1.

[43] The four legal reasons and bases for the denial of permissive intervention are discussed in ¶¶ 28 through 36 at pages 11 through 14 of this Interim Decision.

like solar, storage and demand-response and other low-cost options to meet the roles previously played by natural gas turbines;" and

c) that Decision No. R19-0801-I "be modified to reflect the fact that the OCC signed the Stipulation in the underlying 16A-0396E (2016 PSCo Electric Resource Plan) docket and supported a plan containing these gas turbines in that docket [and] therefore is very likely constrained in what they can say in this docket related to the acquisition of the gas turbines the OCC previously supported acquiring.[44]

II. FINDINGS AND CONCLUSIONS

39. In finding that Ms. Glustrom had failed to satisfy her burden of proof to demonstrate that she met all the requirements of Rule 1401(c) and in denying her Petition, the ALJ considered all factual and legal arguments presented in the intervention-related pleadings, including all of those arguments not specifically addressed in Decision No R19-0801-I. Indeed, that Decision evaluated the merits of all of Ms. Glustrom's arguments for permissive intervention, discussed the major relevant facts, and then rejected her arguments.[45]

40. Ms. Glustrom argues that Decision No. R19-0801-I should be modified to "recognize" the arguments in her Petition and quotes text relating to the adequacy of OCC's representation from her Petition.[46] In ruling on a motion, it is not necessary to discuss all factual assertions in the decision. Indeed, findings by the Commission in a decision need not be presented in any particular form, and a necessary finding may be implied from other findings made.[47] The findings in Decision No. R19-0801-I, that Ms. Glustrom failed to satisfy her burden

[44] Motion to Modify at pages 2-4. Adequacy of the OCC's representation is discussed ¶¶ 40 through 44 at pages 16 through 18 of this Interim Decision; Ms. Glustrom's alleged "unique position" is discussed at ¶¶ 41 through 44 at pages 17 and 18; and the ERP Stipulation signed by the OCC is discussed at ¶ 21 at page 8.

[45] *See* Decision No. R19-0801-I, ¶¶ 25 through 41 at pages 9 through 16.

[46] Motion to Modify at page 3.

[47] *Colorado-Ute Electric Ass'n. et al. v. Public Utilities Comm'n. et al.,* 760 P.2d 627, 641 (Colo. 1988); *Caldwell v. Public Utilities Comm'n*, 200 Colo. 134, 138, 613 P.2d 328, 332 (1980).

of proof to demonstrate that she met all the requirements of Rule 1401(c) and denying her permissive intervention, in fact are greater than adequate and are clearly discernible.

41. Because the primary argument in the Motion to Modify concerns adequate representation by the OCC of Ms. Glustrom's interests, this Decision will first address that issue. After quoting text from the Petition regarding the OCC's representation, Ms. Glustrom argues two reasons that the OCC could not adequately represent her interests: (1) "her unique position in this docket and the importance of considering the ability of alternatives like solar, storage and demand-response and other low-cost options to meet the roles previously played by natural gas turbines;" and (2) "the OCC signed the Stipulation in the underlying [Proceeding No.] 16A-0396E (2016 PSCo Electric Resource Plan) docket and supported a plan containing these gas turbines in that docket."[48]

42. Regarding Ms. Glustrom's first assertion, in its Phase I Decision in Public Service's 2016 ERP, the Commission discussed consideration of alternative scenarios for renewable energy and demand-side resources, energy storage, and approved Public Service's proposed wind and solar studies.[49] After over 27 months of litigation in the 2016 ERP, the Commission issued its Phase II decision selecting a CEP Portfolio of resources[50] including approximately 1,100 MW of new wind resources, approximately 700 MW of new solar resources, 275 MW of new battery storage, and 383 MW of existing natural gas assets

[48] Motion to Modify at pages 3 and 4.

[49] *See* Decision No. C17-0316 (mailed April 28, 2017), ¶¶ 3, 21, 32, 152, and 179 – 181 at pages 3, 4-5, 8, 10, 51, and 60, in Proceeding No. 16A-0396E (Phase I ERP Decision).

[50] Public Service filed its 2016 ERP on May 27, 2016 and the Commission issued the Phase II ERP Decision on September 10, 2018. That is a period of 27 months and 14 days.

(Manchief and Valmont).[51] Consideration of alternative resources, such as solar, storage and demand-response were considered, is entirely appropriate in an ERP proceeding, but not in this Proceeding, which is a Commission-required filing to implement the Commission's Phase II ERP Decision.

43. Regarding Ms. Glustrom's second assertion, the Commission has previously held that the presumption of adequate representation by the OCC may be overcome if: (1) there is proof of collusion between the OCC and the utility or any other party; (2) the OCC has or represents some interest adverse to the consumer; or (3) the OCC fails in its duties of representation due to nonfeasance, negligence, or bad faith.[52]

44. The interest, strategy, or even the desire for a different outcome from those of the OCC in a proceeding, has long been found by this Commission to be insufficient to justify a permissive intervention.[53] In the Motion to Modify, Ms. Glustrom provided no evidence of bad faith, collusion, or negligence by the OCC. She disagrees with the OCC's litigation strategy and decision to sign the Stipulation. She has again failed to overcome the presumption of adequate representation of residential consumers by the OCC and as a matter of law failed to make a compelling showing of why OCC's representation is inadequate.[54]

---

[51] *See* Decision No. C18-0761, ¶¶ 103 – 108 and 119 – 121 at pages 31 – 33 and 36, in Proceeding No. 16A-0396E. Ms. Glustrom's argument about the importance of the chosen discount rate fails because, in its Phase I ERP Decision, the Commission ordered Public Service to present sensitivity runs for two alternative discount rates in its 120-Day Report. Decision No. C17-0316 ¶ 94 at pages 32 and 33.

[52] Decision No. C11-0987 (mailed on September 14, 2011) in Proceeding No. 11A-510E. Although not bound by this Commission Decision, the ALJ finds the Commission's rationale to be well-reasoned and persuasive.

[53] Decision No. C11-1163 (mailed on October 31, 2011), ¶¶ 12-15, in Proceeding No. 11A-510E.

[54] *See Estate of Scott v. Smith*, 577 P.2d 311, 313-314 (Colo. App. 1978) (finding adequate representation when there was no evidence of bad faith, collusion, or negligence on the part of the representative); *Feign v. Alexa Group, Ltd.*, *supra,* 19 P.3d at 26 (requiring a compelling showing to demonstrate why representation by the party charged by law with representing the individual's interest was not adequate).

45. The Motion to Modify, moreover, ignores several legal requirements and historical facts critical to the denial of Ms. Glustrom's Petition for permissive intervention, which are also essential to a fair understanding and evaluation of her arguments for modification of Decision No. R19-0801-I.

46. First, Ms. Glustrom ignores the legal requirement that, as the movant for permissive intervention, she had the burden of proving that she satisfied all the standards in Rule 1401(c) for permissive intervention.[55] In Decision No. R19-0801-I, the ALJ concluded that Ms. Glustrom failed to satisfy her burden of proof to demonstrate that she met all the requirements of Rule 1401(c) for permissive intervention.

47. Second, Ms. Glustrom ignores the legal principle that prohibits any collateral attacks on Commission decisions that have become final. Indeed, § 40-6-112(2), C.R.S., states that: "In all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive." In applying § 40-6-112(2), C.R.S., the Colorado Supreme Court has held that a final Commission decision in a proceeding cannot be collaterally attacked in a different proceeding.[56] In *The Colorado Office of Consumer Counsel v. Aquila Networks – WPC (Aquila),* the OCC filed a complaint alleging that Aquila's rates, approved by the Commission in a prior electric rate case, were excessive and not just and reasonable. The OCC requested that the Commission reduce Aquila's rates of return on equity and rate base and order Aquila to reduce its base rates by over $1 million. The Commission dismissed the complaint on

[55] Rule 1500, 4 CCR 723-1; *see* Decision No. R19-0801-I, ¶ 19 at page 7.

[56] *Lake Durango Water Co., Inc. v. Public Utilities Comm'n*, 67 P.3d 12, 22 (Colo. 2003). In that decision, the Court also cited the general proposition in Colorado law that, "A final judgment entered with proper jurisdiction is not subject to collateral attack." *Id.,* 67 P.3d at 22 [citation omitted].

the grounds *inter alia* that the complaint and requested relief were an impermissible collateral attack on the Commission's final rate case decision, contrary to § 40-6-112(2), C.R.S.[57]

48. The Motion to Modify provides clear evidence that, more likely than not, Ms. Glustrom's purpose in attempting to intervene in this Proceeding is to attack collaterally the Commission's Phase II Decision in the Public Service 2016 ERP that approved the resources in the CEP Portfolio, including the 382 MW of existing natural gas generating assets (*i.e.*, Manchief and Valmont).

49. For example, Ms. Glustrom asserts the following in the Motion to Modify:

a) "Ms. Glustrom did not sign the 16A-0396E Stipulation so she is in a unique position to raise issues before the Commission about whether PSCo acquiring the Valmont and Manchief gas turbines in 2020 is needed for the "Public Convenience and Necessity" as this docket should be determining."[58]

b) "Among the issues that the Commission should be considering with respect to the Valmont and Manchief gas turbines and which Ms. Glustrom is uniquely situated to raise are:

i. "With a projected 2023 reserve margin well above the approved 16.3% reserve margin, is it really in the "public convenience and necessity" for PSCo to acquire more gas turbine capacity?

ii. "With a growing number of analyses showing that gas turbines will very likely become unnecessary due to the evolution of solar, storage and demand management technologies, is it really in the "public convenience and necessity" for PSCo to acquire these turbines?

iii. "If the gas turbines become obsolete before they are fully depreciated should ratepayers or shareholders be responsible for the undepreciated portion of the turbines?

[57] *The Colorado Office of Consumer Counsel v. Aquila Networks – WPC,* Decision No. C05-1339 (mailed on November 16, 2005), ¶ 41 at page 15, Ordering Paragraphs 1 and 2 at page 16, in Docket No. 05F-337E; affirmed in Decision No. C06-0004 (mailed on January 5, 2006), denying rehearing, reargument, or reconsideration ("Our decision to grant Aquila's Motion to Dismiss was based on our finding that the OCC's complaint was an impermissible collateral attack on a previous Commission decision"). *Id*., ¶ 18 at page 7.

[58] Motion to Modify at page 6, emphasis added.

iv. "Given the availability of thousands of MW of low-cost, low-carbon wind, solar and storage projects, is it in the "public convenience and necessity" for PSCo to acquire 383 MW of gas turbines because, under current practice, the 383MW of gas turbines will be given their full capacity value and thereby reduce or eliminate any perceived "need" to acquire more low-cost and low-carbon wind, solar and storage resources as a result of the "Loads and Resources" analysis undertaken for PSCo's next electric resource plan."[59]

c) "Importantly, Ms. Glustrom was one of the few PUC participants who questioned the Colorado Energy Plan (CEP) based in part on the bundling of the other aspects of the CEP with the acquisition by PSCo of gas turbines that were intended to operate for 2-4 decades at a time when many analysts, utilities and Public Utility Commissions around the country, are finding that the roles that used to be played by natural gas turbines can increasingly be met at a lower cost and better long-term performance with increased solar, storage, demand management and other resource options like reciprocating engines."[60]

d) "Ms. Glustrom is unique in her on-going presentation of evidence at the Colorado PUC showing the importance of the discount rate that is chosen in analyzing investments in fuel-dependent options (like purchasing natural gas turbines that will be operating for 2-4 decades) as compared to fuel-free options like solar energy, storage and demand management options."[61]

e) "[This docket] should be very sensitive to the availability of lower cost, better performance options and the critically important choice of which discount rate is used in comparing those options."[62]

f) "[A]lmost all of the portfolios brought forth by PSCo in their analysis of the bids involved significant investments in natural gas generation and the "Alternative CEP" … also contained the 383 MW of gas turbines."[63]

50. This Proceeding is not the first time that Ms. Glustrom has attempted an unlawful collateral attack on a prior final Commission decision. In a 2008 Public Service electric rate case, Chief ALJ G. Harris Adams struck almost 11 pages of Ms. Glustrom's answer testimony and numerous attachments, because he concluded she was attempting an improper collateral

[59] *Id.*

[60] Motion to Modify at page 3, quoting from the Petition at page 2.

[61] *Id.*

[62] *Id.*

[63] Motion to Modify at page 5, quoting from Appendix B of Public Service's 120 Day Report in 16A-0396E, which is not in the record of the instant proceeding.

attack on a final Commission decision (No. C05-0049 in Proceeding No 04A-214E (mailed January 21, 2005)) that had granted a CPCN and authorization to construct the Comanche 3 generating unit.[64]

51. Third, Ms. Glustrom also ignores the fact that this Proceeding is a follow-up filing from Public Service's 2016 ERP, required by the Commission, and is intertwined with that proceeding. Significantly, in both Phase I and Phase II of Public Service's 2016 ERP, the Commission denied her requests for permissive intervention.[65]

52. In Phase I of the 2016 ERP proceeding, Ms. Glustrom made arguments for permissive intervention similar to those she made here: (1) that language in § 40-6-109, C.R.S., allegedly gave her a right to intervene; (2) that she had a pecuniary interest as an Xcel Energy customer and stockholder; and (3) that no other party, including the OCC, could represent her interests, because of her knowledge and experience. The Commission rejected all of her arguments and denied permissive intervention.[66] As discussed above, Ms. Glustrom's arguments for permissive intervention in the instant Proceeding are similar to her arguments in Phase I of the 2016 ERP.

53. In Phase II of the 2016 ERP proceeding, Ms. Glustrom apparently made arguments for permissive intervention similar to her Phase I arguments. A majority of the Commission concluded that, "Ms. Glustrom does not raise additional arguments from those

[64] Decision No. R09-0293-I (mailed on March 18, 2009) in Docket No. 08S-520E; *see also* Decision No. R09-0373-I (mailed on April 8, 2009) clarifying Decision No. R09-0293-I and affirming that Ms. Glustrom's stricken testimony will not be allowed as a collateral attack; Decision No. R09-0431-I (mailed on April 24, 2009) denying Ms. Glustrom's motion for modification.

[65] *See* Decision No. C16-0663-I, ¶¶ 44 through 52 and Ordering Paragraph No. 10 at pages 11 through 14 and 17 (Phase I); Decision No. C17-0796-I, ¶¶ 19 through 25, 29, and 31, and Ordering Paragraph No. 11, at pages 8, 9, 11, and 21 (Phase II), denying Ms. Glustrom's separate requests to intervene in the 2016 ERP.

[66] Decision No. C16-0663-I, ¶¶ 44 through 52 and Ordering Paragraph No. 10, at pages 11 through 14 and 17.

already considered and rejected by this Commission when it previously denied her intervention. Consistent with our prior decisions regarding Ms. Glustrom, we deny Ms. Glustrom's request for intervention."[67]

54. The Commission also denied Ms. Glustrom's request for permissive intervention in the related Depreciation/RESA Proceeding, No. 17A-0797E. There Ms. Glustrom made arguments for permissive intervention similar to those she made in the instant Proceeding: (1) that language in § 40-6-109, C.R.S., allegedly gave her a right to intervene; (2) that she had a pecuniary interest as an Xcel Energy customer and stockholder; (3) that the OCC cannot adequately represent her interests, because the OCC joined the Stipulation in the 2016 ERP that gave rise to Proceeding No. 17A-0797E, and she expected to oppose aspects of the Stipulation; and (4) that no other party can represent her interests because her history of past interventions demonstrated her strong interest in and unique knowledge of the issues.[68] The Commission majority rejected all of her arguments and denied permissive intervention,[69] concluding that, "We find Ms. Glustrom does not provide anything new here to convince us that she meets the requirements of Rule 1401(c) for permissive intervention in this proceeding."[70]

55. Ms. Glustrom made arguments for permissive intervention in the instant Proceeding somewhat similar to her rejected arguments in Phase I of the 2016 ERP and in the related Depreciation/RESA Proceeding. The ALJ, therefore, reviewed the decisions in those proceedings, which concluded that Ms. Glustrom had failed to demonstrate that she satisfied all

[67] Decision No. C17-0796-I, ¶¶ 29 and 31, and Ordering Paragraph No. 11, at pages 11 and 21. Commissioner Frances Koncilja would have granted permissive intervention to Ms. Glustrom.

[68] *See* Decision No. C18-0117-I (mailed February 15, 2018), ¶ 6 at pages 3 and 4, in Proceeding No. 17A-0797E.

[69] Decision No. C18-0117-I, ¶¶ 9 through 11, and 13 through 19, and Ordering Paragraph No. 3, at pages 5 through 8. Commissioner Koncilja would have granted permissive intervention.

[70] *Id.,* ¶ 15 at page 6.

the requirements of Rule 1401(c) and which denied her permissive intervention.[71] While not bound by those decisions as precedent, the ALJ concluded that those decisions and the legal authorities they relied upon were well-reasoned and persuasive. Therefore, Ms. Glustrom's arguments for permissive intervention in the instant Proceeding were rejected following the same authorities and similar reasoning.

56. It is axiomatic that the Commission has the authority to determine how to conduct its proceedings. Indeed, pursuant to § 40-6-101(1), C.R.S., the Commission "shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice." The Commission may look to the Colorado Administrative Procedure Act (APA) (§ 24-4-101 *et seq.*, C.R.S.) for guidance. Section 24-4-105, C.R.S., "grants substantial discretion" to agencies such as the Commission "to control the scope and presentation of evidence" in a proceeding.[72] The APA also provides, among other things, that a hearing officer (or an ALJ) shall "regulate the course of the hearing," "issue appropriate orders which shall control the subsequent course," and "dispose of motions to intervene."

57. In a recent challenge to another ALJ's denial of permissive interventions to persons that had failed to demonstrate that they satisfied the requirements of Rule 1400(c), the Commission opined that:

> Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. The Commission, *en banc*, itself has discretion to overturn the ALJs' rulings when the matters are certified as appealable. Rule 1502(d), 4 CCR 723-1. However, particularly when a case is ongoing before an ALJ, the Commission's review is treated much like an appeal to a higher court. Consistent with C.R.C.P. 24, under Commission Rule 1401, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion; in court, the decision upon the request is reversible only for

[71] Decision No. C16-0663-I and Decision No. C18-0117-I.

[72] *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989).

> an abuse of that discretion. *Grijalva v. Elkins*, 132 Colo. 315, 287 P.2d 970 (1955). It can seldom, if ever, be shown that such discretion was abused in denying the permissive right to intervene. *Allen Calculators, Inc., v. National Cash Register Co*., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188. To show an abuse of discretion, the decision must be shown to be manifestly arbitrary, unreasonable, or unfair.
>
> *See, e.g., King v. People*, 785 P.2d 596, 603 (Colo. 1990).

58. For all of the reasons, analysis, findings, authorities, and conclusions discussed above, Ms. Glustrom's Motion to Modify should be, and will be, denied.

59. Finally, Ms. Glustrom requests, if the Motion to Modify is denied, that the ALJ certify his Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 CCR 723-1.[73]

60. The ALJ will grant the request to certify this Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d).

III. ORDER

A. It Is Ordered That:

1. Based upon the foregoing reasons, analysis, findings, authorities, and conclusions, the Motion Requesting Modification of Decision No. R19-0801-I, filed on October 17, 2019 by Ms. Leslie Glustrom, *pro se*, is denied.

2. In the exercise of his sound discretion, the Administrative Law Judge grants the request of Ms. Glustrom to certify, and hereby certifies, this Interim Decision as immediately

[73] Rule 1502(d) Provides that: "The Commission, hearing Commissioner or Administrative Law Judge may certify any interim decision as immediately appealable through the filing of a motion subject to review by the Commission en banc. Such motion shall be filed pursuant to rule 1400 and shall be titled 'Motion Contesting Interim Decision No. [XXX-XXXX-I].'"

appealable to the Commission, pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.

3. This Decision shall be effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director