Decision No. R19-1022

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

PROCEEDING NO. 19R-0483ALL

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IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1, TO AMEND, STREAMLINE AND CLARIFY RULES ON THE COMMISSION'S OWN INITIATIVE AND PURSUANT TO THE PROVISIONS OF SENATE BILL 19-236.

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**RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE G. HARRIS ADAMS AMENDING RULES**

Mailed Date: December 23, 2019

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## I. STATEMENT

1. On September 13, 2019, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) to amend the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Decision No. C19-0747. The NOPR commenced this Proceeding. The Commission referred the rulemaking proceeding to an Administrative Law Judge (ALJ) and scheduled a hearing for October 29, 2019.

2. Throughout the Proceeding, oral and written comments were filed with the Commission by Black Hills Colorado Electric, LLC, Black Hills Colorado Gas, Inc., and Rocky Mountain Natural Gas LLC, doing business as Black Hills Energy (collectively, Black Hills); Qwest Corporation dba CenturyLink QC (CenturyLink); the Colorado Telecommunications Association (CTA); Energy Outreach Colorado (EOC); Colorado Rural Electric Association (CREA); Public Service Company of Colorado (Public Service); the Regional Transportation

District (RTD); Tri-State Generation and Transmission Association, Inc. (Tri-State); Natural Resources Defense Council (NRDC), Sierra Club, and Western Resource Advocates (WRA) (NRDC, Sierra Club and WRA will be referred to collectively as the Conservation Commenters); the Colorado Energy Office (CEO); and the Colorado Office of Consumer Counsel (OCC).

3. At the scheduled time and place, the hearing was convened.

4. Not all modifications to the proposed rules are specifically addressed herein. Any changes incorporated into the redline version of the rules appended hereto are recommended for adoption. Similarly, not all comments are specifically addressed herein. Recommendations in comment not incorporated into the redline version of the rules appended hereto were considered, but are not recommended for adoption.

5. Being fully advised in this matter and consistent with the discussion below, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

## II. FINDINGS, DISCUSSION, AND CONCLUSION

### A. Background

6. The Commission's Rules of Practice and Procedure "advise the public, regulated entities, attorneys, and any other person of the Commission's rules of practice and procedure … in order to properly administer and enforce the provisions of Title 40 of the Colorado Revised Statutes and in order to regulate proceedings before the Commission." *See* Basis, Purpose, and Statutory Authority of the Rules of Practice and Procedure.

7. Proposed modifications come from a variety of sources and are intended to further the purpose of the rules. The Commission intends to address particular concerns of legislators

and other stakeholders regarding impediments to the public easily understanding and participating in Commission matters.

### B. Proposed Rules

#### 1. Rule 1004. Definitions.

8. Rule 1004(ll) is amended to better define the role of Trial Staff. The OCC comments that the definition should be expanded to recognize that a designation of Trial Staff may occur outside of adjudicated proceedings. The substance of the comment is accurate and reasonable. It will be incorporated in the rule recommended for adoption.

9. Rule 1004(y) is the first rule affected by a category of OCC comment regarding alignment of business applications and processes with precise rule language. Current business processes include creation of proceeding and assignment of an identifying number upon filing of an advice letter. Of technical necessity, the Commission's E-Filing System requires a proceeding (in the context of the business application) in order for the advice letter to be visible to others and for distribution of notice. Further, establishing a proceeding facilitates associating any protest with the proper advice letter. Only if the Commission suspends the proposed effective date of the tariff, the identifying number continues for use as the contested proceeding. However, if the Commission takes no action regarding an advice letter filing, the number assigned effectuates notice, remains associated with the advice letter, and the proposed tariff that goes in to effect by operation of law. In such instance, the status is updated to reflect that the tariff is in effect and the assigned number upon filing of the advice letter never represents a contested proceeding. The number assigned in the Commission's filing system serves more than one purpose.

10. The OCC does not identify difficulties with operation of the existing rule that overcomes the risk of unintended consequences of changing it. For example, including advice

letter in the definition of a pleading (as proposed by the OCC) affects application of the definition throughout the rules. If adopted, the definition would create conflicts between Rules 1202 and 1210, which are beyond the scope addressed by the OCC. The Commission does not propose to change the definition of a pleading. The current rule has performed adequately as interpreted and applied and OCC has not demonstrated sufficient need to change the definition of a pleading. The rule will be adopted as proposed.

11. No other comment addressed or opposed modifications to definitions.

**2. Rule 1007. Commission Staff.**

12. It is well settled that the deliberative process privilege is part of the common law of Colorado. *City of Colo. Springs v. White*, 967 P.2d 1042, 1050-51 (Colo. 1998). Importantly, the privilege protects the frank exchange of ideas and opinions critical to the government's decision making process where disclosure would discourage such discussion in the future.

13. Modification of Rule 1007(a) is intended to define and explain the role of Advisory Staff. Recognizing the deliberative process privilege as part of the common law of Colorado, Public Service comments that the proposed modifications are overly broad. Public Service proposes to modify the language to recognize that "certain" communications are within the scope of the proceeding. The proposal is reasonable and will be adopted. As modified, the proposal may assist a reader to understand that some communications may be privileged, while not attempting to define the scope of privilege defined by common law.

**3. Standards of Conduct**

14. CEO suggests assigning a rule number to the introductory paragraph under the Standards of Conduct heading and titling the new rule as Rule 1100.

15. The Statement, Purpose and Statutory Authority is the only other unnumbered introductory paragraph in the rules. However, the suggested change is purely in form rather than substance. Adopting the proposal would require renumbering all rules in the Standards of Conduct without any substantive change. The undersigned is more concerned with the risk of unintended consequences from changing references to the substantive confidentiality rules that have long been in place. Renumbering alone would also add unnecessary complexity for those researching prior Commission decisions. While the comment may be addressed in a more-comprehensive substantive review in the future, the comment fails to demonstrate sufficient immediate benefits to warrant the risk of affecting current practices at this time.

### 4. Rules Regarding Confidential Information Generally

16. The Commission sought comment as to whether changes are necessary to Rules 1100 through 1103. Public Service comments that it does not believe any such change is necessary. While acknowledging that these rules could be improved, Tri-State comments that "rules generally work well and provide appropriate access to information." *See* Initial Comments of Tri-State at 3. If the Commission seeks to modify Rules 1100 through 1103, Tri-State suggests severing those issues and convening workshops to consider appropriate amendments. The body of comments failed to demonstrate sufficient need to address these rules generally in this proceeding.

### 5. Rule 1100. Confidentiality

17. Rule 1100(n) in the current rule is proposed to be reorganized as Rule 1100(b). The rule identifies documents presumed to be available by the Commission for public inspection in accord with the *Colorado Open Records Act*. Subparagraph (X) includes "safety inspection

reports or information filed with the Commission or compiled by Commission staff pursuant to Commission decision or rule."

18. RTD's comments that the listed types of documents may be considered by the public as presumptively available for inspection without regard to restrictions provided by law. In order to avoid ambiguity, RTD suggests duplicating the phrase "subject to restrictions specifically provided by law" with the documents listed in 1100(b).

19. RTD's proposal is reasonable and will be adopted.

### 6. Rule 1105. Personal Information - Disclosure

20. CEO and EOC comments suggest expanding the scope of permissible disclosure in Rule 1105(c) to accommodate the State's Weatherization Assistance Program. The comments contend that the proposed modifications would bring improved efficiencies and reduce administrative costs. During hearing, no responsive comments were offered.

21. The proposed modifications are reasonable and will be adopted. Providing information to CEO, subject to the same protections as EOC and the Low-income Energy Assistance Program, will further the public interest by ensuring program funding reaches intended beneficiaries.

### 7. Rule 1200. Parties, *Amicus Curiae*, Non-Parties.

22. Several commenters address the proposed amendments to Rule 1200(c) explicitly allowing participants appearing as *amicus curiae* to address policy issues independent of legal argument. Legal argument incorporating policy considerations have long been permitted by the Commission. Proposed modifications address the role of *amici curiae* in proceedings.

**Public comment versus *amicus curiae* status**

23. The Conservation Commenters seek clarification whether the Commission intends a net increase in participation without affecting those granted intervention in proceedings. CEO supports increased participation, but joins concerns of the Conservation Commenters that the proposed rule will result in additional participants not being full parties to the proceeding (*i.e.*, denials of requests for permissive intervention). CEO notes that subjective, policy, or academic interest is not a sufficient basis to intervene and raises concern that groups not having well-defined financial interests or other real property interests will be denied permissive intervention.

24. Except as to the proposed addition of Rule 1401(d), the Commission proposes no modification to the standard for permissive intervention in Rule 1401(c). In any event, permissive intervention and amicus status remain discretionary. To the extent subject matters may be addressed by parties, *amici*, and public comment, interested persons must choose how they would like to participate and they carry the corresponding burden of demonstrating any appropriate requested relief. Rule 1509(b) continues a bright line between submitting public comment and petitioning for amicus curiae status. One granted participation as *amicus curiae* is precluded from submitting comment. The potential for overlapping subject matters does not create a conflict. *See, e.g.*, Decision No. C17-0196-I issued March 10, 2017, in Proceeding No. 16A-0396E.

25. CEO recommends removing the proposed page limitation for *amici curiae* and cautions that failure to do so could merely result in additional public comments.

26. CREA properly recognizes potential for overlapping subject matters to be addressed by *amici curiae* and public commenters. However, the rules retain clear distinctions between the roles and comment fails to demonstrate sufficient concern to warrant further modification.

27. The Commission is providing the potential for a broader range of participation in rule. Including a page limit applicable to an *amicus curiae* provides an appropriate means for the Commission to manage the proceeding and informs a person's expectations. If a person does not wish to be subjected to page limits, they may wish to participate through other means rather than seeking *amicus curiae* status.[1] Including the proposed page limit is reasonable and will be adopted.

**Candor and Standards of Conduct**

28. CEO contends inclusion of the provision regarding candor and Standards of Conduct are redundant. The Rules of Professional Conduct impose a duty of candor to the tribunal upon attorneys. CEO contends that the current rules impose no such burden upon non-attorneys appearing before the Commission, and thus, should not be imposed upon *amici curiae*.

29. The Commission is exercising its discretion to broaden the scope of possible *amicus curiae* status. No longer mandating representation by counsel, the Commission requires inclusion of the specified acknowledgement as a condition of requesting *amicus curiae* status. This requirement emphasizes to those requesting *amicus curiae* status that the Commission is specifically relying upon candor in their statements. The proposal is reasonable even if duplicative or imposing a modest additional burden. The rule proposed will be adopted.

**Definition of *amicus curiae* in Commission proceedings**

30. CREA comments to characterize current practices regarding *amici curiae* appearing before the Commission as being consistent with civil proceedings. Typically, they participate through filing of legal briefing and statements of position on the same schedules as parties.

[1] Note that Rule 1509(b) still prohibits parties and *amici curiae* to a proceeding from providing public

31. CEO recommends clarifying language regarding acceptance of issues. Comparing to standards applicable in appellate courts, concern is raised that the term "issues" is vague and someone interested might choose to submit public comment rather than presenting an issue as an *amici curiae*. Concern is also address the term "proposition" and limiting *amici curiae* ability to raise policy or legal arguments based on the organization's interests not raised by a party.

32. Public Service proposes further clarification that parties define the scope of the proceeding.

33. Tri-State and Public Service propose requiring *amici curiae* to file policy considerations by the deadline for answer testimony to ensure a fair opportunity for response.

**Discussion regarding role**

34. The Commission maintains distinctions in the roles of persons participating in proceedings: a party, an *amicus curiae*, and a member of the public. *See* Decision No. C17-0196-I mailed March 10, 2017, in Proceeding No. 16A-0396E.

35. Foundationally, *amicus curiae* means "friend of the court" in Latin. The Commission exercises discretion to grant a request for *amicus curiae* when it is convinced the requester can provide assistance sought in arriving at a just and reasonable determination of a proceeding. *See* Rule 1200(c), *see also* Decision No. C13-0967-I mailed August 9, 2019, in Proceeding No. 13D-0559E, and Decision No. R17-0409-I mailed May 19, 2017, in Proceeding No. 17A-0179T.

comment in the same proceeding.

36. No matter when offered, the arguments and considerations of *amicus curiae* are not evidence and are not part of the evidentiary record. *See* Rule 1200(c), and *see also* Decision No. R15-0219 mailed March 9, 2015, in Proceeding No. 14A-0872CP-XFER.

37. While the Commission has long included a rule recognizing *amicus curiae* status, the term is not universally defined or applied.

38. Colorado state district courts have long permitted third parties to participate in litigation as *amici curiae*. *See Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 378 P.3d 835, 843 (Colo. App. 2016); *Oborne v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 764 P.2d 397, 399 (Colo. App. 1988). ("[T]he Commission, the State Board of Land Commissioners, and the Independent Petroleum Association of Mountain States were allowed to appear before the trial court as *amici curiae*."). However, the Colorado Rules of Civil Procedure, are silent as to participation. Concluding that the trial court had not erred when it accepted an *amicus* brief, the Colorado Court of Appeals stated that "[t]he Colorado Rules of Civil Procedure do not address this situation, and we have not found any Colorado authority that addresses it." *See Jefferson*, 378 P.3d at 843. Further, in denying a Motion for Leave to File Response as *Amicus Curiae*, the Colorado District Court Water Division One stated: "Nor is the court aware of any authority that would permit a nonparty to file a brief as *amicus curiae* in a case in water court. *Compare Colo. Appellate Rule 29*." *In re Water Rights*, No. 03 CW 415, 2008 *Colo. Water* LEXIS 9, at *20 (*Colo. Water* April 17, 2008).

39. Federal district courts in Colorado have discretionarily permitted *amicus* participation. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107 (D. Colo. 2018) ("Courts have broad discretion in determining whether to allow participation by *amicus curiae*."). However, the Federal Rules of Civil Procedure are silent as to

*amicus* participation. *See Ctr. for Biological Diversity v. Jewell,* No. 16-cv-01932-MSK-STV, 2017 U.S. Dist. LEXIS 215881, at *3 (D. Colo. May 16, 2017). The United States District Court for the District of Colorado has stated:

> District courts have the discretion to authorize participation by *amici curiae*. But neither the Tenth Circuit nor the Federal Rules of Civil Procedure set forth standards upon which such discretion should be exercised. As a consequence, district courts often look to Federal Rule of Appellate Procedure 29 ("Rule 29"), which governs *amicus curiae* participation in appeals, for guidance.

*Id*.; *see also Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, No. 12-cv-02620-LTB, 2017 U.S. Dist. LEXIS 189776, at *3 (D. Colo. Nov. 16, 2017). ("No Federal Rule of Civil Procedure governs *amicus curiae* participation in a district court case, so courts commonly look for guidance in *Federal Rule of Appellate Procedure 29,* which governs the filing of such briefs in the United States Circuit Courts of Appeal.").

40. In determining whether to permit the filing of an *amicus* brief, federal courts consider the following, among other things:

> (1) whether the proposed *amicus* is a disinterested entity; (2) whether there is opposition to the entry of the *amicus*; (3) whether counsel is capable of making arguments without the assistance of an *amicus*; (4) the strength of the information and argument presented by the potential *amicus curiae's* interests; and (5) perhaps most importantly, the usefulness of information and argument presented by the potential *amicus curiae* to the court.

*Endrew F.*, 2017 U.S. Dist. LEXIS 189776, at *3-4; *see also United States v. Bd. of Cnty. Comm'rs of Otero,* 184 F. Supp. 3d 1097, 1115 (D. Colo. 2015).

41. Parties to Commission proceedings are entitled to be heard, examine and cross-examine witnesses, and introduce evidence. *See* § 40-6-109, C.R.S. While expanding opportunity for participation, the Commission expresses no intent for *amici curiae* to change the scope of the proceeding or permit introduction of evidence in proceedings. Public Service's proposed clarification regarding scope are reasonable and will be adopted.

42. At its heart, the Commission recognizes *amici curiae* to assist the Commission. The Commission is largely free to define the role as it believes helpful, limited only by the bounds of Colorado law (*i.e.*, including the rights of parties). The Commission proposes to provide an opportunity to expand public input to the decision making process. Incorporating protections in the proposed rules, the rights of parties are adequately protected. Commenters have not shown otherwise and the rule will be adopted consistent with the discussion above.

43. The undersigned appreciates and understands concerns about implementing the revised role of *amici curiae*. However, the proposal to tie *amici curiae* policy considerations to the answer testimony deadline is problematic. Most obviously, not all Commission proceedings require prefiled written testimony. Secondly, the proposal ignores the possibility of *amici curiae* positions aligning with the proponent of the requested relief (*e.g.*, the applicant in an application proceeding). Finally, and to the undersigned's view of the traditional role of a friend of the Commission, the *amici curiae* should be able to weigh the entire body of evidence when addressing the Commission.

44. Rather than accelerate the deadline for *amici curiae* positions, the undersigned anticipates the possibility of more requests for reply briefing, on a case by case basis (which may or may not be granted). Accelerating timing of policy positions as proposed would inappropriately allow an *amici curiae* to influence the flow of the proceeding, including presentation of rebuttal evidence. The Commission remains bound to decide proceedings before it based upon the record. An opportunity for reply briefing may provide an appropriate means to address concerns raised in comment, where justice so requires.

### 8. Rule 1201. Attorneys.

45. The Commission proposes deleting the requirement by rule that all *amici curiae* be represented by an attorney at law.

46. Unless appearing *pro se*, Black Hills proposes refinement to require representation for a party or *amicus curiae* presenting legal considerations.

47. CEO supports the proposed rule as a means to increase participation.

48. CREA comments that inconsistency and confusion could result among the paragraphs of Rule 1201 and suggests expanding the role of public comment to avoid these concerns.

49. Jurisdiction to regulate and control the practice of law is granted to the Supreme Court. *See Supreme Court of Colorado v. Grimes*, 654 P.2d 822, 823 (Colo. 1982) citing *Conway-Bogue v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957). The Supreme Court has applied its jurisdiction in the context of Commission proceedings, recognizing:

> There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. Difficulty arises too in the application of the definition.
>
> *Denver Bar Ass'n v. PUC*, 391 P.2d 467, 471 (1964).

The Supreme Court identified examples of the practice of law as well as common activities not constituting the practice of law. *Id.* at 471-472.

50. Natural persons may appear and represent themselves, notwithstanding the fact that they may not be a lawyer. *Denver Bar Ass'n v. PUC*, 391 P.2d 467, 471 (1964)(citations omitted). The Colorado Legislature has also created an exception from the general prohibition of an individual appearing as counsel for another entity in a court of record. An officer of a closely

held entity may generally represent the entity before the Commission before any court of record or before an agency if the amount in controversy does not exceed $15,000. *See* § 13-1-127, C.R.S.

51. Related to the legislative nature of its functions, the Commission invites public comment. Public comments provide an opportunity for interested persons to submit input for the Commission's information and to encourage the Commission to exercise discretion in a matter. *See* Rule 1509.

52. The undersigned agrees with CREA that the Commission could have chosen to expand public participation by modifying the role of public comment. However, that is not the path chosen and does not preclude adoption of the proposed rules. As to commented potential for inconsistency, the "notwithstanding paragraph (a)" reference in Rule 1201(b) will be clarified as to *amicus curiae*.

53. These rules inform the public about the Commission's practices and procedures. While comments attempt clarification, the Commission expands possible participation by eliminating any potential rule-imposed requirement for representation. However, the Commission does not define the practice of law. Whether the character of an act performed constitutes the practice of law ultimately relies upon the particular circumstances of the case. *Id*. at 471. The remainder of the rule will be adopted as proposed.

**9. Rule 1202. Form and Content.**

54. Rule 1202(f) sets forth the requirements for formatting written testimony in Commission proceeding. Subparagraph (f)(V) sets out the requirement that each type of testimony along with its attachments shall be a single exhibit and marked with a single exhibit

number during hearing. Subparagraph (f)(V) sets forth in detail how testimony is to be properly marked for identification.

55. RTD's comment observes that each type of a witness' prefiled written testimony, consisting of testimony and incorporated attachments, are filed as a single document. It offers revisions so that all testimony of a witness, regardless of type, would be filed as one exhibit.

56. The rules will be adopted as proposed. A witness's direct testimony (including any attachments) would be filed as one exhibit. If the same person separately files rebuttal testimony (including any attachments), the rebuttal testimony would be filed as an exhibit separate from the first exhibit.

**10. Rule 1203. Time.**

57. The body of the NOPR referenced a proposed rule modification that was omitted from the attachments to the decision. A few commenters noted the omission. The statement in the body of the decision will not be addressed further.

**11. Rule 1207. Utility Notice.**

58. Changes are proposed to clarify compliance filings and associated filing requirements.

59. CEO comments that the Commission should require compliance filings to be filed in the proceeding of the decision authorizing the filing to ensure that all parties to the original proceeding will be notified of the filing.

60. Handling of advice letters is one example of where, the Commission must adapt business processes to technical limitations of business applications. In order for the Commission to review (and potentially reject) an advice letter and proposed tariff as a compliance filing in the business applications currently available, it must be filed in a proceeding separate from the

proceeding in which the decision issued authorizing the filing. Notice is also provided for all advice letters in the same manner. This process, required in rule, is critical for the Commission in order to ensure and enable timely review. On the other hand, the commented concerns of parties to the underlying proceedings are understandable. It is also noteworthy that compliance filings are typically filed on shortened notice.

61. Full duplication of the compliance filing is overly broad and more burdensome than necessary to address concerns raised in comment. Attempting a balance of all concerns, the rule will be amended to require the filing of a notice in the underlying proceeding identifying the compliance filing.

### 12. Rule 1208(b). Adoptions and Adoption Notices

62. Proposed amendments address filing requirements in the event a utility transfers ownership or control to another entity or changes its corporate name.

63. Black Hills proposes a revision to clarify that an advice letter and associated tariff reflecting a utility name change may be filed subsequent to the adoption notice. It urges that the accommodation is reasonable because the updated tariff reflecting a utility name change can take considerable time and effort to develop.

64. The adoption notice is reasonably adequate to notify the public of a change in information contained on the title page of the tariff until an appropriate filing can be developed. However, to open-endedly require a further filing effectively negates the filing requirement under the proposed rule. To acknowledge the practical reality, while maintaining the general requirement, a specific time limit will be incorporated into the proposed rule.

### 13. Rule 1210 (Rule 1305). Tariffs and Advice Letters.

65. Because notice of an advice letter is identified by the same number when the proposed effective date is suspended to create a contested proceeding, the OCC proposes that motions requesting permissive intervention and protests be able to be filed upon the posting of notice. The OCC contends that § 40-6-111(b), C.R.S. supports the proposed modification. However, confusion and unnecessary burden could result. Illustratively, when would response time expire as to a motion requesting permissive intervention? There is no need for the Commission to address permissive interventions prior to deciding to set the matter for hearing. Further, it is wasteful and inefficient to require that responses be filed before the Commission decides to set the matter for hearing. Even though the same number is used in the Commission's E-Filing System to track an advice letter whether it goes into effect or is contested, the OCC has not shown sufficient need to change the rule at this time. The rule will be adopted as proposed.

### 14. Rule 1302(g). Show Cause Proceedings.

66. The NOPR streamlines the show cause process and captures all information in one proceeding.

67. Black Hills and Public Service are concerned with changes in timing. Black Hills is unaware of problems or concerns with the 20-day timeframe. Public Service comments that a 15-day response time is more appropriate than ten.

68. The OCC opposes the filing of a proposed order and contends the process appears to contemplate filing a decision twice.

69. Public Service suggests the rule not presume any violation. Public Service also suggests clarification that the process begins with allegations and that only the Commission

designates the parties, rather than Staff. Finally, Public Service proposes retaining the explicit opportunity for cure.

70. Initially, the undersigned notes that the show cause process is rarely used by the Commission. However, it is reasonable to improve efficiency of the process. The proposed rule will be clarified to promote efficiency, in light of comments.

71. The rules continue to provide a preliminary review of a request for issuance of an Order to Show Cause, supported by an affidavit. The subject respondent will be notified, provided the allegations and the supporting affidavit, and be granted an opportunity to respond to the request for issuance of the show cause order. Notably at that point, the only issue is whether the Order to Show Cause should be issued by the Commission. If the Commission issues the Order to Show Cause, the named respondents have the opportunity to show cause as a response on the merits.

72. Echoing comments regarding discovery response times, and partially addressing comments of Black Hills and Public Service, ten calendar days can materially impact the business days to respond. By changing the proposed process to ten business days, respondents will be assured of more time to respond, while still modestly shortening the historical process.

73. Addressing comment regarding an explicit period of cure, insufficient need has been shown to expressly continue the provision. As adopted, a party named in an Order to Show Cause will likely have been aware of the allegations for weeks. If the allegations have merit, the responding party would have the opportunity to negotiate resolution or cure to moot the claims alleged. If the order issues, the respondent still has the opportunity to cure, negotiate settlement, or otherwise request relief not to address the merits of the allegations. Solely deleting the

explicit language regarding a cure does not negate the opportunity to resolve the underlying dispute and otherwise causes unnecessary delay.

74. Addressing the OCC's concern regarding possible confusion resulting from filing of a proposed interim decision, in addition to the rule itself, emphasis will be added that the affidavit will be filed supporting issuance of a proposed interim decision.

**15. Rule 1303. Applications.**

75. Proposed modification to Rule 1303(c) injects an opportunity for the Commission to seek additional information for determining completeness of an application.

76. Black Hills comment address the distinction between substantive matters in a proceeding and the information required to start litigation of an application.

77. RTD comments that the rules provide notice of application requirements through specific provisions and that the modifications would "erode the fair notice of application requirements, and the relative predictability in cost and time that rules of procedures otherwise provide." Rather, RTD prefers continuation of Staff issuing notices of deficiency as has occurred in the past.

78. Public Service comments that the proposed modifications would frustrate the purpose of time limits imposed by § 40-6-109.5, C.R.S. and create administrative inefficiencies. The Company contends the change is unnecessary and adds to applicable statutory timelines.

79. Applications are deemed complete in accordance with § 40-6-109.5, C.R.S., which provides:

> the commission shall issue its decision on such application no later than one hundred twenty days after the application is deemed complete as prescribed by rules promulgated by the commission.

80. Some comment improperly equates deeming an application complete with a prima facie demonstration. As address in Decision No. R12-1466:

> The undersigned sees completeness as an integral part of efficient processing of Commission proceedings. Too quickly deeming an application complete shifts the burden of determining and understanding the basis and relief requested to the discovery process. The proposed rule conceptually adopts an appropriate balance of party interests and proposals to modify will not be adopted.
>
> ….
>
> The deeming process only determines completeness sufficient to commence the applicable statutory period. The determination is made without prejudice as to the merits of the proceeding, including whether the application, in fact, satisfies any required scope of the proceeding.
>
> Decision No. R12-1466 mailed December 21, 2012 at 42-42, Proceeding No. 12R-500ALL.

81. Those filing applications define the scope of the proceeding in the first instance. It is reasonable that the Commission should understand the relief sought before triggering the time available to reach a decision.

82. The undersigned is concerned that the common experience of RTD is not as predictive for all affected industries for all applications. Where the relief sought is more predictable or of narrow scope, it is more likely that rules can provide specificity. However, that is not the case across the Commission's jurisdiction. In any event, the additional provision does not necessarily change Staff's practice of notifying those seeking relief of deficiencies, as RTD supports.

83. When the Commission reaches a decision that additional information is necessary, the proposed rule allows, based upon facts and circumstances present, for supplementation. The NOPR illustrates applicability where two applications may otherwise appear to stand alone. The Commission may find it necessary to understand how one will affect the other based upon

specific circumstances present. There is simply no way to anticipate all such possibilities in rules of general applicability.

84. Public Service's observation that the Commission theoretically could enter a decision requiring additional information in every application is correct. This recognition reflects the important counter-balance encouraging filers to clearly define and support the scope of relief sought, avoiding need for the Commission to enter such a decision.

85. Beginning the time for issuance of a decision without understanding the relief sought unfairly burdens the Commission and intervening parties. Would the Company and the Commission not be in a worse position if the application was ultimately denied at the end of litigation because information known at the beginning to be necessary was not provided? The proposal seeks to avoid the Commission facing a predicament of choosing whether to seek additional information or guess and hope that others obtain answers. Parties request that specific or coordinated relief be granted within time periods for a variety of reasons. If the necessary information is not present at the beginning of the case, it would be tremendously inefficient and possibly impractical for the application to ultimately be denied based thereupon at the end of contested litigation.

86. The possibility of commented inefficiencies does not overcome the benefit from efficient determination of merits that the Commission seeks to address. Commenters should not assume the Commission's effort to promote efficiency will be applied to abuse its discretion. The Commission is expanding sole reliance upon rules of general applicability. Where a decision determines that additional information is necessary in a particular application, there is no more efficient manner to provide that information than at the beginning of the process. While rules are intended to advise participants, it is wholly unreasonable for all filers to attempt to bind

the Commission's discretion to decide any case based upon particular facts and circumstances. To attempt otherwise would also improperly reward those ever seeking to provide the minimum amount of information over those assisting the Commission in reaching a decision that is truly in the public interest.

87. The proposed rule is within the Commission's discretion, reasonable, and will be adopted.

**16. Rule 1304. Petitions.**

88. The Commission proposes to clarify the process for determining whether to go forward with a petition for declaratory order. Public Service recommends further clarification that the Commission is not limiting the basis upon which the Commission may decide not to accept a petition. The proposal is reasonable and will be adopted in part for clarification.

**17. Rule 1400. Motions.**

89. CEO proposes that Rule 1400 be modified to certify all denials of permissive intervention for immediate appeal, limiting the time for filing a motion for reconsideration. Addressing Rule 1401, CEO also proposes that a person have a seven-day response time to reply to a challenge of a claim of right.

90. The Conservation Commenters also recommend clarifying the process to challenge interim decisions denying intervention, impose a seven-day response time, and require Commission action on such a challenge within 21 days of filing.

91. Since its adoption, Rule 1502 has provided that interim orders are generally not subject to exceptions. Commenters did not point to any occurrences where the current rules failed to operate as intended and the issues raised have been previously considered and addressed by the Commission:

> 8. In recommending adoption of Rule 1502, Judge Ken F. Kirkpatrick summarized:
>
> It is the current practice of the Commission to entertain appeals of interim [*3] orders on a discretionary basis. The new rule should not encourage the appeal of interim orders, which would unnecessarily involve the Commission in ongoing proceedings that have been referred to ALJs. In addition, appeals of interim orders almost always unavoidably delay a proceeding. Nonetheless, there are certain circumstances where a significant ruling regulating the future course of the proceeding is made and a review would be appropriate. The rules currently have no mechanism for a presiding officer to certify an interim order as immediately appealable. Putting the presiding officer as the gatekeeper for interim order appeals seems to be a reasonable approach for allowing for some necessary interlocutory appeals but not encouraging practices that will result in unnecessary delay.
>
> Decision No. R12-1466 at 60, *quoting* Decision No. R05-0461 at 18.

92. The Commission denied exceptions to Judge Kirkpatrick's Recommended Decision, reiterating that it is left to the "discretion of ALJs and the Commission as to when interim orders may be appealed." Decision No. R09-1068-I mailed September 22, 2009, *quoting* Decision No. C05-1093 at 36. *See also* Decision No. R12-1466 at 60.

93. As observed in 2012, the current rule has continued to prove adequate and remains an important aspect of managing pending proceedings on a timely basis. Sufficient cause has not been shown to modify the rule.

94. The OCC comments regarding the length of time it takes for those requesting permissive intervention to know whether their request will be granted. Permissive intervenors do not become a party until granted such status. The OCC proposes establishing a seven-day response time.

95. The OCC’s proposal to establish a seven-day response time to requests for permissive intervention is reasonable, not opposed in any comment, and will be adopted.

### 18. Rule 1401. Intervention.

96. Modifications are proposed in accordance with SB19-236 and to allow challenges to claimed interventions by right or the party's request for hearing. Several commenters seek clarification or further modification of the rule regarding permissive intervention.

**Rule 1401(b)**

97. Without identifying any specific basis or purpose, CEO proposes that challenges to legally protected interests be limited to those not having a statutory intervention of right. Then, when a legally protected interest is challenged, CEO contends that an opportunity for reply be available for the party claiming such right.

98. The proposal to prohibit a party from even be permitted to challenge a statutory claim of right will not be adopted. CEO demonstrates no reasonable basis for such a prohibition to challenge the claim as being within the scope of the statutory right.

99. Historically, while not specifically proscribed in rule, parties have challenged intervention of right by filing a motion to strike the intervention. The party intervening based upon a claim of right would then have an opportunity to file a response to the motion in accordance with Rule 1400. The rule will be amended to expressly incorporate this best practice.

**Rule 1401(c)**

100. CEO proposes clarification of "tangible interests" and recognizing that policy interests alone is a sufficient basis for intervention. CEO believes the Commission considers state policies and goals when reaching decisions and that parties include policy discussions in comments and testimony.

101. The Commission clearly incorporates any number of policy considerations in reaching a decision; however, that does not necessarily require the Commission to permit those

having only a policy interest in a subject matter be permitted to participate as a party to the proceeding. Rather, the Commission's relies upon its own expertise and discretion as well as those the Colorado Legislature has granted intervention by right and those demonstrating a pecuniary or tangible interest substantially affected by the proceeding to address policy considerations

102. CEO addresses the meaning of the term "tangible" interest:

> While Black's Legal Dictionary … [defines] tangible in terms of material or physical existence….Dictionary.com defines tangible as "definite, not vague or elusive." Merriam-Webster defines tangible to mean "capable of being precisely identified by the mind" or "capable of being appraised at an actual or approximate value."

Consistent with the PUC's mission, CEO contends the rule should specify that environmental interests are tangible interests.

103. As noted by the Conservation Commenters, and evident in prior decisions, the Commission has granted permissive intervention to environmental groups in specific cases. Particularly in light of the discretionary nature of permissive intervention, further specificity has neither been shown necessary to modify the rule to allow intervention nor would the rule require intervention even if amended. The rule will be adopted as proposed in the NOPR.

104. The Conservation Commenters do not propose specific modifications, but request clarification and additional guidance.

105. The Commission must "conduct its proceedings in such a manner as will best conduce the proper dispatch of business and the ends of justice." § 40-6-101(1), C.R.S. Section 40-6-109(1) C.R.S. "creates two classes that may participate in PUC proceedings: those who may intervene as of right and those whom the PUC permits to intervene. *DeLue v. Public Utilities Commission*, 169 Colo. 159, 454 P.2d 939, cert. denied, 396 U.S. 956, 24 L. Ed. 2d 421,

90 S. Ct. 428 (1969). Under the statute, the PUC has promulgated rule 15 R.I 276, 7 A. 2., 4 Cambria Co. Reports 723-1 (1980), limiting persons whom it will permit to intervene to those having "a substantial personal interest in the subject matter of the proceedings [whose] intervention will not unduly broaden the issues." *RAM Broadcasting of Colorado, Inc. v. Public Utilities Com.*, 702 P.2d 746, 749 (Colo.1985).

106. In addition to § 40-6-109, C.R.S., the Colorado Legislature has statutorily granted intervention by right to the Colorado Office of Consumer Counsel pursuant to § 40-6.5-106, C.R.S. and the Colorado Energy Office pursuant to § 40-6-108, C.R.S.

107. The OCC represents the "public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers by appearing in proceedings before the commission and appeals therefrom in matters which involve proposed changes in a public utility's rates and charges, in matters involving rulemaking which have an impact on the charges, the provision of services, or the rates to consumers, and in matters which involve certificates of public convenience and necessity for facilities employed in the provision of utility service, the construction of which would have a material effect on the utility's rates and charges." *See* § 40-6.5-104, C.R.S.

108. The mission of CEO is to:

(a) Sustain the Colorado energy economy and promote all Colorado energy;

(b) Promote economic development in Colorado through energy-market advances that create jobs;

(c) Encourage Colorado-based clean and innovative energy solutions that include traditional, clean, and renewable energy sources in order to encourage a cleaner and balanced energy portfolio;

(d) Promote energy efficiency;

(e) Increase energy security;

(f) Lower long-term consumer costs; and

(g) Protect the environment.

§ 24-38.5-101, C.R.S.

109. Most comment addresses those requesting permissive intervention, rather than those intervening by right. In Decision No. C13-0442, the Commission reviewed the several requirements for permissive intervention:

> 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).[2] 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).
>
> Decision No. C13-0442 mailed April 16, 2013.

110. When permissive intervention was most recently visited in a Rules of Practice and Procedure rulemaking, the undersigned observed:

> In establishing permissive intervention standards, the Commission must be mindful of the resulting impact from increasing the number of parties upon the efficient administration of proceedings utilizing limited resources, the nature of proceedings, and the likelihood that expanding the number of parties will materially assist the Commission in reaching a just and reasonable result. Illustratively, too low of entry threshold can result in unnecessarily burdensome

[2] 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.

> multi-party litigation. Litigation costs for all parties as well as the Commission may be materially impacted by expanding the discovery process and lengthening hearings. Particularly where duplicate interests advocate redundant or irrelevant positions, Commission proceedings are not furthered and resources are wasted.
>
> Decision No. R12-1466 at 45-47.

111. The need to balance these considerations remains today. The Commission has applied the current standard to deny permissive intervention where it was found that pecuniary and tangible interests would not be substantially affected or would be otherwise adequately represented. *See e.g.*, Decision No. C13-0967-I in Proceeding No. 13D-0559E; Decision No. R19-0625-I in Proceeding No. 19AL-0290E (certified for interim appeal and upheld by Decision No. C19-0757 in Proceeding No. 19AL-0290E); and Decision No. R19-0801-I in Proceeding No. 19A-0409E.

112. The Supreme Court favorably cited the test for inadequate representation under Rule 24 in Wright and Miller:

> If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.

*Feigin v. Alexa Group, Ltd*., 19 P.3d 23, 31 (Colo. 2001), *citing 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 1908, 318-19 (2d ed. 1986).

113. Considering whether an interest is adequately represented, the Commission has noted reliance on the OCC's status as a governmental entity required to represent interests as a factor. *See e.g.*, Decision No. C13-0442 mailed April 16, 2013 at 19, and Decision No. R19-0625-I in Proceeding No. 19AL-0290E. The Commission similarly looks to CEO as a governmental entity because the Colorado Legislature granted it broad intervention of right to fulfill its statutory responsibilities.

114. The standards specified in the rules must be applied based upon the facts and circumstances of each proceeding. Dependent upon findings based upon those facts and circumstances, the level of clarity and guidance sought is not possible in light of the long-standing standard applied by the Commission. Thus, the body of Commission case law is the most beneficial aid to practitioners, while acknowledging that the Commission is not bound by the doctrine of *stare decisis*.

115. The OCC proposes that the Commission act on motions for permissive intervention prior to expiration of the notice period. The rule will be amended to clarify that the provision is permissive. Particularly in determining multiple requests for permissive intervention, the Commission may choose to await expiration of the notice period in order to consider the number, positions, and identity of those seeking permissive intervention in light of other parties in the proceeding. Also, current practice maximizes the opportunity for all seeking intervention to respond to other requests for permissive intervention. While this may slightly delay commencement of discovery for those granted permissive intervention, the benefit to permissive intervenors cannot overcome the benefit to the Commission identifying parties before deciding motions for permissive intervention.

**Rule 1401(d)**

116. CEO proposed further modifications to implement § 40-2-125.5(5)(f), C.R.S., which provides:

> The commission shall consider affected communities within the filing qualifying retail utility's service territory with a tangible and pecuniary interest, and organizations representing those communities shall be presumed to have standing in a proceeding seeking approval of any clean energy plan filed pursuant to this section.

117. CEO suggests that organizations representing communities (*e.g.*, non-governmental organizations") be required to demonstrate how the NGO represents such community. Upon such a showing, CEO interprets the statute grants a "community, including an elected political body representing such a community, a statutory intervention as of right." CEO comments at 13.

118. The Commission summarized the recently-enacted legislation:

> Senate Bill 19-236, directed "electric [utilities] with greater than five hundred thousand customers in the state or any other electric utility that opts in..." to file a Clean Energy Plan to reduce carbon emissions to 80 percent below 2005 levels by 2030 and reduce atmospheric carbon emissions by 100 percent by 2050.
>
> Decision No. C19-0756 mailed September 17, 2019, in Proceeding No. 19M-0495E.

119. The Colorado Legislature incorporated a broad policy declaration § 40-2-125.5(1), C.R.S. addressing matters of statewide importance. However, CEO presents no basis to support statutory creation of intervention by right nor the scope of community. Other provisions granting statutory intervention by right are clear and unambiguous. The Colorado Legislature provided communities "shall be presumed to have standing in a proceeding." § 40-2-125.5(5)(f), C.R.S. No basis has been shown to equate this presumption with a right.

120. The statute requires the Commission to consider affected communities within a qualifying retail utility's service territory with a tangible and pecuniary interest when considering a clean energy plan. CEO presents no basis to narrow the definition of communities and organizations representing those communities. The statutory language does not define or limit affected communities in terms of interests, geography, or otherwise. The Commission has not proposed to further define communities at this time. CEO has not demonstrated that the rules

and existing procedures regarding permissive intervention require further amendment at this time. The rule will be adopted as proposed.

### 19. Rule 1404. Referral to Hearing Commissioner or Administrative Law Judge

121. Rule 1404 is amended to implement legislative changes pursuant to SB19-236. Adjudicatory proceedings are no longer before an administrative law judge upon filing. Rather, they will be before the Commission *en banc* unless the Commission refers the case by rule, minute order, or written decision.

122. Referral to an administrative law judge or hearing commissioner has always been, and remains, a matter within the Commission's discretion. However, for the benefit of affected parties as well as an administrative law judge or hearing commissioner, it should be clear whether a matter is before the Commission or referred. As drafted, subparagraphs (b) is permissively stated. The undersigned believes it should be clear that the identified matters are referred to be heard in the first instance by rule. This aligns with the statutory reliance upon the rule for referral and avoids ambiguity of knowing whether, in fact, any specific case is referred.

### 20. Rule 1405. Discovery

**Rule 1405(b)**

123. The OCC's comment recommends clarification of the applicability within Rule 1405 to types of proceedings. Comment points out that Rule 1405(b) applies to applications, not advice letter and tariff proceedings. Rule 1405(c) does not apply to advice letter and tariff proceedings because they do have a statutory period within which the Commission must issue decision (*i.e.*, Section 40-6-111(b), C.R.S. addresses the suspension period). Finally, 1405(d)

applies in proceedings with prefiled testimony. The OCC points out that this may, but does not necessarily cover advice letters.

124. The proposed addition to Rule 1405(b) is reasonable and will be adopted to avoid potential confusion.

125. Public Service also proposes that the rule reflect business days, rather than calendar days. It comments that the discovery process has fallen out of balance and that this one change would significantly assist the regulatory community and the Commission. No reply comment opposed the requested change.

126. As noted by Public Service, the Commission has little involvement in day-to-day uncontested discovery. Specifying response times in business days is reasonable and will more accurately align with the time reasonably available for preparation of a response. Further, it will avoid potential manipulation of weekends and/or holidays.

**Rule 1405(f)**

127. Proposed revisions to Rule 1405 raise the issue for discussion regarding the proper balance between the availability of adequate information and the possible burden of less restrictive rules for requests. Rule 1405(f) proposes to extend the period of time prior to the filing of a proceeding when discovery will be presumed not to be reasonably calculated to lead to the discovery of admissible evidence from four years to ten years. In addition, and as an exclusion to this limiting period, discovery requests concerning a utility's regulatory asset will only be limited in time by the useful life of that asset or the depreciation life. Predictably, those more likely responding to discovery oppose expansion and those more likely propounding discovery support expansion.

128. Black Hills first points out that the four-year period in Rule 1405(f) is not a limit on discovery; rather, it is a presumption applied in the context of the Commission's standard for discovery. Based upon Black Hills' experience and review of Commission decisions, it does not support the proposed revision. Black Hills also notes that the Commission has already adopted a scope of discovery that is broader than that permitted under the Colorado Rules of Civil Procedure. Further expansion of the scope of discovery will increase litigation costs and burdens as well as impact business practices necessary for compliance.

129. CIEA acknowledges that certain narrow subjects may require a longer time window of relevant information. However, it contends those cases represent the exception rather than the rule. It further comments regarding the potential for dramatic increases in costs and burden of participating in Commission proceedings, if adopted.

130. Tri-State also comments regarding concerns as to cost and burden. Tri-State's experience reflects a trend of increasing burden and cost to comply with discovery obligations. It is concerned that more than doubling the period of time for which responsive information must be produced will significantly increase the problems it has experienced. As an alternative, while not agreeing with the reasoning, Tri-State suggests a specific subset of adjudicatory proceedings where a ten-year period could be adopted, leaving the four-year period in place for other adjudicatory proceedings.

131. Regarding asset life, Black Hills seeks further clarification whether the intent is to address regulatory or physical assets. Physical assets, in particular, can have lives up to 35-50 years. Black Hills anticipates that the broad expansion proposed will impose an undue recordkeeping burden on utilities.

132. Public Service also comments regarding the proposed references to life of an asset (or liability) and notes that some assets (or liabilities) have very long amortization periods. Aside from burdens of scope, Public Service points out that changing systems and capabilities over many years can significantly increase discovery burdens. Public Service illustratively points to the Company's prepaid pension asset that started in 1987. In order to comply with the proposed scope, the Company would have to develop a process for a timely and cost effective means of readily producing these documents.

133. The OCC strongly supports the change to ten years. The OCC points to illustrative cases where it contends a period greater than four years is appropriate and is often necessary to develop an understanding of the context, magnitude, or trends.

134. Critically, consideration begins with recalling that these rules are of general applicability to all Commission proceedings. Addressing comparable comment in a prior proceeding, the undersigned recognized:

> The presiding officer in any proceeding is in the best position to exercise discretion and weigh affected discovery interests.
>
> The goal of this proceeding must be to establish the appropriate "default" procedures. Where those provisions are adequate, prehearing conferences can more likely be delayed or avoided. Where prehearing conferences are necessary, deadlines may be modified on a case by case basis as has occurred in the past. Promotion of efficiency in the discovery process benefits all parties concerned in the exchange of information. However, the undersigned is convinced that increasing the potential for additional process regarding discovery disputes interferes with maximizing the Commission's opportunity and ability to meet the letter and spirit of applicable statutory periods.

135. The cost of litigation should not be increased more than is necessary. As Administrative Law Judge Garvey recently recognized, the cost of discovery and other legal costs ultimately fall upon ratepayers. *See* Decision No. R19-0625-I at 9.

136. Those initiating proceedings, in the first instance, have some opportunity to manage the scope of discovery through their requested relief. As commented by the OCC, it is reasonable that the amount of discovery increases with the scope and complexity of proceedings.

137. The Commission raised for discussion the period of time prior to the filing of an application that will presumptively be deemed to be not reasonably calculated to lead to the discovery of admissible evidence. As noted in comment, the Commission's discovery standard is already fairly broad, relative to trial courts. The undersigned finds the weight of comment supports continuing the status quo at this time and addressing needed exceptions on a case by case basis.

138. The Commission noted that a four-year look-back period seems overly restrictive for someone conducting discovery for trend analysis and historical implications, particularly because adjudicatory proceedings impact investments and capital expenditures for decades. Relative to all of proceedings, it is not clear how often those issues arise in proceedings. However, it seems the exception rather than the rule and such a large expansion applicable to all proceedings increases burdens without any ability to attempt quantification of benefit. Thus, in proceedings where such issues are anticipated, the period could be addressed on a case by case basis during a prehearing conference or upon motion.

139. There is little comment demonstrating that discovery directed to a time period greater than four years prior to the filing of an application was in fact reasonably calculated to lead to the discovery of relevant information **and** that objections based upon the period of time were the basis for denial of such discovery. It seems that current practice would result in no such objection or the parties conferring as to a reasonable period, where appropriate. Otherwise, one

might expect those parties being denied discovery to raise the issue in this proceeding and requests to compel discovery would be more common.

140. Defining a more narrow scope of proceedings where discovery is anticipated to reasonably address a longer period of time before filing has appeal. However, there is insufficient comment to develop such a rule at this time. Perhaps a rule could be fashioned relative to prior proceedings or some other basis of limitation.

141. As to the life of asset, first the rule would require clarification that the additional provision only relates to the presumption based upon the time period covered in discovery, but the discovery otherwise remains subject to objection and must be reasonably calculated to lead to the discovery of admissible evidence. However, comment raises significant concern as to the scope of the proposal. Particularly because the provision cannot be limited to a considered narrow scope of proceeding, it could potentially have an unintended drastic impact upon the scope of permissible discovery. Further, the comment reasonably suggests that maintaining such records in a manner to permit compliance with discovery obligations could come at a significant cost. Finally, similar to consideration of lengthening the time addressed in the presumption regarding reasonable calculation, the same issues arise as to the scope of proceedings affected and no indication whatsoever of when objections were raised to discovery reasonably calculated to lead to the discovery of admissible evidence resulted in such discovery not being provided.

142. The amendments addressing discovery in Rule 1405(f) are not incorporated for adoption at this time.

### 21. Rule 1408. Settlements.

143. Proposed amendments to Rule 1408 expand the evidentiary support for all settlement agreements.

144. Black Hills comments that imposing additional requirements for all settlements will discourage settlement, conflicting with the express policy to encourage them. Further, it comments that joint testimony simply may be impossible because individuals may contend that approval is appropriate and in the public interest for different, often conflicting, reasons.

145. Black Hills also points out that many parties appearing before the Commission have no obligation whatsoever to the public interest; rather, they may appropriately pursue their personal interests. Thus, Black Hills contends it is inappropriate for the rule to impose an obligation to agree to a settlement only because it serves a public interest.

146. Black Hills comment also addresses the proposed attestation contending non-lawyers should not be required to attest that a settlement is in accordance with applicable laws. A lesser alternative is proposed attesting that parties are not aware of a settlement agreement violating applicable laws.

147. In sum, Black Hills contends the current rule appropriately leaves discretion with the presiding officer to consider whether oral or written testimony is necessary to support any given settlement agreement.

148. CenturyLink comments that expanding the requirements for every settlement to include prefiled, joint testimony supporting settlement of every contested case is excessive and that the Commission and administrate law judges should shape procedures to meet the needs of each case. At least, it is suggestion that a concept of proportionality and discretion should guide any additional obligations. Illustratively, CenturyLink notes resolution of minor proceedings should not impose such a significant burden.

149. CenturyLink proposes adding a permissive standard to the provision. Substantively, CenturyLink also notes that not all proceedings are resolved based upon the

standard that the agreement is in the public interest. Finally, it suggest considering removal of the requirement of joint testimony as the reasons one party agrees to a settlement may be entirely independent of any another party might agree.

150. CTA joins the comments expressed by CenturyLink, the OCC and Black Hills. It further joins that the current rule is adequate and does not require modification. In sum, the presiding officer considering a settlement is in the best position to structure consideration of the settlement based upon the proceeding and the Commission's policy of encouraging parties to settle their differences.

151. Public Service also opposes an imposition that joint testimony must be filed. Comment highlighted that current processes have proven effective, permitting some parties to file testimony while others choose not to proactively support approval.

152. CEO supports the proposed amendments but proposes eliminating the requirement that testimony be jointly filed. CEO recognizes that diverse interests and perspectives may lead parties to support approval of a settlement.

153. The OCC comments that the proposed amendments are not necessary because supporting testimony is generally provided. Also, the OCC comments that oral testimony at hearing has been accepted in the past without requiring pre-filed written testimony. Finally, supporting testimony has not necessarily been requested or provided by all parties historically.

154. The NOPR attempts to clarify what is to be filed with a settlement. However, settlements are commonly approved by the Commission omitting some or all of the clarified requirements. Parties must provide sufficient evidentiary support for the Commission's decision. The undersigned joins commented concern that imposing broad burdens on all settlement agreements will frustrate the encouragement of parties to resolve their differences. On the other

hand, an attempt to obtain evidentiary support for a settlement agreement may promote efficiency and avoid otherwise unnecessary hearings. Thus, the proposal will be made permissive and further modified to address commented concerns.

**22. Rule 1409. Conferences.**

155. Black Hills proposes amending Rule 1409 to establish "default and non-binding procedural schedules that are applicable to both application and advice letter proceedings." It contends more Commission guidance is necessary to inform parties of the establishment of a fair procedural schedule. In particular, Black Hills notes the extension to of the applicable statutory periods through enactment of SB19-236.

156. Black Hills' comment was not addressed by any other comment. The undersigned notes first that such a process is applied in transportation proceedings; however, in practice the rule seldom governs proceedings. *See* Rule 1405(k). The undersigned also finds transportation proceedings more predictable in scope as opposed (particularly) to energy proceedings. Thus, it would likely prove even more difficult to define a generally applicable schedule, resulting in less likelihood to govern proceedings. The Commission did not propose default procedural schedules and the undersigned is not convinced that adopting any rule would do more than create an exception to a general rule that must still be defined elsewhere.

**23. Rule 1502. Interim Decisions.**

157. CEO proposes a time limit for requesting reconsideration of an interim decision, deadlines for rulings on motions requesting certification for interim appeal, and immediate certification for appealability of decisions denying intervention.

158. The Conservation Commenters propose specific time periods for ruling upon a motion to certify for interim appeal and then such ruling should be immediately appealable.

Striking the Commission reference at the beginning of Rule 1502(d) is also proposed to be stricken as the process would not apply to Commission decisions.

159. The Commission summarized the purpose and application of the process for certifying an interim decision on appeal:

The scope of interim relief is indeed an extraordinary remedy and is not proposed to be modified. As has been recognized:

> 7. Interim orders are generally not subject to exceptions. Rule 1502, 4 Code of Colorado Regulations (CCR) 723-1. However, 1502(b) provides that "[a] presiding officer may certify an interim order as immediately appealable via exceptions." Rule 1502(b), 4 CCR 723-1.
>
> 8. In recommending adoption of rule 1502, Judge Ken F. Kirkpatrick summarized:
>
> It is the current practice of the Commission to entertain appeals of interim orders on a discretionary basis. The new rule should not encourage the appeal of interim orders, which would unnecessarily involve the Commission in ongoing proceedings that have been referred to ALJs. In addition, appeals of interim orders almost always unavoidably delay a proceeding. Nonetheless, there are certain circumstances where a significant ruling regulating the future course of the proceeding is made and a review would be appropriate. The rules currently have no mechanism for a presiding officer to certify an interim order as immediately appealable. Putting the presiding officer as the gatekeeper for interim order appeals seems to be a reasonable approach for allowing for some necessary interlocutory appeals but not encouraging practices that will result in unnecessary delay.
>
> Decision No. R05-0461 at 18.

Denying exceptions to Judge Kirkpatrick's Recommended Decision, the Commission reiterated that it is left to the "discretion of ALJs and the Commission as to when interim orders may be appealed." Decision No. R09-1068-I, issued September 22, 2009, quoting. Decision No. C05-1093 at 36.

Decision No. R12-1466 at 60-61 mailed December 21, 2012, in Proceeding No. 12R-500ALL.

160. The Commission recently reiterated reliance upon administrative law judges to independently manage cases:

> 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 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).
>
> Decision No. C19-0757 at 8, in Proceeding No. 19AL-0290E.

161. These considerations underlying original adoption and continued operation under the rule remain true. It is important that the ALJ be able to efficiently manage referred matters. The Commission proposed no modification and the current rule has proven adequate. Sufficient cause has not been shown to modify the rule.

### 24. Rule 1505. Exceptions

162. In consideration of the lengthening of the applicable statutory period in § 40-6-109.5, C.R.S., the OCC proposes simplifying Rule 1505(a) to adopt a 14-day time period within which parties may file responses to exceptions. The proposal is reasonable and there was no responsive comment addressed the proposal. It will be adopted.

## C. Conclusion

163. Attachment A of this Recommended Decision represents the rule amendments adopted by this decision with modifications to the prior rules being indicated in redline and strikeout format (including modifications in accordance with this Recommended Decision).

164. Attachment B of this Recommended Decision represents the rule amendments adopted by this decision in a clean/final format.

165. It is found and concluded that the proposed rules as modified by this Recommended Decision are reasonable and should be adopted.

166. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

## II. ORDER

### A. The Commission Orders That:

1. The Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, attached to this Recommended Decision in legislative/strikeout format as Attachment A, and in final format attached as Attachment B, are adopted. The adopted rules are also available through the Commission's Electronic Filings system at:

https://www.dora.state.co.us/pls/efi/EFI.homepage.

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. If this Recommended Decision becomes a Commission Decision, the relevant rules are adopted on the date the Recommended Decision becomes a final Commission Decision.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the participants and the representative group of participants, 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.

5. 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

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director