Decision No. C20-0177

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19R-0483ALL

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.

COMMISSION DECISION ADOPTING RULES

Mailed Date: March 30, 2020
Adopted Dates: February 26, 2020 and March 4, 2020

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I. BY THE COMMISSION

A. Statement

1. On September 13, 2019, the Public Utilities Commission, on its own initiative, issued the Notice of Proposed Rulemaking (NOPR) to amend the Commission's Rules of

Practice and Procedure (P&P Rules), 4 *Code of Colorado Regulations* (CCR) 723-1. Decision No. C19-0747. The NOPR commenced this Proceeding.

2. The purpose of the Commission's P&P Rules is to "advise the public, regulated entities, attorneys, and any other person of the Commission's rules of practice and procedure. These Rules of Practice and Procedure are promulgated 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." The purpose of the NOPR was to solicit comments on possible changes to the P&P Rules as described in the NOPR and its attachments, and to schedule a rulemaking hearing. We provided interested persons the opportunity to submit written comments on the proposed rules and to provide oral comments at the scheduled hearing. The Commission referred the rulemaking proceeding to an Administrative Law Judge (ALJ) and scheduled a hearing for October 29, 2019.

3. Comments to the proposed rules were submitted 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, doing business as CenturyLink QC; the Colorado Telecommunications Association; Energy Outreach Colorado (EOC); Colorado Rural Electric Association; Public Service Company of Colorado (Public Service); the Regional Transportation District (RTD); Tri-State Generation and Transmission Association, Inc.; 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).

4. At the scheduled date and time, the ALJ convened a public comment hearing and received comments from interested parties. After taking comments at the hearing and considering the written comments submitted by various parties, the ALJ issued Recommended Decision No. R19-1022 on December 23, 2019 adopting rules as amended.

5. Subsequently, exceptions to the Recommended Decision were filed on January 13, 2020 individually by OCC, CEO, and WRA. Black Hills filed a response to the exceptions on January 27, 2020.

6. We review the rules as proposed by the ALJ and the parties' exceptions to those proposed rules and adopt permanent rules as discussed below.

B. Analysis and Findings

7. In the NOPR we stated that the Commission last updated its P&P Rules approximately five years ago. We found the time ripe to review our processes and attendant rules based on our experiences as well as recommendations we received from active parties and Commission Staff concerning ways to improve our processes to make them as streamlined and effective as possible. These rules concern the Commission's business processes and the amendments adopted here provide clarification and updates of rules we find are in need of updating, as well as those amendments necessary due to legislative changes in the 2019 legislative session. We address the rule amendments in numerical order.

C. Adopted Rules

Rule 1004
Definitions

8. Rule 1004(a) as amended in the NOPR to clarify the definition of an accelerated telecommunications interconnection complaint proceeding is adopted.

9. Rule 1004(e) was amended to add language regarding the role of Advisory Staff. The Recommended Decision removed language binding Advisory Staff to the same standards of conduct as Commissioners and ALJs. The recommended amendment will be adopted.

10. Rule 1004(g) as amended, changed the definition of "business day" to Monday through Friday, 8:00 a.m. through 5:00 p.m. Mountain Time, excluding any day the Commission offices are legally closed is adopted.

11. Rule 1004(z) which defines the term "Presiding Officer" as that term applies to Commission proceedings is adopted.

12. Rule 1004(gg), which makes clear that all Commission rulemaking proceedings are conducted in conformance with the Colorado Administrative Procedures Act codified at § 24-4-101, C.R.S. *et seq.,* was further amended by the ALJ to provide that "where there is a specific statutory provision in title 40 C.R.S. applying to the commission, such a specific statutory provision shall control as to the Commission." We adopt the proposed additional language.

13. Rule 1004(ll) provided the definition of "Trial Staff" and explains its role in Commission proceedings. The Recommended Decision added proposed language which included proceedings in which Trial Staff filed notice of participation. We adopt the proposed additional language.

Rule 1005
Meetings

14. Rule 1005(c), which explains public comments taken at Commission Weekly Meetings and the circumstances under who may provide public comment is adopted as set forth in the NOPR.

15. Rule 1005(e) informs the public that Commission Weekly Meetings will be webcast and audio recordings will be archived and available on the Commission's website and will be adopted as provided in the NOPR.

Rule 1007(c)
Commission Staff

16. Rule 1007(c) defines and explains the role of Advisory Staff and clarifies that all communications between advisors and Commissioners and ALJs are to be considered part of the deliberative process. We adopt the language as provided in the NOPR.

Rules 1100-1103
Confidential Information

17. The purpose of the amendments to the confidentiality rules is to bring them into closer conformance with federal and state court rules related to confidentiality. This includes streamlining language that is now overly broad related to what types of information generally falls under the rubric of confidentiality and requiring affidavits attesting to the confidentiality sought by the parties.

18. Rule 1100(b) sets forth the parameters of the documents and information that are available by the Commission for public inspection in accord with the Colorado Open Records Act and subsumes Rule 100(n).

19. We propose changes to Rule 1100(i) to include Commission Trial Staff legal counsel in the existing list of persons to have access to all information filed under the confidential rule standards by virtue of executing an annual nondisclosure agreement. This will preclude those attorneys from filing a nondisclosure agreement in every proceeding in which they participate.

20. The remainder of the amendments to Rule 1100 are to streamline the rule to make it more user friendly.

21. The Recommended Decision accepted a proposal by RTD 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 suggested duplicating the phrase "subject to restrictions specifically provided by law" with the documents listed in 1100(b). We adopt that proposed change to the language of Rule 1100(b).

Rule 1105
Personal Information - Disclosure

22. CEO's and EOC's 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 the hearing, no responsive comments were offered.

23. Modifications to Rule 1105(c) include allowing a utility to disclose information regarding monthly gas, steam, and electric customer charges and general usage for up to 36 months rather than 24 months. It also adds the number of heating degree days to the list of information that may be disclosed. The proposed amendments also include the Weatherization Assistance Program as an entity that may request the information set out in the rule.

24. We adopt the proposed language amendments to Rule 1105(c) as set out in the Recommended Decision.

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

25. We proposed amendments to Rule 1200(c) to clarify that we may allow parties to appear as *amicus curiae* to address legal issues, as well as policy issues. We determined that allowing parties to do so in certain circumstances may provide additional information in assisting the Commission in its decision-making process.

26. In his Recommended Decision, the ALJ stated that 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 ALJ recommended adopting the proposed rule.

27. CEO takes exception to the ALJ's findings regarding the role of *amicus* parties. CEO argues that while it has no recommendations regarding the language of proposed Rule 1200(c), it nevertheless takes the opportunity to express concerns over recent decisions that denied several parties status in proceedings, especially those organizations with ties to environmental and environmental justice organizations. CEO states that it opposes anything that funnels such organizations away from party status toward *amicus* status.

28. CEO is also concerned that the definition of *amicus curiae* proposed is too limiting. CEO argues that the term "issue" has a different and broader meaning in Commission contexts than a question of law under review by an appellate court. Instead, the term "issue"

could mean something as broad as a factual or legal argument, a situation, or even simply a concern. Under these meanings, to make a policy argument, *amici* might need to go beyond the issues raised by the parties. CEO provides the example that an *amicus* might wish to present an issue they have with an application which no party has raised. The proposed language would prohibit an *amicus* from presenting the issue. To the extent the proposed language is intended to keep *amicus* from raising policy or legal arguments based on the organization's interests in the proceeding that are not already raised by a party, CEO opposes the language.

29. CEO requests that the language requiring standards of conduct and candor applicable to *amicus* parties be removed. CEO finds the requirements confusing, redundant, and unnecessary. CEO would rather see this language in a separate section applicable to general standards of conduct for all parties appearing before the Commission.

30. CEO also opposes a 15-page limit for *amicus* briefs, and instead requests that they be allowed 30 pages as other parties to the proceeding.

31. If *amici* are allowed to make policy arguments, then CEO's concern that environmental and environmental justice organizations would be precluded from participating as parties is misplaced and speculative. This was not our intent in proposing the amendments to Rule 1200 and nothing we proposed would lead one to believe that the rule amendments are to serve as a funnel to move those groups to the sidelines in Commission proceedings.

32. Black Hills, in its response to the exceptions takes issue with CEO's exceptions. Black Hills takes the position that when weighing the competing interests, the Recommended Decision properly found that reasonable limitations are necessary on *amicus curiae* participation to ensure no abridgement of due process rights. Black Hills agrees with the Recommended Decision's reasonable limitations on *amicus curiae* participation and it is concerned that if

CEO's requests are adopted, then utilities such as Black Hills will have their fundamental due process rights denied. Black Hills also believes it is appropriate for *amicus curiae* to be held to the same or similar standards of conduct and candor as attorneys in proceedings before the Commission.

33. Regarding CEO's arguments that *amici* should not be limited to addressing only issues raised by the parties is untenable. By allowing *amici* to raise extraneous issues not directly germane to the proceeding would open proceedings to unintended consequences, improperly expanding the scope of the proceeding and unfairly requiring the main litigants to address those unanticipated issues directly affecting the litigants' due process rights. *Amici* are intended to participate for the limited purpose of providing legal or policy considerations for the Commission to consider within the scope of the proceeding. To allow *amici* to steer the proceeding away from the proponent's intended path for relief fails to serve the interests of the parties or the Commission.

34. We therefore deny CEO's exceptions and retain the currently effective language of Rule 1200(c).

Definition of Attorneys
Rule 1201

35. Rule 1201(a) was proposed to reinforce that parties appearing in proceedings must be represented by an attorney in good standing with the Colorado Supreme Court or as authorized under Rule 205.4 of the Colorado Rules of Civil Procedure. It also supports Rule 1200 in that it removes the requirement that *amicus curiae* must be represented by legal counsel.

36. In keeping with our decision regarding Rule 1200, we decline to amend Rule 1201(a) and retain the currently effective rule.

Rule 1202
Form and Content

37. The proposed modifications to Rule 1202 are to clarify that administrative staff are the creators of the captions for advice letter filings. The amendments also list the information to be included in those captions and clarify the information to be included in the title of the proceeding.

38. Rule 1202(f) sets forth the requirements for formatting written testimony in a Commission proceeding. Subsection (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 a hearing. Subsection (f)(V) sets forth in detail how testimony is to be properly marked for identification.

39. In addition, amendments are proposed to coordinate the requirements for the formatting of filed testimony with Rules 1410 through 1416, which are the proposed rules governing electronic hearing processes.

40. The Recommended Decision offered no additional amendments to the rule language as proposed in the NOPR. We therefore adopt the amended rule language as it appears in the NOPR.

Rule 1204
Filing

41. Rule 1204(a)(II) proposes requirements for E-filings captions. When filing through the E-Filings System, the filing party must enter the title of a filing in title case format,

i.e., the first letter of each word is capitalized, except for certain small words such as articles and short prepositions.

42. The proposed rule language was not addressed in the Recommended Decision and is therefore adopted as it appears in the NOPR.

Rule 1205
Service

43. Rule 1205 amendments are a general cleanup to make the rule more understandable. These amendments are adopted as the language appears in the NOPR.

Rule 1207
Utility Notice

44. The change to Rule 1207(b) corrects the statutory citation to § 40-3-104(1)(c)(I)(E), C.R.S.

45. Changes to Rule 1207(g) are to clarify language for the requirement for compliance filings. This is to include also, the definition of a compliance filing. This will make clear to parties what is expected when the Commission orders a compliance filing and the proper method of filing.

46. In the Recommended Decision, the ALJ added additional language requiring the filing of a notice in the underlying proceeding identifying the compliance filing.

47. We adopt the additional language proposed by the ALJ and therefore adopt the amended language as proposed in the NOPR with the additional language proposed by the ALJ to Rule 1207(g).

Rule 1208
Adoptions and Adoption Notices

48. Amendments to this rule address advice letter tariff filings requirements in the event a utility transfers ownership or control to another entity or changes its corporate name. In addition to the requirements of paragraph (a), the utility shall file a compliance advice letter and tariff pursuant to subparagraph 1210(c)(III), if applicable.

49. In the Recommended Decision, the ALJ added language that places a ten-day period of time in which a utility is to file a compliance advice letter and tariff.

50. We adopt the additional language proposed by the ALJ and therefore adopt the amended language as proposed in the NOPR with the additional language proposed by the ALJ to Rule 1208(b).

Rule 1210 (Rule 1305)
Tariffs and Advice Letters

51. These amendments are made pursuant to statutory additions and changes by Senate Bill (SB) 19-236. This amendment increases the amount of time for the Commission to extend a suspension period in an advice letter filing after the initial 120-day process. The amendment, comporting with statutory changes, alters the follow-on period which is currently 120 days to an additional 10 days or 130 days.

52. The ALJ adopted the rule language as proposed in the NOPR. We therefore adopt the language as proposed in the NOPR.

Rule 1211
E-Filings System

53. We proposed updating the e-filings rules to reflect current Commission business practices including e-mailing parties to a proceeding of an administrative change to information

submitted through the e-filing system. However, this is only to be done in the event it is determined that confusion could result by providing notice of the administrative change through e-filings. This process is proposed to be utilized when any administrative changes are deemed to be rather minor.

54. The proposed rule changes will also allow for administrative changes to captions and to clarify the process when filings are inadvertently made in an incorrect proceeding.

55. The proposed language was adopted by the Recommended Decision without comment. We adopt the amendments to the rule language as set forth in the NOPR.

Rule 1302(h)
Show Cause Proceedings

56. This substantive change to the Show Cause rule was intended to streamline what is now a somewhat cumbersome process. The proposed amendments were intended to streamline the process on the front end to capture all information in an actual proceeding.

57. The proposed show cause matter, when made by a party to a proceeding, is to be referred by rule to an ALJ and will require the Commission Director to automatically set a hearing date for the show cause proceeding. The proposed amendments will also shorten the time for the object of the show cause to respond or answer from 20 days to 10 days.

58. In addition, the rule changes will require the ALJ to issue an interim decision either granting the issuance of the show cause, or dismissing the proposed show cause based on the response of the object of the show cause within ten days of a show cause hearing. If the show cause order is granted and after the hearing, the ALJ is to send the matter back to the Commission for disposition on the merits of the show cause claim.

59. Rule 1302(f) was proposed to be modified to allow for an ALJ, in the first instance, to hear matters regarding pending utility discontinuances as part of a complaint case.

60. In response to various comments received during the rulemaking process, the ALJ amended language in several subsections to change the discovery response time to ten business days rather than calendar days, and emphasizing that an affidavit will be required in support of issuance of a proposed interim decision.

61. We find those changes appropriate and will therefore adopt the amendments to Rule 1302 as set forth in the NOPR with the changes proposed by the ALJ in the Recommended Decision.

Rule 1303
Applications

62. We proposed adding additional language to Rule 1303 to address the process of determining whether an application is "complete" under our processes. Rule 1303(c) sets forth the process to determine completeness of an application. Additional language was proposed to be included whereby the Commission may request further information in support of an application. This would be especially applicable if the application is considered extraordinary or in some manner impacts markets or other proceedings. It may also be utilized if the application proceeding has broader implications than a typical proceeding.

63. The request for further information to determine completeness of the application will suspend the current 15-day period in which the Commission must determine completeness or the application is automatically deemed complete. In that event, the statutory deadline for the Commission to issue a decision does not begin to run until the determination of completeness is made by the Commission based on the additional information.

64. No changes to the rule as provided in the NOPR were proposed in the Recommended Decision. We therefore adopt the amendments to Rule 1302 as set forth in the NOPR.

Rule 1304
Petitions

65. We found it necessary to clarify the language of Rule 1304(i) regarding the process for determining whether to go forward with a petition for declaratory order. The proposed language clarifies that the first step in assessing a petition for declaratory order is for the Commission, in the first instance, to determine whether to accept or reject the petition. If the petition is rejected, the matter is closed. Should the Commission accept the petition, the next step is to receive briefs from the petitioner (if not already included in the petition) and from any party opposing the relief sought in the petition.

66. Public Service commented that further clarification was necessary to show that the Commission does not intend to limit the basis upon which it may decide not to accept a petition. We clarify that this was not our intent, but merely language that clarifies the process for determining whether to go forward with a petition for declaratory order. Therefore, we adopt the amended language as provided in the NOPR.

Rule 1305
Rejection or Suspension of Proposed Tariffs, Price Lists, or Time Schedules

67. The proposed rule change adds language that indicates during the initial notice period, any person may file a written protest against a proposed tariff, price list, or time schedule.

68. As no amendments to the language as provided in the NOPR are indicated in the Recommended Decision, we adopt the language as set forth in the NOPR.

Rule 1306
Rulemaking Proceedings

69. Language is proposed in this rule to make clear that the Commission has discretion to accept or reject petitions for rulemaking from any party.

70. As no amendments to the language as provided in the NOPR are indicated in the Recommended Decision, we adopt the language as set forth in the NOPR.

Rule 1400
Motions

71. During the public comment period, CEO proposed 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. 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. OCC proposed establishing a seven-day response time to motions for permissive intervention.

Rule 1401
Intervention

72. Pursuant to legislative changes initiated pursuant to SB19-236, the language of the rule was proposed to be modified to allow for communities affected by qualified retail utilities Clean Energy Plan filings to seek to intervene in those proceedings. The rule further indicated that those communities must be represented by legal counsel (*See*, Rule 1401(d)). It was also proposed to amend Rule 1401(b) to allow responses to interventions by right regarding the party's legally protected interest, or the party's request for hearing.

73. The ALJ found that a proposal to prohibit a party from being permitted to challenge a statutory claim of right under 1401(b) would not be adopted. The ALJ found that CEO demonstrated no reasonable basis for such a prohibition to challenge the claim as being within the scope of the statutory right. The ALJ pointed out that historically, while not specifically proscribed in a 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 ALJ amended the rule to expressly incorporate this best practice.

74. CEO and WRA, in their respective exceptions to the Recommended Decision, take issue with the ALJ's findings concerning Rule 1401. While each party's arguments run into each of the subsections of 1401, they nonetheless express a common theme.

75. WRA takes the position that if a party contests an Interim Decision denying intervention, it would put the ALJ in the position of "gatekeeper" for interim order appeals, which is problematic. According to WRA, interim decisions denying intervention are "significant ruling[s] regulating the future course of the proceeding"[1] and therefore warrant appropriate treatment and an opportunity for timely review by the full Commission. Decisions denying intervention are distinguishable from other types of interim decisions, in that they are a *de facto* final agency action for the entity seeking intervention. WRA posits that a decision denying intervention operates as a final decision because it is "conclusive of the issue presented."[2]

[1] WRA Exceptions at p. 3.

[2] *Id.*

76. WRA goes on to argue that an order denying intervention is the consummation of the agency's decision-making process as to the issue at hand. An organization denied intervention is prohibited from further participation as a party to the proceeding, marking the consummation of their interests in the proceeding. Second, an order denying intervention is an action that determines the "rights or obligations" of the organization seeking intervention. Upon issuance of an order addressing motions for permissive intervention, organizations seeking intervention either are granted the right to participate fully in the proceeding by presenting evidence, promulgating discovery, and cross-examining witnesses, or they are denied these rights. Because interim orders denying intervention have the effect of a final agency action for the organizations seeking leave to intervene, WRA takes the position that the existing approach is inappropriate for these types of Commission orders.

77. As with CEO, WRA notes several Commission decisions in which environmental groups were denied intervention in proceedings. WRA argues that the existing process creates unnecessary confusion and delay and creates the very real risk of depriving parties of their due process rights. WRA recommends amendments to the Commission's existing P&P Rules to clarify and streamline review of interim decisions, including interim decisions denying motions to intervene.

78. CEO takes no issue with the proposed Rule 1401(b) language regarding intervention as of right and challenges to that request. However, it seeks clarification that the statutory right to intervene applicable to it and OCC are allowable only to the extent that a party allege CEO or OCC are operating outside their statutory authority.

79. We agree with the ALJ that the current process has not proven to be a denial of a parties' due process rights. A party may seek to have the interim decision denying intervention

immediately appealed to the Commission for review. The language of the rule is straightforward. To adopt the parties' recommendations would require the Commission to basically interfere with a proceeding once it's been assigned to an ALJ. When a party requests reconsideration of an interim decision denying intervention, the proponent of the proceeding, as well as any other party to the proceeding would most likely file responses. This would result in additional delays to the litigation, which WRA identified as a concern in the first place. However, WRA's proposal to shorten timelines has merit. We therefore adopt the language as proposed in the NOPR with the amendments suggested by the ALJ, including language in Rule 1401(c) that requires a party to respond to a motion for permissive intervention within seven days after service of the motion, or such lesser or greater time as the Commission may allow.[3] The remaining issues surrounding Rule 1401(c) are addressed below.

80. Regarding Rule 1401(c), several parties sought to expand the rulemaking regarding this Rule. For example, during the public comment period and hearing, regarding Rule 1401(c), CEO proposed clarification of the term "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. CEO also contends that the rule should specify that environmental interests are tangible interests.

81. The ALJ addressed those concerns in stating that the Commission clearly incorporate 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

[3] The exceptions of WRA and CEO in addressing Rule 1401 addressed the rule in its entirety in places, rather than specifically by subsection. While we address some issues raised regarding 1401(c) in the analysis of Rule 1401(b), we nonetheless note that the attached red-lined rules sort out the final Commission determinations.

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

82. As to including an environmental interest as a tangible interest, the ALJ found that particularly in light of the discretionary nature of permissive intervention, further specificity was not shown to be necessary to modify the rule to allow intervention, nor would the rule require intervention even if amended. In recounting past Commission decisions concerning permissive interventions, the ALJ noted that the need to balance costs and whether allowing additional parties into a proceeding will materially assist the Commission in reaching a just and reasonable result, is as relevant now as in the past. Therefore, the rule was adopted by the ALJ as proposed in the NOPR.

83. The ALJ cited to *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) for the proposition that when the interests of an absentee party are identical to one of the parties to a proceeding, or if a party to the proceeding is charged by law with representing the absentee party's interest, a "compelling showing should be required to demonstrate why this representation is not adequate." *Id*. Applying this standard, the ALJ concluded that the standards specified in the rules must be applied based upon the facts and circumstances of each proceeding. As such, the ALJ declined to amend the language of Rule 1401(c) as requested.

84. Exceptions to the Recommended Decision regarding Rule 1401(c) were filed by WRA and CEO as discussed above. In addition to those arguments, additional arguments were raised as indicated in the following discussion.

85. WRA wishes to add language to both subsections that would include "motions requesting reconsideration of an interim decision denying intervention,"[4] consistent with its arguments above. WRA argues that its proposed changes to Rules 1400(b) and (c) would ensure motions seeking reconsideration of an interim decision denying intervention are timely considered.

86. WRA expresses concern with regard to the Commission's denial of its interventions previously. According to WRA, these decisions are a significant departure from the Commission's long-standing practice, and are not in response to any change in the statutory intervention standards or rules governing intervention. WRA requests the Commission take this opportunity to restate its long-standing policy of recognizing environmental protection as a tangible interest that can serve as the basis for permissive intervention in Commission proceedings. One method WRA has in mind is to indicate that "pecuniary or tangible interests" include "environmental or environmental justice interests consistent with state policy."[5] In the alternative WRA suggests the Commission list examples of pecuniary or tangible interests. WRA states that it is not seeking to substantively change the intervention standard, but rather preserve the long-standing *status quo*.

87. According to WRA, categorically excluding environmental protection from the set of recognized tangible interests that can serve as the basis for intervention would deprive the Commission of robust evidentiary records upon which to base its decisions. Allowing conservation organizations with demonstrated tangible interests in environmental protection to intervene in Commission proceedings ensures that evidence and information related to

[4] WRA Exceptions at p. 8. (Emphasis Omitted)

[5] *Id.* at p. 10. (Emphasis Omitted)

environmental protection and emissions impacts may be fully considered and evaluated by the Commission. Thus, WRA urges the Commission take this opportunity to reaffirm its long-standing position that environmental protection interests are tangible interests, and that those interests may warrant intervention in Commission proceedings on a case-by-case basis.

88. CEO believes that it is a long-standing Commission practice to consider State policies and policy goals, among other factors, when reaching decisions and that parties routinely include policy discussions in their comments and testimony. It cites to the Electric Resource Plan and Renewable Energy Standard plan proceedings.

89. CEO suggests that it is not obvious which proceedings will have environmental policy issues raised in them. Further, it is not reasonable to allow some parties with interests in addition to policy interests to present policy arguments, while prohibiting groups existing specifically to advocate for policy goals from participating on equal footing as intervening parties. CEO argues this would undermine policy organizations' ability to respond to policy arguments and to advocate for their own policy goals, and would unfairly advantage the policy goals of organizations with both policy concerns and financial interests.

90. CEO further argues that allowing policy interests to form a sufficient basis for permissive intervention is reasonable based on the "tangible interests" standard the Commission has adopted. CEO takes the position that environmental interests, such as an interest in ensuring that utilities adopt policies to increase adoption of energy efficiency, meet these notions of tangible interests. CEO argues that environmental and environmental justice interests are tangible in the context of the Commission's mission which includes serving the economic, environmental, and social values of the state.

91. We are not persuaded by CEO's and WRA's arguments to include environmental concerns and environmental justice interests as a standard under "tangible interests" in granting permissive interventions. To do so would certainly raise opposition from parties with other interests not specifically delineated in Rule 1401(c). This in turn could raise arguments of discrimination by including CEO's and WRA's specific definitions of "tangible interest" without defining other interests that would qualify as "tangible." We do not find CEO's and WRA's arguments compelling and see no reason to alter the language of 1401(c) as the parties propose.

92. We agree with the ALJ's findings, especially his reference to the basic, settled legal principle that when the interests of an absentee party are identical to one of the parties to a proceeding, or if a party to the proceeding is charged by law with representing the absentee party's interest, a "compelling showing should be required to demonstrate why this representation is not adequate."[6]

93. Therefore, we deny WRA's and CEO's exceptions regarding Rule 1401(c) because what they propose creates a statutory right the Legislature simply did not intend, in addition to the discrimination problems we discussed previously.

94. New Rule 1401(d) was proposed whereby communities affected by a qualified retail utility's clean energy plan pursuant to § 40-2-125.5(5)(f), C.R.S., may move to intervene in proceedings set forth in statutory language. The rule specifies that such communities must be represented by an attorney.

95. CEO commented that the statutory language provides an intervention as of right status to communities. The ALJ found that while the Legislature incorporated a broad policy

[6] Decision No. R19-1022 at ¶ 112.

declaration in § 40-2-125.5(5)(f), C.R.S., CEO offers no basis to support a statutory creation of intervention as of right for those communities. The ALJ referred to language in the statute that states that communities "shall be presumed to have standing in a proceeding"[7] and held that there is no basis to equate that presumption with a right.

96. The ALJ further stated that 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. The ALJ was not convinced that CEO presented a basis to narrow the definition of communities and organizations representing those communities. The ALJ went on to state the statutory language does not define or limit affected communities in terms of interests, geography, or otherwise. The ALJ determined that CEO had not demonstrated that the rules and existing procedures regarding permissive intervention require further amendment at this time and adopted the rule as proposed in the NOPR.

97. In its exceptions, CEO again argues it wants language to appear that communities affected by a QRU's clean energy plan have an intervention of right status. In addition, CEO requests that nongovernmental organizations demonstrate they represent a community in order to intervene on that community's behalf.

98. CEO argues that the language of § 40-2-125.5(5)(f), C.R.S., requires the Commission to grant standing to a community affected by a clean energy plan intervention by right in the proceeding concerning approval of that clean energy plan because the Legislature explicitly recognized that such a community has a tangible and pecuniary interest in that plan, forming the basis of the presumption of standing, which can only be ready to be equivalent to the

[7] *Id.* at ¶ 116.

right to intervene. According to CEO, no other reasonable interpretation of this statutory language exists.

99. We agree with the ALJ's rationale here. We agree that the statutory language, while not completely clear, nonetheless does not define or limit affected communities in terms of interests, geography, or otherwise. Therefore, we deny CEO's exceptions here.

Rule 1404
Referral to Hearing Commissioner or Administrative Law Judge

100. This rule change was also pursuant to legislative changes initiated pursuant to SB19-236. The amended language will state that the law (now) requires that all matters to come before the Commission, in the first instance, are to be heard by the Commission rather than an ALJ, unless the Commission assigns the matter to an ALJ or Hearing Commissioner by rule, written order, or minute entry. This language will also be referenced in Rule 1302 as it applies to formal complaint proceedings.

101. Rule 1404(b) was proposed to be clarified to indicate that all financial show cause proceedings and insurance show cause proceedings in Transportation matters are to be heard in the first instance by an ALJ in keeping with current practices.

102. Rule 1404(d) was proposed to be amended to acknowledge that certain routine administrative transportation matters may be delegated to Transportation Staff. Those matters will be further defined in an upcoming Transportation rulemaking proceeding.

103. No amendments were added by the ALJ other than a request to indicate that subsection (b) referrals of show cause proceedings under Rule 4 CCR 723-6-6009 of the Commission's Rules Regulating Transportation by Motor Vehicle are heard by ALJs. We do not

see a need to amend the language of the proposed Rule, but we point out that Rule 6009 matters are to be referred to an ALJ in the first instance.

Rule 1405
Discovery and Disclosure of Prefiled Testimony

104. The ALJ amended Rule 1405(b) to provide that a party is to serve discovery responses on direct and answer testimony, and objections, if any, within ten business days from service of a request. This language was added at the urging of Public Service. In addition, with rebuttal and cross-answer testimony, a party is to serve discovery responses within seven business days of a request. Finally, the ten-day period in which to serve discovery responses and objections in a proceeding with no statutory time period for a Commission decision or when the applicable time limits have been waived is also amenable to us.

105. Black Hills opines that the ALJ's findings are well reasoned and supported. It states that the ALJ found that adopting the change to business days "will more accurately align with the time reasonably available for preparation of a response,"[8] and that adopting the change will avoid potential manipulation of weekends or holidays. We agree and therefore, we adopt the amendments to Rule 1405(b) and (c) as set out in the Recommended Decision.

106. Rule 1405(f) was amended pursuant to the NOPR to include a sentence that "[d]iscovery requests concerning a utility's regulatory asset (liability) with a life over ten years are only restricted in time by the life of the asset or the end of the life of the depreciation for that asset." The ALJ removed that sentence based on comments discussing concern as to the scope of the proposal. Parties commented that the provision cannot be limited to a considered narrow scope of proceeding. As a result, it could potentially have an unintended drastic impact upon the

[8] Black Hills' Response at p. 3.

scope of permissible discovery. Further, commenters suggest that maintaining such records in a manner to permit compliance with discovery obligations could come at a significant cost.

107. We disagree with the comments and the ALJ's amendments to Rule 1405(f). We find ten years to be an adequate amount of time. OCC filed exceptions to the discovery procedures as set out in proposed Rule 1405(f). Because utilities have a distinct advantage when it comes to the amount of information they have and because utilities have adequate staffing and resources to prepare rate cases compared to the resources of the OCC and Trial Staff, OCC supports the proposed language change to ten years for when a discovery request is presumptively deemed to be not reasonably calculated to lead to the discovery of admissible evidence, instead of four years which is currently contained in the rule. Thus, the OCC requests that the Commission adopt Rule 1405 as proposed in the NOPR.

108. We agree with OCC that we see no burden to utilities by implementing a ten-year period prior to the filing of the application for discovery requests. We find that a period shortened to four years may leave intervenors with inadequate information on which to base their respective cases. Therefore, we adopt the language of Rule 1405(f) as proposed in the NOPR.

Rule 1408
Settlements

109. The proposed amendments to this rule were intended to clarify that settlement agreements filed with the Commission are to include attestations regarding the applicability of relevant laws. In addition, settlement agreements are to state and explain why the agreement is in the public interest, and include supporting testimony from the settling parties explaining how the public interest is met.

110. The ALJ amended our proposed Rule language without comment. Instead of requiring that parties to a settlement **must** attest the terms and conditions are in accordance with applicable laws, the ALJ softened the language to read that "those supporting approval of a settlement agreement are encouraged to attest that they are not aware of a settlement agreement's violation of any applicable laws."

111. We will adopt the ALJ's softer language; however, we may revisit this language should it be determined that the ALJ's language fails to lead to the outcomes that led us to amend the rule language in the first place.

Rule 1502
Interim Decisions

112. In comments to the NOPR, CEO proposed 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. The Conservation Commenters proposed specific time periods for ruling upon a motion to certify for interim appeal and that such ruling should be immediately appealable. Striking the Commission reference at the beginning of Rule 1502(d) is also proposed as the process would not apply to Commission decisions.

113. The ALJ denied those requests for modification of Rule 1502(d), finding that it is important for ALJs to be able to efficiently manage referred matters. The ALJ noted that the Commission proposed no modification and the current rule has proven adequate.

114. WRA, in its exceptions, reiterates its request that the Commission make certain changes to Rule 1502. Specifically, WRA requests Rule 1502(d) be amended to clarify that

interim decisions denying intervention are self-certified and thus immediately appealable to the Commission, as follows:

> (d) 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]. Any interim decision denying a motion for permissive intervention shall be issued as a certified decision that may be immediately appealed to the Commission under Rule 1502(b).[9]

115. According to WRA, having a requirement to certify an interim decision denying intervention in the first instance will make that decision immediately appealable to the full Commission. This will prevent unnecessary motions work for the entity seeking intervention, other parties in the proceeding, and the ALJ or Hearing Commissioner presiding over the proceeding.

116. WRA also states that it is sensitive to the Commission's concern that review of interim orders not disrupt the orderly disposition of the proceeding. Therefore, WRA also suggests adding language to Rule 1502(b) that places reasonable deadlines on the process, in order to avoid unnecessary delay, as follows:

> (b) Interim decisions shall not be subject to exceptions or applications for RRR, except that any party or rulemaking participant aggrieved may challenge the matters determined in an interim decision in exceptions to a recommended decision or in an application for RRR of a Commission decision. A party or rulemaking participant may file a motion for modification of an interim decision issued by the Commission upon good cause shown. Such good cause may include, without limitation, establishing that the deferral of Commission reconsideration of the interim decision's rulings will result in the practical denial of a person's substantive or procedural rights or will cause unreasonable delay in the completion of the proceeding. A motion for reconsideration of an interim decision

[9] WRA Exceptions at p. 6. (Emphasis in Original)

> shall be filed no more than 7 days after the date of issuance of the interim decision.[10]

CEO agrees with WRA's proposals.

117. The proposals here tie in with WRA's and CEO's arguments raised in Rule 1401 above. We find it problematic to make interim decisions denying interventions immediately appealable to the Commission due to interference by the Commission in ongoing ALJ proceedings. We agree with the ALJ that the language is not necessary. Therefore, we deny WRA's and CEO's exceptions.

D. Conclusion

118. Attachment A of this Decision represents the rule amendments adopted by this Decision with modifications to the prior rules as indicated in redline and strikeout format.

119. Attachment B of this Decision sets forth the rule amendments adopted by this Decision in a final format.

120. It is found that the good cause exists to adopt the proposed rules attached to this Decision as Attachment A and Attachment B.

II. ORDER

A. The Commission Orders That:

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

> https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=19R-0483ALL.

[10] *Id.* at p. 7. (Emphasis in Original)

2. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Decision.

3. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETINGS February 26, 2020 and March 4, 2020.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

Commissioners

COMMISSIONER FRANCES A. KONCILJA'S TERM EXPIRED MARCH 13, 2020.