Decision No. C19-1024

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0409E

IN THE MATTER OF APPLICATION OF THE PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE ACQUISITION OF, AND APPROVAL OF COST REVOVERY FOR, THE MANCHIEF GENERATION FACILITY AND VALMONT 7&8

DECISION DENYING MOTION FOR RECONSIDERATION

Mailed Date: December 19, 2019
Adopted Date: December 11, 2019

I. BY THE COMMISSION

A. Statement

1. This Decision denies the motion filed November 22, 2019, by Ms. Leslie Glustrom requesting reconsideration of Interim Decision Nos. R19-0801-I, issued September 27, 2019, and R19-0943-I, issued November 20, 2019, which the assigned Administrative Law Judge (ALJ) certified as immediately appealable pursuant to Rule 1502(d), of the Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. We find that the ALJ did not abuse his discretion in denying the requested permissive intervention filed by Ms. Glustrom and, therefore, deny the motion for reconsideration.

2. We also further find Ms. Glustrom's request for recusal of the assigned ALJ is procedurally inappropriate and substantively unsupported. Her requests to revise the procedural schedule is similarly inappropriate for our consideration; however, it is also mooted both by our determination to uphold the ALJ's decisions denying her intervention and modifications made to the schedule by the ALJ in Decision No. R19-0958-I, issued November 27, 2019.

B. Background

3. On July 23, 2019, Public Service Company of Colorado (Public Service or Company) filed an application requesting approval of Certificates of Public Convenience and Necessity (CPCNs) for the acquisition of: (1) the 301 MW Manchief generation facility; and (2) the 82 MW Valmont generation facility. Through the acquisition of these two facilities and request for CPCN, Public Service aims to comply with the Preferred Colorado Energy Plan (CEP) Portfolio approved through final decisions in Phase II of Public Service's 2016 Electric Resource Plan.[1] The matter was referred to an ALJ for a Recommended Decision.

4. Ms. Glustrom timely provided a three-page petition to intervene in this proceeding, stating she has an interest in, and is affected by, the proceeding as a ratepayer and significant shareholder of Public Service. She therefore claims to satisfy the language for intervention in § 40-6-109, C.R.S. And, while she "always appreciates the hard work" of the Office of Consumer Counsel (OCC), she claims that over the last 15 years, the OCC has "essentially never held the same positions with respect to fossil fuel expenditures as Ms. Glustrom has." She further states that she was one of the few PUC participants who questioned the CEP in support of her intervention in this case.

5. Public Service responded in opposition to Ms. Glustrom's intervention, claiming she did not satisfy Rule 1401, 4 CCR 723-1, because she fails to show a pecuniary or tangible interest that is not adequately represented by other parties, including explaining that the OCC does not represent her interests as a customer or that the Company does not represent her interests as a shareholder. Public Service also pointed out that her interventions were denied in the ERP and

[1] *See* Decision No. C16-0663-I, issued July 15, 2016, at ¶ 43 and Ordering Paragraph Nos. 11 and 18, and Decision No. C17-0796-I, issued September 28, 2017, at ¶ 32, Proceeding No. 16A-0396E.

related accelerated depreciation proceedings that were the genesis of the instant CPCN Application.

6. Ms. Glustrom filed a reply to Public Service's response that points to Decision No. C19-0621-I, which allowed Ms. Glustrom to intervene in Public Service's most recent rate case.[2] Ms. Glustrom states that the decision "concludes that the Commission maintains discretion to grant or deny petitions for intervention and that Ms. Glustrom showed good cause to allow her to intervene in that docket."[3] Ms. Glustrom asserts that by failing to cite to Decision No. C19-0621-I, and by failing to cite to various statutes concerning utility regulation and clean energy implementation, PSCo presents an incomplete and "inaccurate" view of Colorado law.

7. Assigned ALJ Steven Denman addressed pending interventions, in addition to other procedural matters, through Interim Decision No. R19-0801-I, issued September 27, 2019 (September Decision). Within his decision, the ALJ denied Ms. Glustrom's intervention.[4] Although reply is not typically permitted under the Commission's rules, the assigned ALJ determined he would consider Ms. Glustrom's reply in making his September Decision.

8. Through his analysis, the ALJ addresses whether, in this case, Ms. Glustrom's pleadings satisfy the Commission's intervention standard. He includes that § 40-6-109, C.R.S, the intervention statute cited by Ms. Glustrom, is implemented by Commission Rule 1401, 4 CCR 723-1, and that Ms. Glustrom's claim she is "interested in" and "affected by" the proceeding is properly analyzed under the framework for permissive intervention in Rule 1401(c).[5] The ALJ notes that the Commission used Rule 1401(c), interpreting § 40-6-109(1), C.R.S., in a 2011

[2] Decision No. C19-0621-I, Proceeding No. 19A-0268E.
[3] Glustrom Reply at p. 5
[4] September Interim Decision, at ¶¶ 25-41.
[5] September Decision, at ¶¶ 36-38

proceeding that denied Ms. Glustrom permissive intervention, and that the interpretation was upheld by the Denver District Court.[6] Consistent with reasoning and analysis in prior Commission decisions, including those in Public Service's recent ERP, the ALJ finds that her status as a ratepayer and shareholder are not sufficient to demonstrate a substantial pecuniary[7] interest in this proceeding.

9. Additionally, among other findings, the ALJ found that Ms. Glustrom failed to show that her interest is not adequately represented by other parties. Particularly, he found that Ms. Glustrom failed to discuss whether her interests were adequately represented by the OCC as required by Rule 1401(c), and that she had failed to make a compelling showing of why OCC's representation is inadequate. Consistent with prior Commission reasoning addressing similar arguments from Ms. Glustrom, the ALJ finds that Ms. Glustrom's interests as a stockholder are represented by Public Service, which has a fiduciary responsibility to its stockholders.

10. Ms. Glustrom subsequently requested modification of the September Decision and that, if the ALJ affirms his September Decision, she requested that the decision be certified as immediately appealable. In the motion, Ms. Glustrom adds that the OCC signed a stipulation in the underlying 2016 ERP proceeding and supported the CEP that included the 383 MW of gas resources at issue. Because she did not sign the stipulation, Ms. Glustrom claims to be "in a unique position to raise issues before the Commission about whether PSCo acquiring the Valmont and Manchief gas turbines in 2020 is needed.

[6] *Glustrom v. Pub. Util's Comm'n*, Case No. 11CV8131 (Order Dismissing Appeal, July 11, 2012).

[7] Because Ms. Glustrom did not argue that she has a substantial tangible interest in the proceeding's outcome, the ALJ does not address that aspect of Rule 1401(c).

11. Through Interim Decision No. R19-0943-I, issued November 20, 2019 (November Decision), the ALJ addressed in detail Ms. Glustrom's arguments, ultimately affirming the September Decision, in addition to determining it was more likely than not that Ms. Glustrom's stated reasons for intervention raised a collateral attack on the Commission's Phase II ERP Decision.

12. Within the November Decision, the ALJ addresses procedural history of the Commission's determinations in Public Service 2016 ERP.[8] He notes that the Commission denied Ms. Glustrom's intervention in these and the related accelerated depreciation proceeding. The ALJ notes that he is not bound by these prior Commission determinations, but finds the ERP intervention decisions reasoning persuasive, thereby rejecting the arguments put forth here by following the same authorities. He again rejects Ms. Glustrom's arguments, citing prior Commission Decisions, in addition to again citing *Glustrom v. Pub. Util's Comm'n*, in which the Denver District Court affirmed that § 40-6-109(1), C.R.S. does not entitle Ms. Glustrom to intervenor status.[9]

13. The ALJ points out that the Motion to Modify does not articulate any challenge to his use of Rule 1401's standard that Ms. Glustrom must have a pecuniary or tangible interest in this case, nor does she challenge his findings on applying that standard. Rather Ms. Glustrom requests that the decision be modified to reflect her arguments that OCC's representation is inadequate; her "unique position" and the importance of considering alternative options to natural gas turbines; and reflect that OCC signed the stipulation and is likely constrained in its arguments. The ALJ states that the failure of Ms. Glustrom's Motion to Modify to address his finding that she

[8] November Decision, ¶¶ 18-23.
[9] *Id.*, at ¶ 33.

lacked a substantial pecuniary interest in the proceeding is itself reason to affirm the September Decision.

14. While the ALJ affirms his finding that she does not show a pecuniary interest in the instant matter, he also discusses her requests to address the Commission's consideration of renewables. He notes that, after 27 months of litigation in the 2016 ERP, the Commission issued its Phase II decision selecting the CEP portfolio. This includes approximately 1,100 MW of new wind resources, 700 MW of new solar resources, 275 MW of new battery storage, and 383 MW of existing natural gas assets (the focus of the instant proceeding). He opines that consideration of alternative resources, such as solar, storage, and demand-response, were considered and entirely appropriate for the ERP proceeding, but not for this narrowly focused CPCN application.[10]

15. He further addresses her arguments that OCC is "constrained" by pointing out that the presumption of adequate representation from the OCC can be overcome if there is proof of collusion between the OCC and the utility or any other party; the OCC has or represents some interest adverse to the consumer; or the OCC fails in its duties due to negligence or bad faith.[11] Ms. Glustrom provides no evidence of bad faith, collusion, or negligence by the OCC. Disagreement with litigation strategy is not sufficient to overcome the presumption of adequate representation from the OCC. Therefore, her "unique" interests are insufficient to differentiate her as a ratepayer from the OCC's representation.[12]

16. The ALJ goes on to include that her filing also wholly ignores the legal principles, including those that prohibit collateral attack on Commission decisions.[13] In applying

[10] *Id.*, at ¶ 42.
[11] *See* Decision No. C11-0987, issued Sept. 14, 2011, Proceeding No. 11A-0510E.
[12] November Decision, at ¶¶ 43-44.
[13] *Id.*, at ¶ 47.

§ 40-6-112(2), C.R.S. the Colorado Supreme Court has held that a final Commission decision in a proceeding cannot be collaterally attacked in a different proceeding. *Lake Durango Water Co. Inc. v. PUC*, 67 P.3d 12, 22 (Colo. 2003). The ALJ finds it more likely than not that Ms. Glustrom's purpose in attempting to intervene in the proceeding is to attack collaterally the Commission's Phase II ERP Decision that approved resources in the CEP portfolio, including the 383 MW of existing natural gas generating assets. The ALJ then includes that this is not the first time that Ms. Glustrom has attempted an unlawful attack a Commission decision, *citing* Decision No. R09-0293-I, issued March 18, 2009, Proceeding No. 08S-520E; Decision No. R09-0373-I, mailed April 8, 2009 (clarifying and affirming that Ms. Glustrom's stricken testimony will not be allowed as a collateral attack); and, Decision No. R09-0431-I, mailed April 24, 2009 (denying Ms. Glustrom's motion for modification).[14]

17. The ALJ includes this and other analysis, finding persuasive Commission determinations that rejected similar arguments made by Ms. Glustrom in the 2016 ERP and related proceedings, which were the genesis of the instant CPCN application.[15] As requested, he certified his determinations as immediately appealable to the Commission, pursuant to Rule 1502(d), 4 CCR 723-1.[16]

18. On November 22, 2019, Ms. Glustrom filed a motion to the Commission requesting reconsideration of the ALJ's determinations denying her intervention. For the first time in her pleadings, she also requests the recusal of ALJ Denman from this proceeding. Also for the first time, Ms. Glustrom seeks that the Commission – not the assigned ALJ – alter the procedural

[14] *Id.*, at ¶ 50.
[15] *Id.*, at ¶¶ 51-55.
[16] *Id.*, at ¶¶ 59-60.

schedule, including without limitation timing of answer testimony that was at the time due December 6, 2019.[17]

C. Intervention Review

19. The Commission has the authority to determine how to conduct a proceeding. As accurately noted by the ALJ,[18] pursuant to § 40-6-101(1), C.R.S., the Commission "shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice." The Commission may look to the Colorado Administrative Procedure Act (§ 24-4-101 *et seq.*, C.R.S.) for guidance. Section 24-4-105, C.R.S. "grants substantial discretion" to agencies such as the Commission "to control the scope and presentation of evidence" in a proceeding. *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989). The Colorado Administrative Procedure Act provides among other things, that a hearing officer (in this case the ALJ) shall "regulate the course of the hearing," "issue appropriate orders that shall control the subsequent course," and "dispose of motions to intervene."

20. 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. Rule 1502(d), 4 CCR 723-1. However, particularly when a case is ongoing before an ALJ, the Commission's review is treated much like an appeal to a higher court. Consistent with C.R.C.P. 24, under Commission Rule 1401, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion; generally, the

[17] Ms. Glustrom also requested shortened response time to her motion, which was denied at the December 5, 2019, Commissioners Weekly Meeting. Given the Thanksgiving Holiday, government closure due to inclement weather, and subsequent ALJ determination to move the answer testimony deadline from December 6, 2019, until December 16, 2019, the Commission determined there was no good cause to grant shortened response time and denied the request by minute entry.

[18] November Decision, at ¶¶ 56-57.

decision upon the request is reversible only for an abuse of that discretion. *Grijalva v. Elkins,* 132 Colo. 315, 287 P.2d 970 (1955). It can seldom, if ever, be shown that such discretion was abused in denying the permissive right to intervene. *Allen Calculators, Inc., v. National Cash Register Co*., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188. To show an abuse of discretion, the decision must be shown to be manifestly arbitrary, unreasonable, or unfair. *See, e.g., King v. People*, 785 P.2d 596, 603 (Colo. 1990). The Commission applies this same standard when it reviews ALJ decisions regarding intervention. *See, e.g.,* Decision No. C19-0757, Proceeding No. 19AL-0290E, issued September 18-2019, at p. 19.

21. Rule 1401(c) requires persons seeking permissive intervention to "demonstrate that the subject proceeding may substantially affect [their] pecuniary or tangible interests" and show that their interests "would not otherwise be adequately represented." This rule is similar to C.R.C.P. 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).

22. The test for adequate representation is whether there is an identity of interests. Disagreement with an existing representative's discretionary litigation strategy is immaterial when determining whether adequate representation already exists in the proceeding. 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).

23. 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 stated that "if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate." *Feigen v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

24. We find that the ALJ did not abuse his discretion in denying Ms. Glustrom's intervention. The September Decision and November Decision provide sound reasoning, consistent with reasoning in past Commission decisions, including those directly pertaining to Public Service's 2016 ERP and accelerated depreciation decisions. Each of these decisions found that Ms. Glustrom did not demonstrate a pecuniary or tangible interest that was not already represented in the proceeding. In these cases, and again in this proceeding, Ms. Glustrom argued that the OCC could not represent her because it previously joined in settlement with Public Service. The Commission has consistently rejected this argument. Each decision explains that an agreement on litigation strategy is not necessary to have an identity of interests.[19]

25. The ALJ's conclusions are also consistent with long-settled law, including determinations in Colorado Courts specific to Ms. Glustrom. Since Ms. Glustrom primarily makes

[19] In her motion, Ms. Glustrom provides that stare decisis does not apply to the Commission. Motion, p. 4. While not binding precedent, the Commission and ALJs may appropriately look to prior decisions, applying legal standards to facts of the cases before them. The ALJ accurately points out that he is not bound by these determinations, but rather finds the reasoning and analysis persuasive as applied to the instant pleadings.

the same arguments here that were explicitly addressed by prior Commission and Court rulings, the ALJ appropriately reviewed and applied these decisions in finding she fails to demonstrate a pecuniary or tangible interest warranting intervention on the CPCN.

26. Findings to grant her intervention in the recent Public Service rate case were made in a separate proceeding, under different circumstances, and through the Commission's discretion to permit her or any other intervenor as a party. The rate case decision permitting her intervention does not address nor make any statement inconsistent with our prior decisions, a point that is discussed by the ALJ in making his decisions. We agree with the ALJ that our determinations in that separate matter are not controlling, nor are they persuasive, in this matter.

27. Rather than addressing whether she has a pecuniary or tangible claim in the matter at hand, Ms. Glustrom claims in her motion that "no damage will be done" if she is allowed intervention. Not only is this statement both an inappropriate standard to permit intervention under Rule 1401, and not a challenge any finding in the September Decision or November Decision, but it also fails to acknowledge that allowing persons not found to have a pecuniary or tangible interest or with interests already represented by other parties to intervene can in fact do "damage" at a cost to ratepayers. Litigation expenses are recouped by the utility through rates. Ms. Glustrom is correct that the standards in § 40-6-109, C.R.S. have remained unchanged. And yet, she has continued to argue under this statute that she must be granted intervention in numerous cases despite clear case law to the contrary analyzing that statute as it applies to her specifically. Ongoing litigation, particularly on issues already decided, will ultimately be borne by ratepayers.

28. Considering all of this and the pleadings before him, the ALJ's determination is not arbitrary, unjust or unreasonable. The request for reconsideration of the ALJ decisions regarding Ms. Glustrom's intervention is denied.

D. Collateral Attack

29. Within his November Decision, the ALJ finds that Ms. Glustrom's pleadings appear more likely than not to raise collateral challenge to the Commission's Phase II ERP decision that approved the CEP Portfolio. This, or any subsequent proceeding, is not an appropriate venue to challenge final commission determinations. *See* § 40-6-112, C.R.S. The motion does not address, nor even recognize, the lengthy discussion by the ALJ regarding this concern.

30. By not raising the issue in her motion, Ms. Glustrom has effectively foreclosed challenging the ALJ's determination to the Commission. Nevertheless, upon review of the pleadings and ALJ determinations, we agree with the ALJ that the request for intervention not only fails to show a pecuniary and tangible interest in the matters before the Commission in the instant CPCN application, but statements in her intervention request[20] appear to indicate that Ms. Glustrom would use this proceeding to inappropriately re-litigate matters already decided. She makes no argument otherwise.

31. The ALJ did not abuse his discretion in his findings denying intervention to include that re-litigation of final decisions – including in this instance re-litigation of the Colorado Energy Plan Portfolio and Phase II Decision that was decided after 27 months of litigation with over 31 active parties – is simply not permitted. We further affirm the ALJ's determinations in that the reasons stated for intervention more likely than not pose a collateral attack on final Commission decisions.

[20] For example, Ms. Glustrom's Intervention states: "Importantly, Ms. Glustrom was one of the few PUC participants who questioned the Colorado Energy Plan (CEP) based in part on the bundling of the other aspects of the CEP with the acquisition by PSCo of gas turbines that were intended to operate for 2-4 decades at a time when many analysts, utilities and Public Utility Commissions around the country, are finding that the roles that used to be played by natural gas turbines can increasingly be met at a lower cost and better long-term performance with increased solar, storage, demand management and other resource options like reciprocating engines." Glustrom Intervention, p. 2.

E. Request for Hearing Officer Recusal

32. Pursuant to Rule 1109, whenever a party in good faith believes that a Commissioner or ALJ has engaged in prohibited communications or may not be impartial, the party may file a motion to disqualify the Commissioner or ALJ. The motion must be supported by an affidavit describing the nature and extent of the alleged prohibited communication or bias. The accused ALJ or Commissioner, within ten days after any response has been filed, is then required to rule on the motion on the record. If the motion is denied, the movant may file a request within ten days for full Commission review.

33. Setting aside that Ms. Glustrom is not a party found to have a tangible or pecuniary interest in this proceeding such that she could file a "motion" under Commission rules, the pleading is still improper, both procedurally and substantively. First, the pleading must be made before the accused ALJ, not to the Commission. Rule 1109 requires that the accused Commissioner or ALJ make the initial determination on any motion for recusal. Ms. Glustom's filing circumvents that important step altogether by raising the issue for the first time in her motion to the Commission.

34. Second, the pleading must be supported by an affidavit, which it is not. In fact, the motion contains little support for the requested recusal. Ms. Glustrom includes ALJ Denman's previous employment as Assistant General Counsel with Xcel from 2013-2016, along with a "screen shot" of the ALJ's LinkedIn page. It then concludes, without further support, that there is "readily apparent potential" for ALJ Denman to put Xcel's interests above the public's interest. She also states that the LinkedIn comment from ALJ Denman commending Cheryl Campbell as "a great leader in the natural gas industry" "undermines any belief that ALJ Denman will be impartial" in this proceeding.

35. These conclusory statements, without affidavit or support, are simply insufficient, both substantively[21] and procedurally. *See* Rule 1109. We reject Ms. Glustrom's request.

F. Schedule Revisions

36. Ms. Glustrom further requests that she be granted two extra weeks to propound discovery, and that the deadline for answer testimony be extended to December 13 or 20, 2019.

37. These requests regarding the procedural schedule are not before the Commission. Only the pleadings regarding her intervention were decided by the ALJ and certified for our review. Nevertheless, the ALJ has recently altered the schedule. Through Decision No. R19-0958-I, issued Nov. 27, 2019, the ALJ granted an unopposed request to modify the schedule and allow additional time for settlement discussions and other procedural reasons requested by current parties. Answer testimony is now due December 16, 2019.

38. The request is therefore mooted, both by the ALJ's recent order and our affirmation of his determination that Ms. Glustrom is not granted intervention. In any event, the request is also further procedurally improper for this Commission to consider.

II. ORDER

A. It Is Ordered That:

1. The Motion Contesting Interim Decision R19-0943-I, Requesting Shortening of Response Time and Requesting Withdrawal of Administrative Law Judge Steven H. Denman from this Proceeding, is denied, consistent with the discussion above.

2. This Decision is effective on its Mailed Date.

[21] Aside from the procedural problems and lack of an affidavit, the conclusory statements prior employment and a congratulatory remark on a LinkedIn page are not persuasive.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 11, 2019.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners