

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20AL-0049G

IN THE MATTER OF ADVICE LETTER NO. 961 FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO INCREASE RATES FOR ALL NATURAL GAS SALES AND TRANSPORTATION SERVICES TO BECOME EFFECTIVE MARCH 7, 2020.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING IN PART AND DENYING IN PART
MOTIONS TO MODIFY DECISION NO. R20-0208-I**

Mailed Date: April 22, 2020

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I. STATEMENT

1. This Interim Decision grants in part and denies in part the “Unopposed Exceptions and Motion of International Brotherhood of Electrical Workers Local # 111 to Set Aside or Modify” Interim Decision No. R20-0208-I, filed on April 3, 2020 by the International

Brotherhood of Electrical Workers Local # 111 (Local 111). This Interim Decision also grants in part and denies in part the “Unopposed Exceptions and Motion of AARP to Set Aside or Modify Decision No. R20-0208-I,” filed on April 6, 2020 by AARP. The Administrative Law Judge (ALJ) also denies as moot the requests by Local 111 and AARP to certify this Interim Decision as immediately appealable to the Public Utilities Commission (Commission), pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

A. Procedural History

2. On February 5, 2020, Public Service Company of Colorado (Public Service) filed with the Colorado Commission, Advice Letter No. 961-Gas, accompanying tariff sheets, and supporting direct testimony and attachments. This filing is a combined Phase I and Phase II rate case proceeding.

3. The procedural history of this Proceeding is set forth in Decisions previously issued herein and is repeated here as necessary to put this Decision into context.

4. The effective date of the tariff sheets filed with Advice Letter No. 961-Gas have been suspended for a total of 250 days until November 12, 2020, pursuant to § 40-6-111(1)(b), C.R.S. (2019).¹

5. Notices of interventions by right were acknowledged for Trial Staff of the Colorado Public Utilities Commission (Staff), filed on February 28, 2020; the Colorado Office of

¹ See Decision No. C20-0112 (mailed on February 20, 2020) and Decision No. R20-0145-I (mailed on March 5, 2020).

Consumer Counsel (OCC), filed on March 9, 2020; and the Colorado Energy Office CEO), filed on March 23, 2020.²

6. Motions for permissive intervention were filed: on March 6, 2020 by Atmos Energy Corporation (Atmos); on March 11, 2020 by the Federal Executive Agencies (FEA); on March 16, 2020 by Energy Outreach Colorado (EOC); on March 18, 2020 by Black Hills Colorado Gas, Inc., doing business as Black Hills Energy (BH Colorado Gas); on March 20, 2020 by WoodRiver Energy, LLC (WoodRiver); on March 23, 2020, by Colorado Natural Gas (CNG); and on March 23, 2020 by Climax Molybdenum Company (Climax). Petitions for Leave to Intervene were filed on March 12, 2020 by AARP and by the Local 111.

7. On March 25, 2020, Public Service filed a response to the filed motions or petitions for permissive intervention. Public Service stated that it,

... does not oppose any of the Motions due to the potential intervenors' stated substantial pecuniary or tangible interest in the outcome of this proceeding as required by Commission Rule 1401(c). However, the Company's position on intervention is not intended to indicate agreement with any individual substantive position taken in the Motions...."³

8. Decision No. R20-0208-I (mailed on April 1, 2020) granted motions for permissive intervention filed on March 6, 2020 by Atmos; on March 11, 2020 by the FEA; on March 16, 2020 by EOC; on March 18, 2020 by BH Colorado Gas; on March 20, 2020 by WoodRiver; on March 23, 2020, by CNG; and on March 23, 2020 by Climax.

9. Decision No. R20-0208-I also denied the Petition for Leave to Intervene filed by AARP on March 12, 2020, and the Petition for Leave to Intervene filed on March 12, 2020 by Local 111, on the grounds that each Petition failed to satisfy the requirements in Rule 1401(c) of

² See Decision No. R20-0145-I; mailed on March 5, 2020); Decision No. R20-0179-I (mailed on March 17, 2020); and Decision No. R20-0208-I (mailed on April 1, 2020), respectively.

³ Public Service Response, at page 2.

the Rules of Practice and Procedure, 4 CCR 723-1, to demonstrate adequately that the movants should be granted permissive interventions.⁴ AARP and Local 111 were, however, *each* granted leave to participate in this Proceeding as an *amicus curiae*, pursuant to Rule 1200(c) of the Rules of Practice and Procedure, 4 CCR 723-1.

10. The Parties to this Proceeding are Public Service, Staff, OCC, CEO, Atmos, EOC, FEA, BH Colorado Gas, WoodRiver, CNG, and Climax.

11. In the late afternoon of Friday April 3, 2020, Local 111 filed its “Unopposed Exceptions and Motion of IBEW Local 111 to Set Aside or Modify” Decision No. R20-0208-I (Local 111’s Motion to Modify), arguing that Decision No. R20-0208-I should be modified to allow its permissive intervention, but if denied, requesting that the ALJ certify his decision as immediately appealable to the full Commission.⁵ After conferral with counsel for the Parties, plus AARP, counsel for Local 111 reported that, while BH Colorado Gas did not respond, all other Parties either stated no position or did not oppose the motion. Local 111 asked that response time to the motion be waived.⁶

12. In the late afternoon of Monday April 6, 2020, AARP filed its “Unopposed Exceptions and Motion of AARP to Set Aside or Modify” Decision No. R20-0208-I (AARP’s Motion to Modify), arguing that Decision No. R20-0208-I should be modified to allow its permissive intervention, or in the alternative, that Decision No. R20-0208-I be certified as

⁴ Rule 1401(c), 4 CCR 723-1, requires requests for permissive intervention to be by motion, not petition. The petitions for leave to intervene filed by AARP and Local 111 were construed by the ALJ as motions for permissive intervention.

⁵ Rule 1502 is quoted in its entirety in Paragraph 21 on page 9, *infra*.

⁶ Local 111 Motion to Modify, at pages 1 and 2. Local 111 only specifically identifies the position of Public Service, which does not oppose the motion and wants a timely resolution of the motion. Local 111 does not specifically identify the individual positions of the other Parties.

immediately appealable to the full Commission.⁷ After conferral with counsel for the Parties, plus Local 111, counsel for AARP reported that counsel for the other parties either stated no position or did not oppose the motion.⁸ AARP did not request that response time to the motion be waived.

B. Permissive Intervention Standards.

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

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. ... The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period.

(Emphasis added.)

14. Rule 1401(c) is similar to Colorado Rule of Civil Procedure 24(a), which provides that, even if a party seeking intervention has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties.⁹ This principle is true even if the party seeking intervention will be bound by the case's judgment.¹⁰ The test for

⁷ AARP Motion to Modify, at pages 1, 7, and 8. See Rule 1502(d) quoted in Paragraph 21 on page 9, *infra*.

⁸ AARP Motion to Modify, at page 2. AARP states that EOC and Local 111 support the motion, but AARP does not specifically identify the individual positions of the other Parties.

⁹ *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n.*, 214 P.3d 451, 457 (Colo. App. 2008).

¹⁰ *Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P.2d 494, 495-496 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city).

adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative.¹¹

15. Significantly, Rule 1401(c) requires additional discussion for certain motions for permissive intervention:

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

(Emphasis added.)

Pursuant to § 40-6.5-104(1), C.R.S., the OCC has a statutory mandate to represent the interests of residential, agricultural, or small business consumers in rate cases. Pursuant to § 40-6.5-104(2), C.R.S., the OCC may choose to represent one class of consumers. “[I]f there is a party charged by law with representing [the individual’s] interest, then a compelling showing should be required to demonstrate why this representation is not adequate.”¹²

16. Pursuant to Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1, the person seeking leave for permissive intervention bears the burden of proof to demonstrate adequately that they have satisfied the requirements of Rule 1401(c).¹³

¹¹ *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

¹² *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

¹³ Decision No. R20-0073-I (mailed on January 30, 2020), ¶ 25 at page 10, in Consolidated Proceeding Nos. 19F-0620E and 19F-0621E (Denying motions for permissive intervention for failure to satisfy the standards required by Rule 1401(c)). The ALJ finds that the Commission’s reasoning and analysis in this Commission decision, as well as in all other Commission decisions relied upon in this Interim Decision, are well-reasoned and persuasive.

C. Decision No. R20-0208-I.

17. Applying the foregoing legal standards for permissive intervention, in Decision No. R20-0208-I the ALJ carefully and fully considered the meager arguments made by Local 111 and AARP in their initial Petitions. The ALJ was also mindful of the Commission's admonition that, in ruling on motions for permissive intervention, the ALJ must determine whether the movant has satisfied its burden of proof in its initial intervention pleading to show sufficiently that it has a tangible or pecuniary interest, to explain why its concerns are not addressed by the OCC (if required), and to connect its alleged substantial interest to the case at hand.¹⁴ In Decision No. R20-0208-I, the ALJ concluded, for the analyses and reasons stated therein, that Local 111 and AARP each failed in their burden of proof to demonstrate that each had satisfied all the requirements of Rule 1401(c), and therefore, the ALJ denied their Petitions.¹⁵

18. In concluding that Local 111 and AARP had failed to satisfy their burdens of proof to demonstrate that each met all the required standards of Rule 1401(c) and in denying their initial Petitions, the ALJ considered and evaluated all factual and legal arguments presented in the initial Petitions, including all of those arguments not specifically addressed in Decision No. R20-0208-I.

¹⁴ See Decision No. C19-0757, ¶¶ 11, 21, 25, and 26 at pages 5, 9, 10, and 11 (mailed on September 18, 2019) in Proceeding No. 19AL-0290E, affirming the ALJ's denial of permissive intervention for failure to satisfy requirements of Rule 1401(c).

¹⁵ Decision No. R20-0208-I, ¶¶ 49 through 56 at pages 18 through 21. Neither Local 111 nor AARP argued specifically that each had a substantial pecuniary or tangible interest in the outcome of this proceeding or connected their allegations of interest to this significant requirement of Rule 1401(c). By contrast, in all of the motions for permissive intervention granted by Decision No. R20-0208-I, counsel for those parties argued specifically that their clients had a substantial pecuniary or tangible interest in the outcome of this proceeding and connected their arguments to this requirement and to this Proceeding.

II. FINDINGS AND CONCLUSIONS

A. Findings on the Motions to Modify.

19. Both Local 111 and AARP call their pleadings “Exceptions,” which is legally and procedurally incorrect. Both cite § 24-4-105(14)(II), C.R.S.,¹⁶ a statute in the State Administrative Procedure Act (APA) that governs the filing of exceptions to an agency’s initial decision within 30 days after service of the initial decision on the parties.

20. However, the Colorado Public Utilities Law, not the APA, applies to exceptions to a recommended decision by a Commission ALJ. Indeed, § 40-6-101(1), C.R.S., provides that:

The commission shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice. All of the provisions of article 4 of title 24, C.R.S., shall apply to the work, business, proceedings, and functions of the commission, or any individual commissioner or administrative law judge; but where there is a specific statutory provision in this title applying to the commission, such specific statutory provision shall control as to the commission.

(Emphasis added)

Since § 40-6-101(2), C.R.S., specifically applies to exceptions filed to a Commission ALJ’s recommended decision, § 24-4-105(14)(II), C.R.S., does not apply to filing exceptions to an ALJ’s recommended decision.¹⁷

¹⁶ Section 24-4-105(14)(a)(II), C.R.S., states: “With regard to initial decisions regarding agency action of any other agency, by filing exceptions within thirty days after service of the initial decision upon the parties, unless extended by the agency or unless review has been initiated upon motion of the agency within thirty days after service of the initial decision.” In the Colorado Public Utilities Law, an ALJ’s recommended decision is the ALJ’s “initial decision,” while an interim decision is not. See § 40-6-109(2), C.R.S., (“[T]he administrative law judge or individual commissioner, after the conclusion of said hearing, shall promptly transmit to the commission the record and exhibits of said proceeding together *with a written recommended decision....*” (Emphasis added.)

¹⁷ The relevant part of § 40-6-109(2), C.R.S., provides that: “[T]he parties ... may file exceptions ... [to the recommended decision]; but if no exceptions are filed within twenty days after service upon the parties, or within such extended period of time as the commission may authorize in writing ..., or unless such decision is stayed within such time by the commission upon its own motion, such recommended decision shall become the decision of the commission and subject to the provisions of section 40-6-115.” Rule 1501 of the Rules of Practice and Procedure, 4 CCR 723-1, addresses the filing of exceptions to an ALJ’s recommended decision.

21. Even if § 24-4-105(14)(II), C.R.S., did apply to an ALJ's recommended decision in a Commission proceeding, which it does not, that statute would not apply here, because Decision No. R20-0208-I was an interim decision, not a recommended decision. Rule 1502 of the Rules of Practice and Procedure, 4 CCR 723-1, cited by both Local 111 and AARP, governs how an interested person may seek reconsideration of an ALJ's interim decision denying their motion for permissive intervention. Indeed, the relevant paragraphs of Rule 1502 provide that:

Rule 1502, Interim Decisions.

- (a) Interim decisions are issued after ... a proceeding is opened by Commission decision or otherwise, other than a decision that may become a final decision of the Commission.
- (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. ...
- (c) *Any person aggrieved by an interim decision may file a written motion with the presiding officer entering the decision to set aside, modify, or stay the interim decision.*
- (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].*

(Emphasis added.)

22. Local 111 and AARP each seeks to set aside the denial of its Petition for permissive intervention, based upon additional arguments that were not included in its initial Petition.

23. The Commission has the discretion to grant or to deny permissive interventions.¹⁸ When an ALJ reviews an initial request for permissive intervention, the ALJ exercises his or her

¹⁸ *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316, 327 (Colo. 1999).

sound discretion in deciding whether to grant or deny the request.¹⁹ That discretion is based upon the ALJ's determination of whether the person seeking permissive intervention has adequately satisfied the requirements of Rule 1401(c). Pursuant to Rule 1500, 4 CCR 723-1, the person seeking permissive intervention must satisfy his or her burden of proof to demonstrate that their motion complies sufficiently with the requirements of Rule 1401(c).²⁰

24. Despite the deficiencies in Local 111's and AARP's initial intervention pleadings to demonstrate sufficiently that each had satisfied its burden of proof to demonstrate the requirements of Rule 1401(c) were met, the ALJ will nevertheless address the additional arguments raised anew by Local 111 and AARP.

25. Local 111 and AARP each argue that they have been allowed to intervene permissively in past Commission proceedings, including the most recent Public Service gas and electric rate cases. They claim that their permissive interventions in those previous cases were granted on the basis of pleadings substantially similar to the Petitions filed, but denied, in this Proceeding.²¹ However, past interventions by a movant in previous proceedings do not entitle the movant to permissive intervention in a subsequent case.²²

26. The Colorado Supreme Court has consistently held that the Commission's prior decisions cannot be applied as binding precedent in future proceedings, even in those involving

¹⁹ Decision No. C19-1024 (mailed on December 19, 2019) ¶ 20 at page 8 in Proceeding No. 19A-0409E, affirming ALJ's denial of permissive intervention for failure to satisfy the requirements of Rule 1401(c); Decision No. C19-0757, ¶ 19 at page 8 in Proceeding No. 19AL-0290E, affirming the ALJ's denial of permissive interventions for failure to satisfy the requirements of Rule 1401(c).

²⁰ Decision No. R20-0073-I (mailed on January 30, 2020), ¶ 25 at page 10, in Consolidated Proceeding Nos. 19F-0620E and 19F-0621E (Denying motions for permissive intervention for failure to satisfy the standards required by Rule 1401(c)).

²¹ Local 111's Motion to Modify, at pages 2 and 3; AARP's Motion to Modify, ¶ 1 at pages 2 and 3.

²² Decision No. R19-0689-I (mailed on August 15, 2019), ¶¶ 11, 12, 21, 25, 30, 32, and 66 at pages 3-4, 5, 7-8, and 16; affirmed by the Commission in Decision No. C19-0757, ¶¶ 12, 21, 22, 26, and 27 at pages 9-11, in Proceeding No. 19AL-0290E.

the same utility. In other words, the doctrine of *stare decisis* does not apply to Commission decisions. The Commission's decision in each new proceeding must be based upon the record in the new case.²³ Therefore, Commission or ALJ decisions in past cases are not binding precedent and whether Local 111's and AARP's request to intervene in other cases was granted – including in Public Service's recent electric and gas rate cases – does not compel the same result in the instant Proceeding. Motions for permissive intervention in each case must satisfy the required standards of Rule 1401(c) and stand or fail on their own individual merits in the new case.²⁴

27. Moreover, the ALJ has reviewed the interim decisions granting permissive intervention in the recent Public Service electric and gas rates cases cited by Local 111 and AARP. Neither of those decisions engaged in any rigorous analysis comparing the alleged interests and arguments of Local 111 and AARP for permissive intervention against the required standards of Rule 1401(c).²⁵ More important, these past decisions are not binding precedent to require the ALJ to grant permissive interventions here, even if based upon similar deficient pleadings. These past decisions do not require granting the Motions to Modify or the requested permissive interventions. This argument is rejected.

²³ See *Colorado Office of Consumer Counsel v. Public Service Company*, 877 P.2d 867, 876 (Colo. 1994); *Colorado-Ute Electric Ass'n. v. Public Util. Comm'n.*, *supra*, 602 P.2d at 865 (Colo. 1979); *B&M Services, Inc. v. Public Util. Comm'n.*, 429 P.2d 293, 295 (Colo. 1967).

²⁴ Decision No. R19-0801-I in Proceeding No. 19A-0409E issued September 27, 2019, ¶ 33 at page 13.

²⁵ See Decision No.R17-0663-I, ¶ 6 and Ordering Paragraphs 1.a) and g) at pages 3, 7, and 8 (mailed on August 15, 2017) in Proceeding 17AL-0363G; and Decision No. C19-0621-I, ¶¶ 1, 6, 16, and 29 at pages 2, 3, 10, and 18 (mailed on July 23, 2019) in Proceeding 19AL-0268E. Decision No.C19-0621-I at least discussed statements in the intervention pleadings filed by Local 111 and AARP, although without any analysis of whether their statements satisfied the required standards. Decision No.C19-0621-I only concluded without explanation that there was good cause to grant the permissive interventions.

28. In its Motion to Modify, AARP argues that no party objected to its Petition. While Public Service did not oppose AARP's (or Local 111's) intervention, it did not agree with the substantive statements made in AARP's Petition. Instead Public Service stated that it,

... does not oppose any of the Motions due to the potential intervenors' stated substantial pecuniary or tangible interest in the outcome of this proceeding as required by Commission Rule 1401(c). However, the Company's position on intervention is not intended to indicate agreement with any individual substantive position taken in the Motions...."²⁶

AARP argues this statement means that Public Service "acknowledged that AARP fulfills the regulatory requirements for intervention."²⁷ The ALJ disagrees, as AARP's interpretation is both self-serving and unreasonable. In fact, Public Service did *not* agree that AARP satisfied the required standards for permissive intervention. While Public Service's statement may be inartful, the more reasonable interpretation, with which the ALJ agrees, is that Public Service did not oppose the motions *to the extent they adequately stated a substantial pecuniary or tangible interest in the outcome of this proceeding*. Significantly, Public Service stated clearly that it did not agree with the individual substantive positions stated in the motions, which includes the substantive positions in AARP's Petition (or Local 111's Petition) that arguments in the Petition satisfied the standards for permissive intervention.

29. In its Motion to Modify, AARP next complains that the ALJ *sua sponte* raised concerns that AARP's Petition was deficient and failed adequately to satisfy the required standards of Rule 1401(c).²⁸ The ALJ, however, has a duty to ensure that the Colorado Public Utilities Law and the Commission's rules are followed, as well as a duty to ensure that the

²⁶ Public Service Response, at page 2.

²⁷ AARP's Motion to Modify, ¶ 2 at page 3.

²⁸ AARP's Motion to Modify, ¶ 2 at page 3.

hearing provides a full record, but does not waste resources on issues that are not relevant.²⁹ The Commission and its ALJs have a duty to protect ratepayers from the expenses caused by intervenors, who add unnecessary litigation costs for other parties and who do not have pecuniary or tangible interests or cannot even determine if they support or oppose the filing.³⁰

30. The Commission and its ALJs must conduct our proceedings justly and efficiently, as required by § 40-6-101(1), C.R.S., “in such manner as will best conduce the proper dispatch of business and the ends of justice.” When an ALJ finds a blatant disregard of, or a failure to prove compliance with, the standards in Rule 1401, the ALJ has an obligation to the Commission, to the industries we regulate, to the intervenors and counsel who follow the Commission’s rules, and to the utility’s consumers who pay the costs of litigation Commission proceedings to enforce the required standards in Rule 1401. The ALJ rejects this argument.

31. In its Motion to Modify, Local 111 argues that by denying its Petition the ALJ has applied a “new standard” for permissive interventions. The history of Rule 1401(c), however, demonstrates that this argument is clearly without merit.

32. From 2003 through early 2006, the Commission engaged in a massive project to recodify its Rules of Practice and Procedure and its substantive utility rules. The requirement in Rule 1401(c), that a motion for permissive intervention must show that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may

²⁹ Cf., Decision No. R19-0689-I (mailed on August 15, 2019), ¶¶ 119 and 120 at pages 31 and 32, in Proceeding No. 19AL-0290E.

³⁰ Decision No. R19-0976-I (mailed on December 6, 2019), ¶ 27 at page 8, in Proceeding No. 19A-0530E.

represent), was adopted by the Commission in 2005 as part of that Recodification Project.³¹ The final Rule 1401(c) adopted by the Commission, which became effective on April 1, 2006, required that:

A motion to permissively intervene shall state the grounds relied upon for intervention, the claim or defense for which intervention is sought, including the specific interest that justifies intervention, and the nature and quantity of evidence, then known, that will be presented if intervention is granted. For purposes of this rule, *the motion must demonstrate that the subject docket may affect the pecuniary or other tangible interests of the movant (or those it may represent) directly or substantially; subjective interest in a docket is not a sufficient basis to intervene.*

(Emphasis added.)³²

33. In 2007, on its own motion, the Commission clarified the last sentence of Rule 1401(c) and added the requirement that the movant must plead in its motion to intervene that its interests would not otherwise be adequately represented:

For purposes of this rule, the motion must demonstrate that the subject docket may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) *and that the movant's interests would not otherwise be adequately represented in the docket;* subjective interest in a docket is not a sufficient basis to intervene.

(Emphasis added.)³³

Indeed, in Decision No. C07-0337, the Commission explained that:

The above language alerts parties that they have to do more than demonstrate an academic interest when seeking to intervene. The language makes clear that the burden is upon the party to show that a pecuniary or tangible interest will be substantially affected, while simultaneously ensuring that parties whose interests

³¹ See Decision No. C05-1308 (mailed on November 2, 2005) in Docket No. 03R-528ALL; Attachment A, Rule 1401(c) at page 33. Compare the Notice of Proposed Rulemaking, Decision No. C03-1399 issued in Docket No. 03R-0528ALL (mailed on December 18, 2003), Attachment B, Rule 1401(c) at page 39, which did not include the requirement that the motion must show that the proceeding may substantially “affect the pecuniary or tangible interests” of the movant.

³² See Decision No. C05-1093 ¶ 109 at page 31 (mailed on February 2, 2007), Adopting Rules, in Docket No. 03R-488ALL, and Attachment A, Rule 1401(c) at page 33; Decision No. C05-1308, Adopting Final Rules, in Docket No. 03R-528ALL; Attachment A, Rule 1401(c) at page 33.

³³ Decision No. C07-0337 (mailed on April 27, 2007), Adopting Rules, in Docket No. 06R-488ALL, and Attachment A, Rule 1401(c) at pages 41 and 42.

are not adequately represented can seek to protect those interests in Commission proceedings.

(Emphasis added.)³⁴

34. In 2013, the Commission made major revisions to Rule 1401(c) by tightening the specific grounds that a movant for permissive intervention must demonstrate and by adding the requirement that the motion must discuss whether the distinct interests of the movant in certain cases is not adequately represented by the OCC:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding.

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

Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. ... Motions to intervene by permission will not be decided prior to expiration of the notice period.

(Emphasis added.)³⁵

³⁴ Decision No. C07-0337 ¶ 24 at page 10.

³⁵ Decision No. C13-0442 ¶¶ 43-47 at pages 18-20 (mailed on April 16, 2013), denying Exceptions and Adopting Rules, in Proceeding No. 12R-500ALL, and Attachment B, Rule 1401(c) at page 47. Decision No. C13-0576 (mailed on May 17, 2013) and its Attachments, in Proceeding No. 12R-500ALL, corrected typographical and citation errors in the rules adopted in Decision No. C13-0442 and its Attachments and adopted the final rules.

35. In adopting this significant revision to Rule 1401(c), Chief ALJ Harris Adams found that:

The heart of Commission proceedings is furtherance of the public interest. The Commission is charged with protecting the interest of the general public from excessive, burdensome rates. ...

... The Commission has stated: “We believe a stricter approach to interventions will result in more streamlined and efficient Commission proceedings, which will lead to ‘the proper dispatch of business and the ends of justice.’” ... Prior attempts have been undertaken to limit permissive intervention based on a general or subjective interest. However, the intent has particularly failed in practice where objections are lacking. ...

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 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. ...³⁶

36. In denying exceptions to the Chief ALJ’s adopted Rule 1401(c) on permissive interventions, the Commission made findings relevant to these Motions to Modify:

First, ... 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. ... 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.³⁷

³⁶ Decision No. R12-1466 ¶¶ 158-161 at pages 46-47 (mailed on December 21, 2012), Amending Rules, in Proceeding No. 12R-500ALL (citations omitted).

³⁷ Decision No. C13-0442 ¶ 43 at page 18, in Proceeding No. 12R-500ALL; citing *Denver Chapter of the Colo. Motel Ass’n v. City and County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) and *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

Rejecting an argument that the amendments to Rule 1401(c) were not “good public policy,” the Commission concluded:

To the contrary, a more disciplined approach to interventions results in more streamlined and efficient Commission proceedings. Further, the Commission is able to address the issues common to all consumers represented by the OCC. It is important to note that residential, agricultural, and small business consumers can participate without becoming parties by filing public comments, including academic and policy comments, and by providing public input to the OCC.³⁸

37. The final substantive revision to Rule 1401(c) made no changes to the pecuniary or tangible interest standards, but removed the words “or telephone” from the requirement that some intervenors must show representation by the OCC would be inadequate. This revision was required as a result of Senate Bill 15-271, which removed telecommunications cases from the authority of the OCC to represent consumers.³⁹

38. In the most recent rulemaking involving the Rules of Practice and Procedure, neither the ALJ nor the Commission modified the standards in Rule 1401(c) that a motion for permissive intervention must show that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that a motion by OCC constituent consumers (or their representatives) must discuss whether the consumer’s distinct interest is either not adequately represented by the OCC or inconsistent with other

³⁸ Decision No.C13-0442 ¶ 46 at page 19, in Proceeding No. 12R-500ALL.

³⁹ Decision No. R15-0861 ¶ 11 at page 3 (mailed on August 11, 2015), Adopting Rules, and Attachment A at page 5, in Proceeding No. 15R-0540ALL.

classes of consumers represented by the OCC.⁴⁰ The rules adopted in this latest rulemaking have not been finalized nor have they become legally effective.

39. This history of the standards for permissive intervention in Rule 1401(c) show that the requirement to demonstrate that the proceeding may substantially affect the pecuniary or tangible interests of the movant has been in Rule 1401(c) in some form since 2006 and essentially in its present form since 2013. This history also shows that the requirement for OCC constituent consumers (or their representatives) to discuss whether the consumer's distinct interest is either not adequately represented by the OCC, or inconsistent with other classes of consumers represented by the OCC, has been in the rule since 2013. This history demonstrates clearly and convincingly that, in denying the permissive interventions of Local 111 and AARP, the ALJ followed and applied the long-standing required standards in Rule 1401(c), and that he did not apply any new legal standard for permissive interventions. Nor did the ALJ deny due process of law in applying the required standards in Rule 1401(c).⁴¹ The ALJ rejects this argument.

40. Local 111 also claims, without citing any authority, that the ALJ's denial of its permissive intervention, by applying the required standards in Rule 1401(c), is "unprecedented."⁴² This argument is patently without merit. Legal research into Commission

⁴⁰ See Decision No. R19-1022 ¶¶ 109-114 at pages 28-30 (mailed on December 23, 2019), Amending Rules, and Attachment A at page 48, in Proceeding No. 19R-0483ALL; and Decision No. C20-0177 ¶¶ 80-92 at pages 19-23 (mailed on March 30, 2020), Amending Rules, and Attachment A at page 48, in Proceeding No. 19R-0483ALL. Changes at the end of Rule 1401(c) were made to shorten response time to motions for permissive interventions to seven days and to allow the Commission to rule on such motions before the notice period expires.

⁴¹ See *Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244, 248-249 (Colo. 2005) (When Commission applied existing standard [whether carrier is ready, willing, and able to provide transportation to anyone requesting it] to the facts, the Commission did not adopt a new legal standard or violate intervenor's right to due process of law.)

⁴² Local 111's Motion to Modify, at page 4.

decisions denying permissive interventions, for failure to demonstrate satisfaction of the required standards in Rule 1401(c), reveals numerous such decisions. For example, the following are a sampling of ALJ or Commission decisions issued in the past 13 years that denied permissive interventions for movant's failure to prove a substantial pecuniary or tangible interest or inadequate representation of its interests by others, including the OCC, as required by Rule 1401(c), or that affirmed an ALJ's denial of permissive interventions for movant's failure to satisfy the required standards in Rule 1401(c). *See e.g.*, (1) Decision No. C07-0576 (mailed on July 6, 2007) in Docket No. 07A-155G (denying permissive interventions); (2) Decision No. R09-1001 (mailed on September 14, 2009) in Docket No. 09A-452CP (denying permissive intervention); (3) Decision No. R09-1011 (mailed on September 15, 2009) in Docket No. 09A-312R (denying permissive intervention); (4) Decision No. C11-0987 (mailed on September 14, 2011) in Docket No. 11A-510E (affirming ALJ's denial of permissive intervention); (5) Decision No. C11-1163 (mailed on October 31, 2011) in Docket No. 11A-510E (denying reconsideration of decision affirming ALJ's denial of permissive intervention); (6) Decision No. R15-0987-I (mailed on September 11, 2015) in Proceeding No. 14A-1196E (denying permissive interventions); (7) Decision No. C15-1119 (mailed on October 16, 2015) in Proceeding No. 14A-1196E (affirming ALJ's denial of permissive interventions); (8) Decision No. C16-0663-I (mailed on July 15, 2016) in Proceeding No. 16A-0396E (denying permissive intervention); (9) Decision No. R19-0625-I (mailed on July 23, 2019) in Proceeding No. 19AL-0290E (denying permissive interventions); (10) Decision No. R19-0689-I (mailed on August 15, 2019) in Proceeding No. 19AL-0290E (denying reconsideration of denial of permissive interventions); (11) Decision No. C19-0757 (mailed on September 18, 2019) in Proceeding No. 19AL-0290E (affirming ALJ's denial of permissive interventions); (12) Decision

No. R19-0767-I (mailed on September 17, 2019) in Proceeding No. 19A-0425E (denying permissive interventions); (13) Decision No. R19-0801-I (mailed on September 27, 2019) in Proceeding No. 19A-0409E (denying permissive intervention); (14) Decision No. R19-0943-I (mailed on November 20, 2019) in Proceeding No. 19A-0409E (denying reconsideration of permissive intervention); (15) Decision No. C19-1024 (mailed on December 19, 2019) in Proceeding No. 19A-0409E (affirming ALJ's denial of permissive intervention); and (16) Decision No. R19-0976-I (mailed on December 6, 2019) in Proceeding No. 19A-0530E (denying permissive interventions).

41. Based upon these reasons, and the foregoing decisions, which the ALJ finds to be well-reasoned and persuasive, the ALJ rejects Local 111's argument that the ALJ's denial of its permissive intervention, for failure to prove the required standards in Rule 1401(c), was "unprecedented."

B. Conclusions on the Motions to Modify.

42. The Commission has stated that, if in its initial intervention pleading the movant fails to satisfy the requirements of Rule 1401(c) and is denied permissive intervention, the movant should not be permitted to make new arguments through a motion for "modification" or "reconsideration;" then the second pleading is, in essence, a new request for intervention that goes beyond the initial pleading.⁴³ Indeed, it is fundamentally unfair to other Parties, whose initial motions for permissive intervention were sufficient to demonstrate adequately that this Proceeding would substantially affect their pecuniary or tangible interests, to give those who

⁴³ Decision No. R19-0689-I (mailed on August 15, 2019), ¶¶ 26, 27, and 28 at pages 6 and 7; affirmed by the Commission in Decision No. C19-0757 (mailed on September 18, 2019), ¶¶ 20, 22, and 26 at pages 9-11, in Proceeding No. 19AL-0290E.

failed initially to comply with Rule 1401(c) a second chance to advance new arguments they could have included in their initial intervention pleading.

43. Nevertheless, both Local 111 and AARP include in their Motions to Modify new, additional information that would have been greatly helpful to understanding their interests under Rule 1401(c), if only they had included such information in their initial Petitions.

44. Local 111 reiterates in its Motion to Modify that it represents Public Service employees as their bargaining unit and has unique familiarity with the operations of Public Service. However, now Local 111 connects its alleged interests to issues likely to be present in this rate case. Local 111 now identifies the maintenance of the legacy defined benefit pension plans as an issue of vital importance to the Public Service employees' bargaining unit. Indeed, in Public Service's appeal of Decisions in the 2017 gas rate case (Proceeding No. 17AL-0363G), the Denver District Court reversed the Commission's exclusion from rate base of the prepaid pension asset and cited Local 111's reply brief and testimony in the hearing in support of reversal on that issue.⁴⁴

45. Based upon the new, additional information provided by Local 111 in its Motion to Modify, the ALJ finds and concludes that Local 111 has demonstrated minimally that this Proceeding may substantially affect the pecuniary or tangible interests of Local 111 (or those it may represent), as required by Rule 1401(c). The ALJ also concludes that Local 111's interests will not be adequately represented by other Parties.

⁴⁴ Local 111's Motion to Modify, Fn. 2 at pages 2 and 3; see *Public Service Company of Colorado v. Public Utilities Commission of the State of Colorado*, Case No. 19CV31427 (Denver District Court, Case No. 19CV31427), at pages 2, 11, and 17. The District Court declined to reverse the Commission's decision to exclude medical retiree prepayments from rate base. *Id.*, at pages 21 and 22.

46. In AARP's initial Petition, AARP's entire argument on adequacy of representation was the following:

AARP's specific interest in this proceeding is not adequately represented by other parties. AARP believes that its intervention and participation in this proceeding would serve the public interest and wishes to become a party to this case for all purposes. Moreover, AARP can assure that its intervention would not unduly delay the proceedings nor prejudice the rights of any party.⁴⁵

47. In its Motion to Modify, however, AARP argues that, "*As AARP stated in its March 12, 2020 Petition, the Office of Consumer Counsel ("OCC") cannot adequately represent AARP's interests, because older residential customers are more vulnerable to increases in energy prices than the residential customer class in general.*"⁴⁶ A careful review of AARP's entire Petition, however, demonstrates that AARP never mentioned the OCC – anywhere. It is absolutely clear that, in its initial Petition, AARP never discussed why or how its alleged concerns about residential customers and rates would not be not adequately represented by the OCC.

48. As new, additional information, AARP argues in its Motion to Modify that differences in energy usage patterns (both the amount and time of day of use) for older residential consumers (those over the age of 65) create the possibility that rate design proposals will impact older residential consumers differently than the residential class as a whole. Finally, according to AARP, older consumers are a distinct subclass of residential customers that cannot be adequately represented by the OCC, which represents residential customers generally. AARP asserts that it wishes to represent this distinct subclass of residential customers and concludes

⁴⁵ AARP's Petition, ¶ 3 at page 2.

⁴⁶ AARP's Motion to Modify, ¶ 4 at page 3 (Emphasis added).

that the OCC cannot adequately represent the substantial pecuniary or tangible interests that AARP hopes to represent.⁴⁷

49. Based upon the new, additional information provided by AARP in its Motion to Modify, the ALJ finds and concludes that AARP has demonstrated minimally that this Proceeding may substantially affect the pecuniary or tangible interests of AARP (or those it may represent), as required by Rule 1401(c). Based on this new, additional information, the ALJ also concludes that AARP's interests will not be adequately represented by the OCC.

50. Other arguments made by Local 111 and AARP in their Motions to Modify to set aside or to modify Decision No. R19-0208-I that are not specifically addressed in this Interim Decision have been reviewed by the ALJ and are denied as without merit.

51. Local 111's request to waive response time to its Motion to Modify is granted.

52. Local 111's Motion to Modify will be granted in part. Local 111's request, that the ALJ certify this Interim Decision as immediately appealable to the Commission, will be denied as moot.

53. AARP's Motion to Modify will be granted in part. AARP's request, that the ALJ certify this Interim Decision as immediately appealable to the Commission, will be denied as moot.

54. Local 111 and AARP each will be deemed to be a permissive intervenor in this Proceeding as of the effective date of this Decision.

⁴⁷ AARP's Motion to Modify, ¶ 4 at page 4.

III. ORDER

A. It Is Ordered That:

1. The “Unopposed Exceptions and Motion of International Brotherhood of Electrical Workers Local # 111 (Local 111) to Set Aside or Modify” Interim Decision No. R20-0208-I, filed on April 3, 2020 by Local 111, is granted in part and denied in part, consistent with the findings, authorities, and conclusions discussed in this Interim Decision.

2. The request by Local 111 to certify this Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, is denied as moot.

3. Local 111 shall be deemed to be a permissive intervenor in this Proceeding as of the effective date of this Interim Decision. Local 111 shall take this Proceeding as it finds it from the effective date of this Interim Decision.

4. The “Unopposed Exceptions and Motion of AARP to Set Aside or Modify Decision No. R20-0208-I,” filed on April 6, 2020 by AARP, is granted in part and denied in part, consistent with the findings, authorities, and conclusions discussed in this Interim Decision.

5. The request by AARP to certify this Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, is denied as moot.

6. AARP shall be deemed to be a permissive intervenor in this Proceeding as of the effective date of this Interim Decision. AARP shall take this Proceeding as it finds it from the effective date of this Interim Decision.

7. This Decision shall be effective upon its Mailed Date.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director