

Decision No. R20-0570-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0226E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER EXTENDING THE APPROVED REGULATORY TREATMENT OF MARGINS EARNED FROM CERTAIN TYPES OF RENEWABLE ENERGY CREDIT AND ENERGY TRANSACTIONS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
SCHEDULING REMOTE PREHEARING CONFERENCE
AND GRANTING INTERVENTIONS**

Mailed Date: August 5, 2020

I. STATEMENT

1. On May 28, 2020, Public Service Company of Colorado (Public Service or the Company) filed a Verified Application (Application) for an order granting an extension of the current approved margin sharing percentages in connection with certain types of transactions involving the sale of Renewable Energy Credits (RECs).

2. On June 29, 2020, the City and County of Denver, Colorado (Denver) filed its Motion to Intervene. In its Motion to Intervene, Denver states it is a legally and regularly created, established, organized, and existing home rule city and county, municipal corporation, and political subdivision under the provisions of Article XX of the Constitution of the State of Colorado and the Home Rule Charter of Denver. Denver has a franchise agreement with Public Service relating to the provisioning of electricity within the City and County of Denver.

3. On June 29, 2020 the Colorado Public Utilities Commission Trial Staff filed a Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a), and Request for Hearing.

4. On June 29, 2020, Western Resource Advocates (WRA) filed its Motion for Leave to Intervene and Request for Hearing. In its Motion for Leave to Intervene, WRA states it is a non-profit conservation organization dedicated to protecting the land, air and water of the West. WRA states it has a tangible interest in protecting the environment and that this proceeding will directly impact this interest. WRA also states that no other party will represent WRA's interests in this proceeding.

5. During its weekly meeting on July 15, 2020, the Commission referred this matter to an Administrative Law Judge (ALJ).

6. On July 31, 2020, the Colorado Office of Consumer Counsel (OCC) filed its Unopposed Motion for Late-filed Intervention, Its Intervention and Entry of Appearance and Request for Waive of Response Time. The OCC listed a series of issues they wish to investigate.

II. INTERVENTIONS

7. The intervention of Staff is by right.

8. The late-filed intervention of the OCC is by right.

9. Denver's intervention is a permissive intervention. Denver states it may address, a number of issues raised in Public Service's Application, including but not necessarily limited to, the following: (a) transactions involving the sale of RECs; and (b) REC margin treatment. Denver argues that if approved the application will "perpetuate REC sales that detract from the

renewable electricity content of the delivered grid mix and undermine the City and County of Denver's ability to reach its electricity decarbonization goals."¹

10. WRA's intervention is a permissive intervention. WRA states that "[a] Commission decision in this proceeding that extends the past regulatory treatment of REC sales and REC margin sharing that has been in effect since 2012, without modification to the margin sharing percentages, without additional reporting requirements, and without consideration of modifications that reasonably enable the Company's customers to progress towards meeting their own renewable energy goals, will directly impact the tangible interests that WRA represents."²

11. Two classes of parties may intervene in proceedings such as this: parties with a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding (permissive intervention). Rule 1401(b) and (c), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure; see § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Public Utilities Comm'n*, 702 P.2d 746, 749 (Colo. 1985).

12. Commission Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, requires persons seeking permissive to show the following:

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 or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the

¹ Denver Motion to Intervene, p. 2, ¶ 7.

² WRA Motion for Leave to Intervene, p. 8, ¶ 9.

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.

13. The requirement in Rule 1401(c) requiring persons or entities seeking permissive intervention in a proceeding to demonstrate that their interests “would not otherwise be adequately represented” is similar to Colorado Rule of Civil Procedure 24(a), which provides that even if a party seeking intervention in a case has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties. See *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass’n*, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case’s judgment. See *Denver Chapter of the Colo. Motel Ass’n v. City & County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

14. Further, Rule 1401(c), 4 CCR 723-1, requires that a movant who is a “residential customer, agricultural customer, or small business customer” must discuss in the motion 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. As set forth in §§ 40-6.5-104(1) and (2), C.R.S., the OCC has a statutory mandate to represent the interests of residential

ratepayers. The Colorado Supreme Court expressly stated that “if there is a party charged by law with representing his interest, then a compelling showing should be required demonstrate why this representation is not adequate.” *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

a) Interventions by Right

15. Staff’s intervention is by right, and it is a party in this proceeding.

16. The late-filed intervention of the OCC is unopposed. The OCC’s intervention is also by right. Good cause is found to allow the OCC’s late intervention. The OCC is a party in this proceeding.

b) Permissive Interventions

17. Denver states the following:

If approved, [Public Service’s] application will perpetuate REC sales that detract from the renewable electricity content of the delivered grid mix and undermine the City and County of Denver’s ability to reach its electricity decarbonization goals. This impact will “substantially affect the pecuniary or intangible interests” of Denver as contemplated by 1401, 4 CCR 723-1, of the Rules of Practice and Procedure of the Commission.³

18. To be granted a permissive intervention, it must be shown that the intervenor has pecuniary or tangible⁴ interest that may substantially affected. Denver’s intervention is not clear as to the specific interest, tangible or pecuniary, that may be substantially affected by the extension of the current approved margin sharing percentages in connection with certain types of transactions involving the sale of RECs.

19. It appears that Denver is arguing that if the current approved margin sharing percentages are extended, this will affect the “renewable electricity content of the delivered grid mix[,]” which it claims is a tangible interest.

³ City of Denver Intervention, ¶ 7.

⁴ The undersigned will assume that Denver’s reference to an intangible interest was a typo.

20. WRA states that “[t]he Company’s Application directly impacts WRA’s goal of rapidly decarbonizing the transportation sector through electrification”⁵ and “WRA has identified specific components of the Company’s Application that may affect its interest in protecting the environment.”⁶

21. The undersigned ALJ does not believe an individual organization’s “goals” constitute a tangible interest.

22. In the past, the Commission has granted interventions but limited participation to the limited interest a permissive intervenor states in their intervention or an interest not adequately represented by other parties.⁷

23. The intervention of Denver shall be granted, but for the limited purpose of how the Application, if granted, will substantially affect Denver’s renewable electricity content of the delivered grid mix. Participation in any hearing and discovery in this proceeding shall be limited to this issue.

24. The intervention of WRA shall be granted, but for the limited purpose of how the Application, if granted, will substantially affect protection of the environment. Participation in any hearing and discovery in this proceeding shall be limited to this issue.

III. PREHEARING CONFERENCE

25. In anticipation of a hearing, the ALJ will schedule a remote prehearing conference per Rule 1409(a), 4 CCR 723-1, of the Commission’s Rules of Practice and Procedure. At the remote prehearing conference, an evidentiary hearing will be scheduled, and procedural

⁵ WRA Motion for Leave to Intervene, p.4, ¶ 6.

⁶ WRA Motion for Leave to Intervene, p.5, ¶ 7.

⁷ See Proceeding 14AL-0660E, Decision No. C14-1043, ¶¶ 25-44.

deadlines will be established.⁸ The parties may raise other issues relevant to this proceeding at the prehearing conference. The parties are required to confer on a hearing date and procedural deadlines before the prehearing conference. As part of this conferral, the parties must discuss whether they are willing and able to hold the evidentiary hearing by video conference.⁹

26. The ALJ encourages the parties to submit a proposed hearing date and procedural schedule prior to the prehearing conference.¹⁰ In such a circumstance, provided that the ALJ substantially approves the proposed schedule, the ALJ may vacate the prehearing conference.

27. The remote prehearing conference will be held using the web-hosted video conferencing service, GoToMeeting. To minimize the potential that the video-conference hearing may be disrupted by non-participants, the link and meeting ID or access code will be provided to the parties by email before the hearing, and the parties will be prohibited from distributing that information to anyone not participating in the hearing.

28. Information and direction on using GoToMeeting to attend the hearing is provided in Attachment A to this Decision. The ALJ strongly encourages the parties to test their ability to use GoToMeeting *before* the remote prehearing conference.

29. *All parties are on notice that* failure to appear at the prehearing conference may result in decisions adverse to their interests, including granting the complete relief opposing

⁸ This includes deadlines to file witness and exhibit lists, exhibits, post-hearing statements of position, settlement agreements and stipulations, and prehearing motions.

⁹ Due to the COVID-19 global pandemic, the Commission's offices are not open to the public, and therefore no in-person hearings are being held. It is unknown when the Commission will be able to hold hearings in-person, but the Commission has been holding evidentiary hearings by video conference.

¹⁰ If the parties wish to preserve the ability to hold a hearing in-person if it becomes an option before the evidentiary hearing, the parties should ensure that Commission Hearing Room A is available for their proposed hearing dates. The parties may review the Commission's public calendar for this information, which they may find on the Commission's website. Also do not propose a hearing date on a Wednesday due to the Commission's weekly meeting.

parties seek. The ALJ will deem any party's failure to appear at the prehearing conference to be a waiver of that party's objection to the rulings made during the prehearing conference.

IV. ORDER

A. It Is Ordered That:

1. The intervention The City and County of Denver, Colorado of is granted consistent with the discussion above, and it is a party to this proceeding.

2. The intervention Western Resource Advocates is granted consistent with the discussion above, and it is a party to this proceeding.

3. Consistent with the above discussion, a remote prehearing conference is scheduled as follows:

DATE: August 25, 2020

TIME: 9:00 a.m.

METHOD: By video conference using GoToMeetings at link provided to parties by email

4. The parties may not distribute the GoToMeeting link, and access or ID code to non-participants.

5. Attachment A hereto is incorporated into this Decision.

6. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director