

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0544FEG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER GRANTING TO IT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO EXERCISE FRANCHISE RIGHTS IN THE CITY OF BOULDER.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY DENYING MOTION REQUESTING
MODIFICATION OF DECISION R21-0106-I AND
CERTIFYING THIS INTERIM DECISION AS
IMMEDIATELY APPEALABLE TO THE COMMISSION
PURSUANT TO RULE 1502(D)**

Mailed Date: April 8, 2021

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I. STATEMENT

A. Summary

1. This decision denies the Motion Requesting Modification of Decision No. R21-0106-I (Motion for Modification) filed by Stephen Pomerance on March 9, 2021. The Motion for Modification requests reversal of the Administrative Law Judge’s (ALJ) denial of Mr. Pomerance’s Petition and Motion to Intervene (Motion to Intervene) filed on January 15, 2021 and his Motion Requesting Leave to Reply in Support of the Motion to Intervene (Motion for Leave to Reply) filed on January 28, 2021. As explained more fully below, Mr. Pomerance has not satisfied his burden of proving that Decision No. R21-0106-I must be modified or set aside. However, the ALJ grants Mr. Pomerance’s request to certify this decision as immediately appealable to the Commission pursuant to Rule 1502(d).¹

B. Background

2. On December 21, 2020, Public Service Company of Colorado (Public Service) filed a Verified Application for a Certificate of Public Convenience and Necessity to Exercise Franchise Rights in the City of Boulder, Colorado (Application). The Application seeks approval of a Franchise Agreement between Public Service and the City of Boulder that was approved by the voters of Boulder on November 3, 2020.

3. On December 22, 2020, the Commission issued notice of the Application.

¹ 4 *Colorado Code Regulations* (CCR) 723-1.

4. On January 15, 2021, Mr. Pomerance filed his Motion to Intervene. Public Service filed an Opposition to Mr. Pomerance's Motion to Intervene on January 22, 2021. Mr. Pomerance filed his Motion for Leave to Reply on January 28, 2021.

5. From January 19 to 27, 2021, the Office of Consumer Counsel (OCC), the City of Boulder (Boulder), and Trial Staff of the Commission (Staff) filed notices of intervention by right and entries of appearance.

6. On February 3, 2021, the Commission issued a minute order deeming the Application complete and referring this proceeding to an ALJ for disposition. The proceeding was subsequently assigned to the undersigned ALJ.

7. On February 26, 2021, the ALJ issued Decision No. R21-0106-I that denied Mr. Pomerance's Motions for Leave to Reply and to Intervene, scheduled a remote prehearing conference for March 17, 2021, and ordered the parties to confer regarding a procedural schedule and Public Service to file a report of the parties' conferral by March 12, 2021.

8. On March 9, 2021, Mr. Pomerance filed a Motion Requesting Modification of Decision R21-0106-I (Motion for Modification) to grant Mr. Pomerance's Motion for Leave to Reply and Motion to Intervene.

9. On March 10, 2021, Public Service filed the report of the conferral by the parties that resulted in a proposed schedule agreed to by the parties (Consensus Schedule).

10. On March 16, 2021, the ALJ issued Decision No. R21-0157-I that, among other things, extended the statutory deadline, established a prehearing schedule based on the Consensus Schedule, scheduled the hearing, and vacated the remote prehearing conference.

C. Decision R21-0106-I

11. In Decision No. R21-0106-I, the ALJ: (a) denied Mr. Pomerance's Motion for Leave to Reply because he had not mentioned, much less carried his burden of proving, any of the four factors specified in Rule 1400(e) that a movant "must demonstrate" to obtain leave to file a reply brief;² (b) denied his assertion of a right to intervene based on authority holding that "[r]atepayers . . . do not have a 'right' to intervene based on § 40-6-109, C.R.S.;"³ and (c) denied his alternative request to permissively intervene because he had neither: (i) carried his burden of establishing that one of the issues he requests the Commission to address – whether Boulder complied with The Boulder City Charter in agreeing to and then placing the Franchise Agreement on the November 4, 2020 ballot – is within the Commission's jurisdiction;⁴ nor (ii) established that the OCC cannot adequately represent his interests in this proceeding.⁵

D. Motion for Modification

12. In his Motion for Modification, Mr. Pomerance requests that the ALJ reverse the decisions in Decision No. R21-0106-I denying his request for leave to file a reply brief in support of his Motion to Intervene, and his request to permissively intervene. Mr. Pomerance does not address, or otherwise request to reverse, the ALJ's decision denying his assertion of a right to intervene in this proceeding.

² Decision No. R21-0106-I at pp. 3-4 (¶¶ 6-7).

³ *Id.* at pp. 9-10 (¶ 20) (quoting Decision No. C18-0117-I issued in Proceeding No. 17A-0797E on February 15, 2019 at p. 6 (¶ 13)).

⁴ *Id.* at p. 10 (¶ 21).

⁵ *Id.* at pp. 10-12 (¶¶ 22-26).

E. Analysis**1. Legal Standard**

13. Under Rule 1502(c), “[a]ny 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.”⁶ Mr. Pomerance bears the burden of establishing that Decision No. R21-0106-I must be set aside or modified.⁷

2. Request to Reverse Denial of Leave to Reply

14. Under Commission Rule 1400(e), “[a] movant may not file a reply to a response unless the Commission orders otherwise.” To obtain the Commission’s permission, the movant must first file a motion for leave to file a reply brief that demonstrates: (a) a material misrepresentation of a fact; (b) accident or surprise, which ordinary prudence could not have guarded against; (c) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or (d) an incorrect statement or error of law.⁸ The movant bears the burden of proving one or more of these factors by a preponderance of the evidence.⁹

15. In his Motion for Modification, Mr. Pomerance purports to provide argument concerning the first and fourth factors. However, he presents conclusory argument concerning alleged material misrepresentations of facts and incorrect statements or errors of law in Decision No. R21-0106-I, not in Public Service’s Opposition to Mr. Pomerance’s Motion to Intervene.¹⁰

⁶ Rule 1502, 4 CCR 723-1.

⁷ Rule 1500, 4 CCR 723-1.

⁸ Rule 1400(e), 4 CCR 723-1.

⁹ Rule 1500, 4 CCR 723-1.

¹⁰ Motion for Modification at p. 1 (“I respectfully intend to demonstrate what appear to me to be ‘misrepresentations of facts’ and/or ‘incorrect statements or errors of law’ in ALJ Farley’s decision to exclude me.”).

Otherwise, Mr. Pomerance does not directly address the first and fourth factors, but instead reiterates and expands upon arguments made in his Motion to Intervene for why he should be permitted to intervene. As a result, Mr. Pomerance has not established a misrepresentation of fact or incorrect statement or error of law in Public Service's Opposition to the Motion to Intervene that would have justified allowing Mr. Pomerance to file a reply brief in support of his Motion to Intervene. Accordingly, Mr. Pomerance has not satisfied his burden of establishing that Decision No. R21-0106-I was incorrect in denying his Motion for Leave to Reply.

3. Request to Reverse Denial of Permissive Intervention

16. In his Motion for Modification, Mr. Pomerance argues that the Commission has jurisdiction to address whether Boulder and Public Service complied with Boulder's Home Rule Charter in entering into the Franchise Agreement and in seeking voter approval of the Franchise Agreement in the November 2020 election.¹¹ Mr. Pomerance also requests reversal of the decision that he did not carry his burden of establishing that the OCC cannot adequately represent his interests in this proceeding.¹² Each argument will be addressed in turn.

a. Interpretation and Application of Boulder's Home Rule Charter

17. Mr. Pomerance asserts that the Commission has the authority to determine whether Boulder and Public Service complied with Boulder's Home Rule Charter in drafting the Franchise Agreement and in placing it on the November 4, 2020 ballot for approval.¹³ As support, Mr. Pomerance cites § 40-5-103(1), C.R.S., which states in relevant part that:

¹¹ Motion for Modification at pp. 3-8.

¹² *Id.* at pp. 2-3.

¹³ *Id.* at pp. 3-4 (arguing that the Franchise Agreement "did **not** meet the requirements of the Boulder City Charter as to what must be included in a franchise agreement") (emphasis in original); Motion to Intervene at 6 (arguing that Boulder did not comply with Sections 118, 120, 123, 125, and 126 of the Boulder City Charter by not

[e]very applicant for a certificate to exercise franchise rights under section 40-5-102 shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the required consent . . . of the proper . . . city . . . or municipal . . . authority.¹⁴

Mr. Pomerance concludes that by giving the Commission the authority to require “such evidence . . . to show that [the] applicant has received the required [local] consent,” § 40-5-103(1), C.R.S. provides the Commission with the authority to determine “whether the actions of the City in granting the franchise were in full legal compliance with its home rule city charter.”¹⁵

18. The ALJ respectfully disagrees. The Commission’s jurisdiction is limited to those matters specifically identified in the Colorado Constitution and Colorado’s statutes.¹⁶ Neither the Colorado Constitution nor Colorado’s statutes provide the Commission with jurisdiction to determine whether a municipality has complied with its municipal laws. In addition, the Colorado Constitution specifically circumscribes the jurisdiction of the Commission in municipal matters. Specifically, Article V, § 35 of the Colorado Constitution states: “The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.” The Colorado Supreme Court has held that Article V, § 35 prohibits the Commission from

including certain provisions in the Franchise Agreement), pp. 6-7 (arguing that Boulder violated City Charter Sections 18, 18A, and 108 in placing the Franchise Agreement on the November 4, 2020 ballot).

¹⁴ Motion for Modification at p. 4.

¹⁵ *Id.* See also *id.* at p. 8 (arguing that because Boulder did not obtain the “required consent” of its citizens, the Commission must now deny the Application “and request that [Public Service] and the City of Boulder go back to the drawing board and finish that they started, clarify all the uncertainties, and include specific deliverables, timelines, costs, and who pays for all the projects, and do all this i[n] a way that is transparent to the public and has PUC staff and OCC support.”).

¹⁶ *Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.*, 816 P.2d 268, 283 (Colo. 1991) (“The Commission’s authority to regulate public utilities is defined by Article XXV of the Colorado Constitution and by various statutory provisions adopted by the General Assembly. . . . Specific statutory provisions regulating public utilities serve to restrict the Commission’s authority”); *Union Rural Electric Ass’n v. Frederick*, 670 P.2d 4, 6 (Colo. 1983) (“The Colorado Constitution specifically limits the jurisdiction of the PUC.”).

regulating municipal utilities operating within their municipal boundaries.¹⁷ It follows that the Commission does not have the jurisdiction to determine whether a municipality has complied with its own laws.

19. Here, the issues raised by Mr. Pomerance would require the Commission to determine whether Boulder has complied with its municipal laws. Indeed, adjudication of Mr. Pomerance's legal issues would require interpretation of Boulder's City Charter to determine: (a) whether the Franchise Agreement includes the provisions allegedly required by the Boulder City Charter; and (b) whether Boulder followed the requirements of its City Charter in placing the Franchise Agreement on the November 2020 ballot. Because there is no Constitutional provision or statute that provides the Commission with the authority to address these questions, the ALJ concludes that the Commission does not have the jurisdiction to address them.

20. Section 40-5-103(1), C.R.S. does not change this conclusion. That statute may provide the Commission with the authority to determine whether the evidence submitted by Public Service is sufficient to prove that the required number/percentage of registered voters approved the Franchise Agreement on November 4, 2020.¹⁸ Section 40-5-103(1), C.R.S. does not, however, give the Commission the authority to determine whether Boulder complied with the Boulder City Charter in drafting the agreement and/or in placing the Franchise Agreement on the November 4, 2020 ballot. Local, state, and/or federal courts have jurisdiction over those questions.¹⁹

¹⁷ *Id.* at pp. 6-7.

¹⁸ This question need not be decided here because neither Mr. Pomerance nor any party has raised it. *See, e.g.*, Motion to Intervene at p. 2 (stating that "the Franchise Agreement barely passed by a 53%/47% margin").

¹⁹ *See* Decision No. C17-0750 issued in Proceeding No. 15A-0589E on September 14, 2017 at pp. 120-121 (¶ 217) ("while the Commission enjoys broad authority over regulated public utilities, that jurisdiction is nevertheless limited. . . . The Commission is not the functional equivalent of a Colorado Constitution article III court, which has general jurisdiction over common law claims and which may award equitable and legal remedies,

21. Accordingly, the ALJ concludes that the Commission does not have jurisdiction to address the issues raised by Mr. Pomerance that require the interpretation and application of the Boulder City Charter. For that reason, those issues cannot serve as the basis modify Decision No. R21-0106-I to grant Mr. Pomerance's request to permissively intervene in this proceeding.

b. OCC's Authority

22. Mr. Pomerance asserts that the OCC is "statutorily focused on economic issues, and not on my legal concerns."²⁰ Mr. Pomerance's "legal concerns" include whether "the numerous poorly written provisions in the proposed Boulder Franchise and other Agreements [] create a high level of uncertainty as to what will happen and whether the citizens of Boulder will be able to use the benefits that are supposed to be granted to them under these Agreements."²¹ According to Mr. Pomerance, § 40-6.5-401(4), C.R.S. does not provide the OCC with the authority to address his "legal concerns."²²

23. Again, the ALJ respectfully disagrees. Section 40-6.5.401(4), C.R.S., states that the OCC:

shall represent the public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers by appearing in proceedings before the commission and appeals therefrom in matters which involve proposed changes in a public utility's rates and charges, in matters involving rulemaking which have an impact on the charges, the provision of services, or the rates to consumers, and in matters which involve certificates of public convenience and necessity for facilities employed in

including monetary damages. The Colorado Supreme Court has held consistently that the Commission does not possess general jurisdiction. . . . Thus, there is a clear point of demarcation between the jurisdiction of the Commission and that of the article III courts.") (citations and footnotes omitted).

²⁰ Motion for Modification at p. 2.

²¹ *Id.* at pp. 2-3. Mr. Pomerance also argues that the OCC is prohibited from addressing "the City of Boulder's failures to follow both substantive and procedural City Charter requirements." *Id.* at p. 3. Because the ALJ concluded above that the Commission does not have jurisdiction to address these issues, they are not addressed here.

²² *Id.* at p. 2.

the provision of utility service, the construction of which would have a material effect on the utility's rates and charges.

The OCC's representation of the public interest required by § 40-6.5-401(4), C.R.S. provides it with the authority to address whether the Franchise Agreement is so poorly written as to obscure the intent of the parties and/or call into question Boulder's ability to obtain the benefit of its bargain. Indeed, the OCC has raised similar issues concerning contractual documents in previous proceedings.²³

24. Moreover, the OCC has signaled that it may undertake that analysis in this proceeding. Specifically, in its Notice of Intervention and Entry of Appearance, the OCC stated that it planned to address “[w]hether granting the CPCN as proposed by Public Service, and which should be read in conjunction with the right to exercise various franchise rights within the Boulder and Public Service Franchise Agreement, is in the public interest.”²⁴ That the OCC may not frame the public interest analysis in precisely the same way as Mr. Pomerance and/or may decide not to pursue Mr. Pomerance's issues does not justify granting his request to permissively intervene. As stated in Decision No. R21-0106-I, “a disagreement over the discretionary litigation strategy of the [OCC]” is insufficient to establish that the OCC cannot adequately represent a ratepayer.²⁵ Accordingly, the ALJ reaffirms the conclusion in Decision No. R21-0106-I that Mr. Pomerance has not carried his burden of establishing that the OCC cannot adequately represent his interests in this proceeding.

²³ See, e.g., Decision No. C11-0001 issued in Proceeding No. 10A-350T on January 3, 2011 at p. 26 (¶ 51) (the OCC argued that a settlement between Staff and the joint applicants in that proceeding should be denied “on the grounds that its terms and conditions are vague and ambiguous and are rendered meaningless and unenforceable” and “leaves many material and substantive issues to be decided at an undetermined future time”).

²⁴ OCC's Notice of Intervention, Entry of Appearance, and Request for Hearing at p. 2 (¶ 5(a)).

²⁵ Decision No. C16-0663-I issued in Proceeding No. 16A-0369E on July 15, 2016, at p. 10 (¶ 39), p. 13 (¶ 50); Decision No. C14-1247 issued in Proceeding No. 14AL-0660E on October 16, 2014, at p. 3 (¶ 4).

c. Conclusion

25. The Commission has the authority to determine how to conduct its proceedings. Specifically, § 40-6-101(1), C.R.S. commands that the Commission “shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice.” Similarly, § 24-4-105, C.R.S., which is part of the Administrative Procedure Act (APA), “grants substantial discretion” to agencies such as the Commission “to control the scope and presentation of evidence” in a proceeding.²⁶ The APA also provides, among other things, that a hearing officer (or an ALJ) shall “regulate the course of the hearing,” “issue appropriate orders which shall control the subsequent course,” and “dispose of motions to intervene.”²⁷

26. In a recent challenge to another ALJ’s denial of permissive interventions to persons that had failed to satisfy the requirements of Rule 1400(c), the Commission stated:

Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. The Commission has discretion to overturn ALJs' rulings when the matters are certified as appealable. However, particularly when a case is ongoing before an ALJ, the Commission's review is treated much like an appeal to a higher court. Consistent with C.R.C.P. 24, under Commission Rule 1401, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion; generally, the decision upon the request is reversible only for an abuse of that discretion. It can seldom, if ever, be shown that such discretion was abused in denying the permissive right to intervene. To show an abuse of discretion, the decision must be shown to be manifestly arbitrary, unreasonable, or unfair.²⁸

27. For the reasons stated above, and consistent with §§ 24-4-105 and 40-6-101(1), C.R.S., the ALJ will exercise his discretion to deny Mr. Pomerance’s Motion for Modification.

²⁶ *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309, 312 (Colo. App. 1989).

²⁷ § 24-4-105(4)(a), C.R.S.

²⁸ Decision No. C19-1024 issued in Proceeding No. 19A-0409E on December 19, 2019 at p. 11 (¶ 20) (citations omitted).

4. Request to Certify Decision as Immediately Appealable to the Commission

28. Mr. Pomerance requests that, if his Motion for Modification is denied, the Interim Decision containing that ruling be certified as immediately appealable to the Commission.²⁹ Rule 1502(d) provides that an ALJ “may certify any interim decision as immediately appealable through the filing of a motion subject to review by the Commission *en banc*.”³⁰ The ALJ will grant the request to certify this Interim Decision as immediately appealable to the Commission, pursuant to Rule 1502(d).

II. ORDER

A. It Is Ordered That:

1. For the foregoing reasons, the Motion Requesting Modification of Decision R21-0106-I filed on March 9, 2021 by Stephen Pomerance, *pro se*, is denied.

2. In the exercise of his discretion, the Administrative Law Judge grants Mr. Pomerance’s request to certify, and hereby certifies, 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.

3. This Decision is effective immediately.

²⁹ Motion for Modification at p. 8.

³⁰ 4 CCR 723-1.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director